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# **THE ENGLISH REPORTS**

**CHANCERY**

**CONSULTATIVE COMMITTEE**

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LORD HIGH CHANCELLOR OF GREAT BRITAIN**

**THE RIGHT HONOURABLE LORD ALVERSTONE,  
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MASTER OF THE ROLLS**

**THE HONOURABLE MR. JUSTICE WRIGHT**

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ATTORNEY-GENERAL**

THE  
ENGLISH REPORTS

VOLUME XXXVI

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## CHANCERY

XVI

**CONTAINING**

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## PREFATORY NOTE

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IN 1 Swans. pp. 128, 333, 334, 335, containing obsolete orders or legal changes, the substance of which will be found in the list at the beginning of the present volume, have been omitted.

Mr. Max. A. Robertson and Mr. Geoffrey Ellis, Barristers-at-Law, are responsible for the work on this volume.





**LIST OF LORD CHANCELLORS, MASTERS OF THE ROLLS,  
VICE CHANCELLORS AND LAW OFFICERS, DURING  
THE PERIOD COVERED BY THE PRESENT VOLUME.**

**LORD CHANCELLOR.**

1807. LORD ELDON.

**MASTERS OF THE ROLLS.**

1801. SIR WILLIAM GRANT.  
1818. SIR THOMAS PLUMER.

**VICE CHANCELLORS.**

1813. SIR THOMAS PLUMER.  
1818. SIR JOHN LEACH.

**ATTORNEYS GENERAL.**

1813. SIR WILLIAM GARROW.  
1817. SIR SAMUEL SHEPHERD.  
1819. SIR ROBERT GIFFORD.

**SOLICITORS GENERAL.**

1812. SIR SAMUEL SHEPHERD.  
1813. SIR ROBERT DALLAS.  
1817. SIR ROBERT GIFFORD.  
1819. SIR JOHN SINGLETON COPLEY.



# Reports of CASES ARGUED and DETERMINED in the HIGH COURT OF CHANCERY; commencing in Michaelmas Term, 1815. By J. H. MERIVALE, Esq., Barrister-at-Law. Vol. III. 1816-1817.

[1] HARRISON and OTHERS *v.* COCKERELL and OTHERS. *March* 14, 1817. Reg. Lib. 1816, A. fo. 324.

Although, in cases in the nature of waste, an injunction will sometimes be granted *ex parte* even after appearance, yet if, in such a case, an injunction has been obtained for default of appearance, and it turns out that an appearance had in fact been entered at the time when the injunction was moved for, the order will be discharged.

On the 7th of *February*, an order was obtained by the Plaintiffs for an Injunction, until answer or further order, to restrain the Defendants, *Cockerell* and *White* (executors and trustees under the will of *R. White*, deceased), from collecting and getting in any more of the testator's personal estate, and from selling or disposing of any part of his real estates, or receiving the purchase-money. This order was founded on an affidavit that the property, if suffered to be paid to, or remain in the hands of, the Defendants, was in danger [2] of being lost; and on certificate of bill filed, and an allegation that the Defendants had not appeared.

A motion was now made, on behalf of the Defendants, to discharge that order, on an affidavit, denying the circumstances from which it was inferred that the property was in danger, and going on to state that an appearance had in fact been entered for the Defendants on the 24th of *January* preceding.

*Sir S. Romilly, Bell, and Wray*, in support of the motion.

*Sir A. Piggott, and Roupell*, contra.

The Lord Chancellor [Eldon] said, that, although in cases in the nature of waste, the Court will sometimes interfere by injunction upon an *ex parte* application, even after an appearance has been entered for the Defendant, yet the fact of his having appeared must be stated; and that in the present case, if the order were allowed to stand, there would be a contradiction on the records of the Court. The order was discharged accordingly, with costs.

SELBY *v.* SELBY. *Rolls.* *April* 24, *May* 6, 8, 1817.

A letter from a mother to her son, beginning "My dear *Robert*," and concluding "Your affectionate mother," not signed so as to constitute a binding agreement on the part of the mother within the intent of the Statute of Frauds. It is not enough to identify; there must be a signing, *i.e.* either an actual signature of the name, or something intended by the writer to be equivalent to a signature; such as a mark by a marksman, &c.

The Bill was for payment of the arrears of an annuity to which the Plaintiff claimed to be entitled by virtue of an agreement entered into by his mother [3] (since deceased) on the occasion of his marriage; which agreement was attempted to be inferred from letters written by her to the Plaintiff upon that occasion. And, on the hearing, a question was raised, whether a letter addressed to the Plaintiff, begin-

"ning My dear Robert" (which was his christian name), and ending with the words, "Do me the justice to believe me the most affectionate of mothers," was sufficiently signed within the meaning of the statute (2 Car. 2, c. 3, s. 4), although the name of the writer no where appeared in it.

*Sugden*, for the Plaintiff. Before the statute, it was only necessary to prove the hand-writing of the party to constitute a binding agreement; and all that the statute requires is, that there should be a signature; that the agreement, in order to be binding, "shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." It no where says that the signature so required is the signing of the name of the party sought to be bound by it. Not more is required to constitute the validity of a deed than of a will, in which case it is decided that the testator's putting his name at the commencement is equivalent to his signing it; and yet the statute expressly requires a signature. (See 1 Bro. C. C. 410; *Sugd. Vend. and Purch.* 76, 77, and cases cited.) The statute requires *signing*, not *subscribing*, and therefore the *mark* of one unable to write is a sufficient signature. It was once a question whether sealing is not signing. (*Shepp. Touchst.* 60, c. 4, No. 5.) A letter written in the third person, or in the name of the office and not of the in-[4]dividual, would be a sufficient compliance with the terms of the statute. "The *Lord Chancellor* agrees to do so and so" would bind *Lord Eldon*, then why not "the mother of *Robert Selby*"; and why not any other words by which the condition of the writer is clearly ascertained? The name may be printed or stamped instead of being written. The signature may be by initials only, and yet this would, in many instances, lead to the greatest uncertainty.

A letter not signed is sufficiently adopted by reference to it made in a subsequent instrument, and will, together with that instrument, constitute a sufficient agreement within the statute.

*Bell* for the Defendant. The words of the statute are positive, requiring nothing less than an actual signing to constitute the agreement. See *Ithell v. Potter*, cited in *Hawkins v. Holmes* (1 P. Wms. 770, 771). It is not enough that the signature, or that which stands in the place of a signature, should identify the party. If so, the words "your affectionate mother" might be dispensed with, and proof of hand-writing would be of itself sufficient. But all the cases say there must be the name of the party, or his mark in case he is incapable of writing his name, but even that mark must be identified by a subscribing witness. In *Stokes v. Moore* (1 Cox, 219; 1 Cox's P. Wms. 771, note. And see *Ogilvie v. Foljambe*, 1 Mer. 53) the name was in the body of the instrument, and it was said, "the meaning of the statute is, that the signing should amount to an acknowledgement by the party that it is his agreement, and, if the name does not give such authenticity to the [5] instrument, it does not amount to what the statute requires." And speaking of the cases of wills to which it had been compared, the Lord Chief Baron observes, "that those cases have been where the instrument importing to be the final instrument of the party has been formally attested, and is in its nature complete, and the only question has been, whether the form of the statute has been complied with." (1 Cox, 222, 3. And see *Walker v. Walker* in the Court of Delegates. *Sugd. Vend. and Purch.* 77, note, and 1 Mer. 503.) As to the case of an agreement established by reference to it made in a subsequent letter or instrument, the principle upon which it proceeds, shews that it is nothing to the present purpose. In *Coles v. Trecothick* (9 Ves. 250) the *Lord Chancellor* says, "though the agreement is not signed, yet if the letter contains all the terms and describes the consideration and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, that letter, which not only is not a signature, but is the last of all things that can be called signing the agreement, is a writing signed; which, ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute."

*Sugden*, in reply. If the mark of a marksman be considered as a sufficient compliance with the statute, it must be admitted to be in consequence of the principle for which I contend; namely, that it is enough to identify the writer, for the statute has no where said that a mark will do. A name printed or stamped has always been held sufficient, and that without any enquiry whether the party was or was not capable of writing his name.

[6] The *Master of the Rolls* said, if he had apprehended at first, that this was the

only letter applicable to the purpose of the Plaintiff's demand, he should not have suffered the cause to go on ; for it was impossible to hold that it could be taken to be sufficiently signed within the statute, unless it were by reference to some other instrument having a proper signature. That it is a very forced construction of the words of the statute to say that the use of the mere ordinary terms of ceremony constitutes a compliance with the regulations it prescribes. It is not enough that the party may be identified. He is required to sign. And, after you have completely identified, still the question remains, whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without a signing ; that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name—such as a person unable to write making his mark. But it was never said, because you may identify the writer, therefore there is a signature within the meaning of the statute. If so, the word “ I ” or “ me ” would be enough, provided you can prove the hand-writing.

Bill dismissed.

[7] SARAH BURGESS, Widow, *Plaintiff*, and HENRY ROBINSON and THOMAS BURTON, *Defendants*. *Rolls*. May 24, 1817.

[See S. C. 1815, 1 Madd. 172.]

Devise to *R.* subject to the payment of Legacies of £200 each, to the Testator's three nephews, to be paid as soon as the Legatees should arrive in *England*, or claim the same, provided they should arrive or claim within three years ; if two only should arrive or claim within the time aforesaid, each to have £250 ; if one only, £400 ; the remainder, in either case, to fall into the residue of his estate ; and, if neither should arrive or claim within the time aforesaid, then £500 (part thereof) to fall into the residue of his estate. Held, the condition not performed by one of the Legatees arriving in *England*, and making his claim after the time specified, although ignorant till then of the will, or of the Testator's death, and no advertisement for Legatees.

*Benjamin Burgess*, by will; devised to the Defendant *Robinson*, certain freehold and leasehold premises, subject to, and charged and chargeable with the payment of £200 to each of his three nephews therein named (making together the sum of £600), “ to be paid to them respectively as soon after his (the Testator's decease, as they or either of them should arrive in *England* or claim the same, provided such claims should be made within the first three years next after his decease ; and, if two only of his said nephews should arrive in *England*, or make their claims within the time aforesaid, each of them should be paid the legacy or sum of £250 ; and if one only should arrive in *England*, or make the claim within the time aforesaid, he should be paid £400, and the residue of the said sum of £600, in either case, should be considered and taken as part of the residue of the Testator's personal estate ; and if neither should arrive in *England*, or claim, &c., within the time aforesaid, the sum of £500, part of the said three legacies, should sink into and be taken and considered as part of his residuary estate.” And he gave the residue of his personal [8] estate to his wife, the Plaintiff *Sarah Burgess*, and appointed the Defendants executors of his will.

Upon the Hearing of this cause (reported in 1 Madd. 172. See Reg. Lib. 1815, A. fo. 155), a Reference was directed to the Master to inquire “ whether the Testator's three nephews mentioned in his will, or any or either of them, arrived in *England*, or claimed the legacies given to them respectively, within three years after the Testator's death.”

Upon this Reference the Master reported that “ he did not find that the Testator's nephews, or any or either of them, did arrive in *England*, or claim the legacies given to them respectively within three years after the Testator's death ” ; and then went on further to state, in his Report, an affidavit made by *John Scott*, identifying himself as one of the three nephews named in the will, and claiming the legacy of £400, as the first and only one of the nephews who had arrived in *England* or claimed the legacy, the testator having died on the 29th of September 1811, and *John Scott* not having arrived in *England* till the 26th of June 1815, and not having claimed

the legacy until some time after that period; the affidavit stating his previous ignorance of the will, and of the Testator's death, together with circumstances of situation from which he inferred the impossibility of his being informed of either until shortly before the claim was made. The Decree had not directed any advertisement for Legatees, nor had any such advertisement ever been made.

The cause now coming on for further directions, it was insisted, on the part of *John Scott*, the Claimant, [9] that the intention of the Testator was clearly to make the legacies payable respectively as soon after the Testator's death as the Legatees, or either of them, should arrive in *England*, and that the limitation "within three years" ought to be confined to the case of claims being made by any of the parties while resident abroad. That the Legacies vested immediately, subject only to be divested in case of no claims being made, which was a condition subsequent.

*Fonblanque*, in support of the claim.

*Wilson*, contra.

The *Master of the Rolls* [Sir Wm. Grant] however, held that the Testator having arbitrarily imposed on the Legatee a condition with which he had not complied; although the non-compliance was the effect of his ignorance of the provision intended; yet the consequence must be that he was not entitled to the Legacy.

*Decreed*, the £500 to be raised out of the estate, and paid to the Plaintiff, with interest at £4 per cent. from the end of three years after the death of the Testator. Plaintiff to have her costs out of the estate. But the Claimant, the nephew, was not allowed his costs.

*July 15.* It afterwards appearing that the £500 had already been paid into Court and laid out in the purchase of stock in pursuance of an order made on the motion of the Defendant *Robinson*, the cause was again spoke to [10] on the minutes, when the Plaintiff claimed to be entitled to the stock, and the dividends which had accrued thereon, and likewise to interest at 4 per cent. upon the principal sum of £400, from the expiration of three years after the Testator's death, to the time of the investment; the Defendant, on the other side, representing that, as the money had been so paid in and invested upon his application, the Plaintiff not having appeared or consented thereto, he (the Defendant) would have been liable to make good the principal sum in case of loss by the fall of stocks, and ought therefore to be held entitled to the advantage which had accrued from their rise subsequent to the investment, insisting, consequently, that the stock ought to be sold, and that, out of the produce thereof, together with the dividends accrued due thereon, the Plaintiff should be paid the £500 with interest as aforesaid.

But His Honour held that the investment of the money was an approbation, by which all parties were bound, and therefore that the stock belonged to the Plaintiff.

MORGAN v. BENJAMIN and PHILIP GOODE. *May 8, June 5, [1817].*

Affidavit in support of Injunction admitted, after Answer, to prove an allegation in the Bill as to acts of the parties neither admitted nor denied by the Answer; but such affidavit not to be allowed in contradiction to the Answer.

On the coming in of the Answer, *Agar*, for the Plaintiff, moved for an Injunction to restrain the Defendants from proceeding in Ejectment, and offered to read an Affidavit made by the Plaintiff and four others, in proof of an allegation in the Bill, that, before the Defendants purchased the premises in question, the Plaintiff had contracted with one *Westcott* for the purchase of the same, and in proof of other collateral circumstances, [11] from which an inference might be drawn that the Defendants, before they became purchasers, had notice of the Plaintiff's title. The case of *Taggart v. Hewlett* (1 Mer. 499), was cited in support of this Application.

Sir *S. Romilly* and *Haslewood*, for the Defendants, objected to the reading of this Affidavit, that there is no instance of the Court having permitted an Affidavit to be received, which, in substance, contradicts the Answer; and that, in the case referred to, the letters of the Testator, if genuine, were binding on the Defendant; whereas, in the present case, the alleged contract between the Plaintiff and *Westcott* was *Res inter alios acta*, and not in any respect binding on the Defendants, who, by their answer, had sworn positively that they purchased for a valuable consideration without notice of the Plaintiff's title.

The *Lord Chancellor* [Eldon] said that, in former instances, the Court has gone so far as to admit Affidavits to be read in support of allegations made by the Bill, where those allegations relate to Acts of the Parties, and the Defendant by his Answer has neither admitted nor denied the truth of them. But that it is repugnant to the whole course of practice to allow Affidavits to be received in contradiction to assertions positively made by the Answer. That, in the present case, he should look at the papers in order to satisfy himself how far the allegation proposed to be substantiated by affidavit had or had not been met by a denial in the Answer of the Defendants.

The *Lord Chancellor* afterwards said, that it was the inclination of his opinion that the Affidavit should not be admitted; but he granted the Injunction on the ground of admissions made by the answer.

[12] WRIGHT v. CASTLE. June 14, 1817.

[See *Allen v. Bone*, 1841, 4 Beav. 493; *Norton v. Cooper*, 1856, 3 Sm. & G. 383; *In re Grey*, [1891] W. N. 201.]

Order to dismiss a Bill, with costs to be paid by the Plaintiff's Solicitor, the Bill having been filed without special authority from the Plaintiff. A Solicitor may, in the exercise of the general authority given him by his Client, defend a suit, but cannot institute one without a special authority for the purpose.

*Leach* moved, on the part of the Plaintiff, to dismiss the Bill, with costs to be paid by his (the Plaintiff's) Solicitor; upon an Affidavit that the Bill had been filed without any authority from the Plaintiff. This affidavit was met by another on the part of the Solicitor, stating that an action had been brought by the Defendant against the Plaintiff on certain promissory notes, to restrain proceedings in which Action the Bill was filed, although not by the express directions of the Plaintiff, yet in the course of business, and by virtue of the general authority under which he acted, as the Plaintiff's solicitor.

Sir S. Romilly, contra.

The *Lord Chancellor* [Eldon]. There can be no doubt as to the course of this Court's Jurisdiction; that, if a solicitor files a Bill in the name of his client, without having authority from him for so doing, then, if the Plaintiff wishes to have the Bill dismissed, it will be so ordered, and the Solicitor will be made to reimburse him all the expences occasioned by its having been filed. It is also settled that, if the Plaintiff denies, and the Solicitor asserts, authority to have been given, and there is nothing but assertion against assertion, the Court will say that the Solicitor ought to have secured himself by having an authority in writing, and that, not having done so, he must abide the consequences of his neglect. There must be a special authority to institute, although a general authority is sufficient to enable the Solicitor to defend a Suit. In this case, the Plaintiff has positively sworn that he gave [13] no authority whatever to file the Bill, and this is met by only a general assertion of his being authorized, on the part of the Solicitor. The motion must therefore be granted.

ROBINSON and OTHERS v. NEWDICK and OTHERS. June 19, 1817.

Where a *Caveat* has been entered against the Inrolment of a Decree, it stays the signing for twenty-eight days after notice given of the Docket having been presented for signature: and the twenty-eight days are twenty-eight *clear* days. In strict practice, the Docket ought not to be presented until after the order to inrol *nunc pro tunc* has been obtained, and actually passed and entered. Upon both these grounds the Inrolment of a Decree made under contrary circumstances was vacated, and leave given to the other party to prosecute their appeal.

The Decree pronounced at the Rolls on the 16th of *December* 1813, was passed and entered in *Easter Term* 1815. On the 15th of *August* 1815, a *Caveat* was entered by the Defendants. On the 15th of *March* 1817 the Defendants received the usual

notice (dated the 14th) of the Docket having been presented for signature. On the 20th of *March* 1817 Instructions were laid before Counsel on the part of the Defendants to prepare a Petition of Appeal, but, owing to the absence of the Counsel from town, the Petition was not prepared before the 9th of *April*. On the 11th of *April* the Petition was presented; was answered on the 12th; and on the 14th notice was given to the Plaintiffs of the Order made upon that Petition. Meanwhile, on the 12th of *April* the Plaintiffs obtained the Signature of the *Lord Chancellor* to the docket presented on the 14th of *March*, and on the same day an Order was made upon their Petition, to have the Decree inrolled *nunc pro tunc*, of which Order notice was given to the Defendants on the 14th.

A Motion was now made on the part of the Defendants, that the Order for the signing and inrolling of the decree might be discharged for irregularity, or, if the [14] Court should be of opinion that the same had been regularly obtained, then that the inrolment might be vacated, and the Defendants be at liberty to proceed to a hearing of their Appeal upon such terms as the Court should think fit.

The Affidavit in support of this Application, besides the circumstances above mentioned, stated that the Register's book had been searched for the Order of Inrolment *nunc pro tunc*, which, on the 22d of *April*, had not yet been drawn up and entered.

Sir S. Romilly and Spranger, in support of the motion.

Leach and Bell, contra.

The *Lord Chancellor* [Eldon]. This is a question of great importance in point of practice—Whether the inrolment of the decree *nunc pro tunc* can prevent the lodging of this Appeal? If the inrolment has been regular, this must necessarily be the case. The practice has been long established that, upon an application to inrol a decree *nunc pro tunc*, the order is made, almost as of course, provided all antecedent matters have been regularly gone through. *Harrison* (1 Harr. Cha. 442 (8th ed.)), referring to *Gilbert*, says that the Order ought to be passed and entered with the Register, and adds that, "though this is never done, yet a case may fall out, where it may be of fatal consequence to the party"; and, strictly speaking, it is certainly irregular to present the docket to the *Lord Chancellor* to be signed before the Order has been so passed and entered.

[15] [His Lordship then stated the circumstances of this case.]

It is quite clear that the Caveat delays the Inrolment for twenty-eight days after the Docket has been presented, and notice given (*Burnet v. Theobald*, 1 P. Wms. 609; and see Beames's Ord. in Chan. 309, note); and, although this has given rise to some discussion, yet, upon consideration, I think the twenty-eight days must be twenty-eight clear days. In the present instance, the Docket was not presented till the 14th of *March*; and notice given not till the 15th, service of which on the Defendant's clerk in Court was sufficient. After this, the Defendant had twenty-eight clear days to present his appeal. On the 11th of *April*, the Defendant left his Petition of Appeal with the *Lord Chancellor's* secretary. Owing to some accident, it was not answered till the 12th, but this is not to prejudice; for, strictly speaking, the Defendant had a right to have the Petition answered as soon as it was presented; and, also, if the twenty-eight days are to be considered as clear days, the 12th was time enough. On the same 12th of *April*, the Plaintiff presented his petition to have the Decree inrolled *nunc pro tunc*, which was answered immediately; so that both the Orders were made on the same day. But the Petition of Appeal was presented before the Petition for Inrolment. That Inrolment is therefore objected to as irregular, on three grounds—*first*, that the Petition of Appeal, under these circumstances, had the priority—*secondly*, that the twenty-eight clear days were not expired before the 13th of *April*—and *thirdly*, that, in strict practice, the Docket ought not to have been presented until after the Order to enroll *nunc pro tunc* had been passed and entered. Upon all these grounds, I think that the Defendants are [16] right in the present application, and that leave must be given for them to prosecute their appeal.

No costs on either side. (1)

(1) From *Lord Clarendon's Orders* (Beames, 205).

That all Decrees and Dismissions, &c., be drawn up, signed and inrolled before the first day after the next Michaelmas or Easter term after the same shall be pro-



nounced respectively, and not at any time after without the special leave of the Court." And see Mr. Beames's note (120), and the references.

Order 4th Dec. 1691, (Beames, 290).—"That all Orders, &c., which shall be pronounced and made in Michaelmas and Hilary terms, or the Vacations after, be actually entered before the first day of Michaelmas term then after; and that all, &c., which shall be pronounced, &c., in Easter and Trinity terms, or the Vacations after, be likewise entered before the first day of Easter term the next following; and that no Orders, &c., that shall not be so entered, shall be afterwards entered, but by the special order of the Court first had and obtained." See Gilb. For. Rom. 163, and Mr. Beames's note (1).

Order 17th June 1698 (Beames, 308).—"That, where a *Caveat* is entered with the proper officer to stay the signing of any decree, &c., in order to the inrolment thereof, such *Caveat* be prosecuted *within a month* after the docket shall be left to be signed with the proper officer by the party that entered the same; otherwise such *caveat* to be of no force, but the docket may *forthwith* be presented as if no *caveat* entered."

*Gilb. (For. Rom. 163)* says, the party hath 30 days from notice given of the decree being left with the Secretary of Decrees for inrolment; but the other authorities referred to in Mr. Beames's note on this Order state that a *Caveat* will prevent the signing for 28 days from the time of the Decree being presented and notice given. See note, p. 309.

[17] JOSEPH JAMES, and HANNAH his WIFE, *Plaintiffs*, and WILLIAM ALLEN and OTHERS, and the ATTORNEY-GENERAL, *Defendants*. *Rolls. June 30, 1817.*

[See the cases collected in the note to *Loscombe v. Wintringham*, 1850, 13 Beav. 89.]

Bequest in trust for such "benevolent" purposes, as the Trustees in their integrity and discretion may unanimously agree on; not to be supported as a charitable legacy; the word "benevolent" not being to be restricted to the sense of "charitable" so as to authorize the Court to say that the application of the property must be confined to such objects as are, strictly speaking, objects of charity. Therefore void for uncertainty, and distributable among the next of kin.

*Elijah Waring*, by his Will, after devising to his Niece the Plaintiff *Hannah James* for her life certain farms and lands therein described, and after her decease to her four daughters in fee, and making certain specific bequests of personal property to the said Plaintiff, gave to his Executors (the Defendants *W. Allen*, and *J. Allen*, and *W. Matthews* deceased) £200 each, in consideration of their taking upon themselves the trusts of his will, and then proceeded as follows:

"Lastly, touching all my personal property whatsoever and wheresoever not before disposed of, subject to whatever expences may be incurred relative to the execution and fulfilment of this my will, I give and bequeath the same to my friends the aforesaid *William Allen*, *Joseph Allen*, and *William Matthews* (whom I constitute and appoint the Executors of this my Will), and to their Executors and Administrators, in trust to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on."

The Plaintiffs, by their bill, prayed that the will might be established, except as to the residuary bequest, and that such residuary bequest might be declared void; charging that the disposition was void for uncertainty.

Sir *S. Romilly*, *Trower*, and *Phillimore*, for the Plaintiffs, contended that this case was the same in principle [18] with that of *Morice v. The Bishop of Durham* (9 Ves. 399), and referred to *Brown v. Yeall* (7 Ves. 50, n.).

*Hart* and *Spence*, for the Defendants (the surviving Trustees and Executors), attempted to distinguish the cases. "Benevolence" is technically a word of charity; but, when coupled with another (as in *Morice v. The Bishop of Durham* with the word "liberality"), it loses its technical sense, and is to be judged of by its acceptation in common language. It was on this ground that His Honor decided in the case referred to. But, when the word stands alone, as in the present case, it is to be construed according to its technical meaning.

The *Lord Chancellor*, in the same case, observed that *Brown v. Yeall* did not apply; for that was for a particular purpose; here, if a valid devise at all, it is for general purposes.

*Lovat*, for the Representatives of the deceased Trustee.

*Mitford*, for the *Attorney-General*.

The *Master of the Rolls* [Sir Wm. Grant]. I certainly did not conceive, that, in the case of *Morice v. The Bishop of Durham* (9 Ves. 399), it was merely by the addition of the word "liberality" that the trust was rendered uncertain, and therefore incapable of being carried into execution. "Liberality" is, no doubt, distinguishable from "Benevolence," but Benevolence is also distinguishable from "Charity." For although many charitable institutions are very properly called "Benevolent," it is impossible to say, that every object [19] of a man's benevolence is also an object of his charity. Nor do I see how the required concurrence of three persons in the selection of the objects does, by any necessity, exclude the appropriation of the property to purposes very different from any that are specified in the Statute of Queen *Elizabeth* (stat. 43 *Eliz. c. 4*), or that have been held to be within the analogies of that statute. In the case before referred to, it was attempted, in the argument on the appeal, to maintain that, although the bequest should be held to be void so far as it was made for purposes of "Liberality," yet it ought to be considered as good, in so far as it was for purposes of "Benevolence"; which last word, it was said, was equivalent to "Charity." The *Lord Chancellor* does not say, that there could not be a proportional division, where a bequest was in part only for a charitable purpose, as in the *Attorney-General v. Doyley* (4 Vin. 485; 2 Eq. Ab. 194; 7 Ves. 58, note), but holds generally, that no charitable purpose was sufficiently expressed. In that case, as in this, the whole property might, consistently with the words of the will, have been applied to purposes strictly charitable.

But the question is, what authority would this Court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute. I see no substantial difference between this case and the former, and therefore consider the point as already decided, though if it were still open, I should not entertain any doubt on the question.

[20] THURGAR, *Plaintiff, against* MORLEY and OTHERS (Part Owners of the Ship *Morley*), and against the Commissioners of the Transport Board, *Defendants*. June 1817.

Charter-party of affreightment between the owners of the ship *M.* and the Commissioners of Transports "for and on behalf of His Majesty." During his continuance in the Transport service the ship makes a capture, which is condemned; and, upon petition to the Treasury, two-thirds of a moiety of the proceeds arising from the capture ordered by warrant from the Crown to be paid to the *owners*. These proceeds are entirely in the discretion of the Crown; and, upon motion for payment into Court of a sum admitted by the Commissioners of Transports to be due for freight under the charter-party, which motion was resisted, on the ground that the Commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant; payment was ordered accordingly, without prejudice to the question of ownership.

On the 28th of April 1812, a charter-party of affreightment was entered into between the Defendant *Morley*, on behalf of the owners of the ship *Morley*, and the Commissioners of the Transport Board, to the effect following:—"It is covenanted, concluded, and agreed, by and between Mr. *John Morley* on behalf of, &c., of the one part, and the Commissioners for conducting His Majesty's Transport service, for and on behalf of His Majesty, of the other part, in the manner following; that is to say, The said *John Morley*, for and on behalf of himself and all and every the part-owners of the said ship or vessel, hath granted and to hire and freight letten, and by these presents doth grant and to hire and freight let, the said ship or vessel to the said Commissioners, to receive on board, at such port or ports as shall be directed, all such soldiers, &c., or whatever else shall be ordered to be put on board her, and

proceed therewith to such port or ports as shall be required, and after having landed the said soldiers, &c., to receive on board such others as shall be put on board her, and proceed [21] therewith as shall be directed. The ship to continue in pay for six months certain, and after that, for so long time as the said Commissioners shall require, and until they, or agents authorized by them, shall give notice of discharge; such notice of discharge to be given at *Deptford* or *Portsmouth*, as may be most convenient for His Majesty's service, and after the ship's arrival at one of those places. And the said Commissioners, for and on behalf of His Majesty, have hired or retained the said ship or vessel for the said time and service accordingly." There followed a covenant, on the part of *Morley* that the ship should be strong, staunch, and substantial, both above water and beneath; that she should be fitted and equipped with masts, &c., and with a complement of men; and that the Master should obey the orders to be from time to time received for transporting soldiers. In consideration whereof the Commissioners agreed, on behalf of His Majesty, that *Morley* should be paid for the freight and hire of the ship at the rate therein mentioned.

The ship *Morley*, on entering the Transport Service, was ordered to the *East Indies*; and in *February* 1813 she captured an *American* ship called the *Rambler*, which she carried into the *Cape of Good Hope*, where the ship and cargo were condemned as lawful prize to the Crown, in consequence of the ship *Morley* having no letter of marque on board at the time of the capture.

An application was afterwards made to the Crown by the owners of the *Morley*, for a certain proportion of the proceeds of the prize, to be paid to them as captors, whereupon a warrant was issued from the Treasury to pay (among other things) two thirds of a moiety of those proceeds to the owners.

[22] Under this warrant, the agents for the owners received the sum of £4738, which was shortly afterwards claimed by the Commissioners of the Transport Board, who sent, by their secretary, to *Morley*, on behalf of the owners, a notice that the whole amount of their share was charged against the ship as the property of that department, in whose service the ship was employed at the time the capture was made.

A suit having been instituted by some of the part-owners against the others, on a question with respect to their shares, to which the Commissioners of the Transport Board were made parties, to account for the freight during the time that the ship remained in their service, a motion was now made in that cause, on behalf of all the part-owners, that the Defendants, the Commissioners, might be ordered within a fortnight to pay into court the sum of £6000, admitted by their answer to be due from the Transport Board for freight as aforesaid.

This application was resisted by the Commissioners, on the ground that they had a right to set off against the freight due, the sum received by the owners on account of the capture.

*Agar* and *Merivale*, in support of the motion, alleging that no action at law could be maintained against the Commissioners, they having expressly contracted on behalf of his Majesty (*Unwin v. Wolseley*, 1 T. R. 674), insisted that the owners of the ship, and not the Transport Board, were clearly entitled to the proportion of the proceeds of the capture granted by the king's warrant; which, if not to be claimed as matter of right, was entirely in the discretion of the Crown, and had been granted by the Crown expressly [23] to the owners; and they cited *Fletcher v. Braddick* (2 New Rep. 182), to show that the Commissioners had not the absolute, but only a particular and limited interest, in the ship, during the continuance of the charter-party, and that the owners, as they would be liable to losses, even while a king's pilot was on board, so they ought to be held entitled to any incidental advantages.

Sir *S. Romilly*, contra, contended that the property of the Commissioners, during the continuance of the charter-party, was absolute and unlimited, amounting to the temporary ownership; and cited *The Trinity House v. Clark* (4 Maule & S. 288), in opposition to *Fletcher v. Braddick*; insisting that that case proceeded entirely on the principle that, on a contract with the Crown, so long as the charter-party is in force, the Crown is to all intents and purposes the sole and exclusive owner.

The *Lord Chancellor*, without hearing the reply, said that the question of ownership was foreign to the object of the present motion; for that, wherever the owner-

ship lay, the proceeds of the capture were the undoubted property of the Crown, and, as such, disposable by the Crown entirely at its own discretion ; and therefore ordered the £6000 to be paid into Court, without prejudice to any question as to the rights of the parties.

[24] ANN FREEMAN, CAROLINE JEFFCOCK, WILLIAM TRANTER, BURGESS TRANTER, and JOSEPH BUTT, *Plaintiffs*, and WILLIAM FAIRLIE, *Defendant*. *Rolls*. July 7, 1817.

[*Cf. Campbell v. Campbell*, 1842, 13 Sim. 169.]

Executor in *India*, having a legacy for his trouble, not entitled to commission on receipts and payments, or either, as Executor ; nor allowed, in passing his accounts after a series of years, to renounce his legacy and charge commission on such receipts and payments.

*Hannah Haigh*, by her will dated the 15th of *October* 1789, after directing her debts to be paid, devised and bequeathed all her real and personal property which she might die possessed of or entitled to as the Widow and Administratrix of her former husband *Samuel Oldham*, or by virtue of the settlement made on her marriage with her then husband *Richard Haigh*, to all such children as she might happen to have, his, her, and their heirs, executors, &c., in equal proportions, and in case of their death without issue before twenty-one, then she gave, devised, and bequeathed all her estates to the four first named Plaintiffs in equal shares and proportions, subject to the payment of a legacy of 10,000 sicca rupees to her said husband, another legacy of £100 sterling to the Plaintiff *Joseph Butt*, and a legacy of £20 a-piece to each of her executors therein named. By a Codicil to her Will she named the Defendant *Fairlie* an Executor jointly with others named in the Will, and desired that each of her executors would accept 500 sicca rupees in lieu of the £20 given them respectively by the will "as an acknowledgment for the trouble they would have in the execution of the trusts of the will," desiring that her executors would lose no time in realizing her property in such manner as they might think best for her estate, and in other respects confirmed her will.

[25] The Testatrix's husband died in her lifetime, whereby the legacy to him of 10,000 sicca rupees became lapsed. The Testatrix herself died in 1791, and the Defendant alone proved the will at *Calcutta*. The bill was filed on the 30th of *June* 1812 for an account of personal estate, for payment of his legacy of £100 to *Joseph Butt*, and for distribution of the residue among the other Plaintiffs, who were also next of kin of the Testatrix, and who were entitled under the will, the Testatrix having never had any children.

The Defendant put in his answer on the 31st of *October* 1812 ; and, on the admissions in that answer, the Plaintiffs moved immediately afterwards for payment of a sum of money into court, which was on the 15th of *November* 1812 ordered by the Lord Chancellor accordingly, confining the sum to the amount of what had been so admitted. [The circumstances upon which this order was made, formed the ground of a very elaborate judgment pronounced by His Lordship, a note of which has been communicated to the reporter, and is subjoined to this statement.]

By the decree made on the hearing of the cause, dated the 17th of *March* 1813, it was referred to the Master to take the usual accounts, and to enquire what interest or profit had been made by the Defendant of the personal estate of the Testatrix, and what balances he had from time to time had in his hands belonging thereto. The Master made his report on the 3d of *February* 1816, whereby he certified (among other things) that all debts and legacies were paid, except the legacy of 500 sicca rupees given to the Defendant by the Codicil, which the Defendant had declined accepting, claiming in his accounts a commission of £5 *per cent.* as being the usual rate of allowance to Executors in [26] *India* on their receipts and payments in respect of the personal estate of their Testators received and paid by them. And, with respect to the inquiry which was directed as to the profit made by the Defendant out of the said personal estate, the Master found various facts upon which he made the allowances which formed the ground of the second exception.

To this report exceptions were taken on the ground of the allowances made to the Defendant by the Master in the accounts subjoined to it by way of Schedule. The exceptions were these :

"First, For that the said Master hath in and by his said General Report, and the second schedule to which it refers, allowed to the said Defendant by way of discharge various sums of money amounting together to 1835 sicca rupees or thereabouts, being equal to the sum of £229 sterling, or thereabouts, by way of commission at the rate of £5 *per cent.* on principal and interest monies received by the said Defendant on account of the personal estate of his Testatrix in the pleadings named. Whereas the Plaintiffs submit the said sums of money by way of commission, or any of them, ought not to have been allowed to the said Defendant, in respect of such his receipts, he the said Defendant being an Executor, and his Testatrix having by a codicil to her will desired her Executors would each accept 500 sicca rupees as some small acknowledgement for the trouble they would necessarily have in the execution of the trusts reposed in them."

"Second, For that the said Master hath in and by his said General Report, and the second Schedule to which it refers, allowed to the said Defendant by way of [27] discharge, various other sums of money amounting together to 2768 sicca rupees, or thereabouts, being equal to £346 sterling, or thereabouts, by way of Commission, at the rate of £5 *per cent.* on sums annually credited by the said Defendant, in his account as Executor for interest from time to time in his hands, and with which interest he is charged in the first schedule to the said report. Whereas the Plaintiffs submit, the said Defendant is not entitled to, and ought not to have been allowed, such last-mentioned commission, for the following (among other) reasons : first, because the sums credited for interest were not in fact received by the Defendant, and invested as part of the personal estate of the Testatrix, but were (as appears by the two examinations of the Defendant), together with the aforesaid principal monies, mixed with the funds of the different mercantile houses in which the said Defendant was and is a partner, and used in their business of merchants ; and secondly, because by virtue of the said Decree the said master is directed to inquire what interest or profit has been made by the Defendant of the personal estate of the said Testatrix, and what balance he had from time to time in his hands belonging thereto, and that therefore the Plaintiffs are advised, the said Master is not at liberty to make to the Defendant any allowance or abatement from the interest admitted by the Defendant to have been made by him, or with which he has submitted to be charged."

The case of *Chetham v. Lord Audley* (1) was cited, in which it was decided that an Executor in India passing [28] his accounts in this Court is entitled to commission upon the receipts or payments, according to the practice in India, that practice being represented in evidence to be that it was usual to make such allowance in every case in which the Executor has not a legacy. And on the matter of the second exception were cited *Raphael v. Boehm* (11 Ves. 79), and *Bindon v. Burdon* (1 Ves. & B. 170).

Sir *Samuel Romilly* and *Dowdeswell*, in support of the exceptions ; and for the Plaintiffs on further directions.

*Hart* and *Wakefield*, for the Defendant.

The Master of the Rolls allowed the exceptions, holding clearly that an Executor, having such legacy for care and trouble, is not entitled to commission, and that he could not, at that distance of time, be admitted to renounce the one in order to be enabled to charge the other.

"Order, that it be referred back to the Master to review his report, and certify what (upon allowance of the exceptions) would remain due from the Defendant on account of the personal estate of the Testatrix.

"Declare, that the Defendant was entitled to have retained and charged in his accounts the legacy of 500 sicca rupees, and referred it to the Master accordingly, to take an account of what was due to the Defendant for principal and interest on the said legacy.

"The Master to carry on the account from the foot of his former report, and to tax the Defendant his costs as between Solicitor and Client ; the Defendant to be at liberty to retain the same out of money reported to be due from him." (Reg. Lib. A. 1816, fo. 1309.)

(1) 4 Ves. 72. See *Robinson v. Pett*, 3 P. Wms. 249, that the Court never allows an Executor for time and trouble, *especially* where there is an express legacy for care and pains.

[29] FREEMAN and OTHERS v. FAIRLIE. Nov. 15, 1812.

Having been favoured with the Short-hand Writer's Notes of the Judgment pronounced by the *Lord Chancellor* upon the Motion made in this Cause for payment by the Defendant into Court of the Money appearing from his Answer to be in his hands as Executor, in which are many important Observations relative to the conduct of Executors, it has been thought expedient to insert it in this place.]

The *Lord Chancellor*. The notice of motion in this case was, that the Defendant be ordered within a month to pay into the Bank, in the name of the *Accountant-General*, to the credit of this cause, the sum of £30,000, in his possession as executor of *Hannah Haigh*, widow, deceased, the Testatrix in the pleadings named; and also that he may in six months so lodge in the hands of his clerk in court, upon oath, all books, papers, and writings touching or relating to the matters in question in this cause in the custody or power of the said Defendant, or his agents. The motion therefore had two objects; the one to bring in the £30,000 alleged to be in his hands as Executor of *Hannah Haigh*—the other that he might deposit in the Master's office all the papers and writings relating to the personal Estate.

Now, the general rule, as to bringing money into Court, may be stated thus; that the Plaintiffs are solely entitled to the Fund, or have acquired in the whole of the Fund such an interest together with others, as entitles them, on their own behalf, and the behalf of those others, to have the Fund secured in Court. The general Rule as to papers [30] and writings is, that an Executor representing an Estate should deposit them, for the benefit of those interested, in the office of the Master, unless there are other purposes which require that he should retain them in his own hands. The present case arises on a Bill, and Answer which I have examined with great care, and it is impossible for any man to look at the case without feeling (at the same time that he is bound to guard against the effects of such feeling) an inclination to say that this Fund ought to be necessarily forthcoming for the benefit of those ultimately entitled to it, whoever they may be. On the other hand, if the Rules of Practice will not authorize the Court to make the order which is prayed for, the Court must not indulge its feelings at the expence of those Rules, which always aim at what is for the benefit of the Suitors.

The Bill states that, in *October* 1789 (now about twenty-three years ago), the Testatrix *Hannah Haigh* made her will, and directed that her just debts and funeral expences should be paid and satisfied. You will perceive in the answer of the Defendant that a dispute is introduced, whether, to this day, her debts are paid or not: a dispute, with reference to which the Court would not be called upon to give much attention, if it should happen to find that those who set up that circumstance as in the way of the persons entitled to this Estate, have nevertheless been paid their legacies. [His Lordship then went on to state the rest of the Will and the Codicil, as already stated. See before, p. 26.] Then follows this clause,—a clause which is more immediately addressed to the attention of her Executors.—She desires “that her Executors will lose no time in realizing her property in such manner as they might think best for her estate, either by public auction or private sale.” After the death of the Testatrix, the Defendant, who carried on the business of a merchant in *Calcutta*, alone proved the [31] will, the other Executors having refused to interfere, although each took their legacies. The legacies to the Executors so refusing are payments which cannot be allowed. The Bill then alleges that the Defendant, immediately after the death of the Testatrix, possessed himself of the whole of her personal estate to a very considerable amount in value, and, recollecting that the Will had charged him with the duty of realizing the property by an immediate sale, it goes on to state that he caused such parts of the estate as did not consist of money or securities for money to be sold, and that he received the money arising from the sale thereof, and invested the same in government and other securities in his own name, and from time to time received the dividends and interest of such securities, as well as of all securities belonging to the Testatrix at the time of her decease, and that he has long since paid the funeral and testamentary expences and debts of the Testatrix. And it charges that ther

remained in his hands a balance of £40,000. The Bill then proceeds to state that applications were made by Mr. *Atkinson* to the Defendant to remit the produce of the Testatrix's estate to this country to be divided among the persons entitled thereto; Then (without going through the details) the Bill charges the Defendant much in the same terms as is usual in bills of this kind against Executors. It interrogates him as to whether the Testatrix's personal estate did not consist of such particulars as are therein mentioned, or of some and what other particulars. It proceeds to ask him more especially whether he did not possess himself of the whole, or what part of the Testatrix's personal estate; whether the personal estate did not amount to a considerable sum, and what is become thereof. And it is to be observed, that these questions are addressed to him at the end of twenty-one years. Whether he did not possess himself of the personal [32] estate of the Testatrix to some, and what amount and value? Whether he did not cause the same to be sold, and the produce to be invested in government, or what other securities, in his own name, or in whose name the same were invested? Whether he did not, and when in particular, receive some, and what dividends and interest? Whether there did not remain in his hands a considerable, and what balance? Whether such balance did not amount to £40,000, or what sum in particular? Whether Mr. *Atkinson* did not frequently apply to him for some, and what account? Whether he did not require him to remit the Testatrix's estate to this country for the purpose before mentioned? Whether he has not paid the several legacies to the Executors, and why and for what reason he paid their legacies and not the legacies to the Plaintiffs? and whether the whole, or some, and what part of the Testatrix's personal estate is not vested in securities in his name and subject to his disposal? Then it requires him to set forth whether he has not, from time to time, or at some and what time, lent different sums of money, part of the personal estate of the Testatrix, upon some and what government securities, or other securities, in the *East Indies*, and in whose name or names, and at what rate of interest, and the dates, parties' names, and other material contents of such securities,—and whether he has not kept some money unemployed? There are several others of these interrogatories which are founded on general allegations in the charges. These are interrogatories which ought to have been answered, and it is therefore utterly impossible to represent this as a case that did not call upon an Executor for such a particular account as at the end of twelve months he would have been bound to give, and at the end of twenty-one years he ought to be able to say something about. To this Bill, thus ample and sufficient in its charges, an answer is put in; which [33] answer does not supply me with the knowledge of the fact, at what time this gentleman (who was an Executor in *India* proving the will of this Testatrix, and who in that character and no other could take into his hands the property, whether personal or real, but who could take into his hands nothing belonging to the real estate, unless he took it as an Executor to this lady, and who must therefore admit himself to have received all that part of the property in his own wrong)—I say, that I cannot collect from this answer at what time he came over to this country. But this is an observation which it is impossible to say is a harsh one—that, if a Testatrix make a will in 1789, dying in 1791, describing in that will, by name, all her residuary Legatees, as living in *England*, one would think it might have occurred to a man who had stood in the character of personal representative to such Testatrix for twenty-one years, that, when he was coming over to *England*, it would be necessary for him to bring some memoranda to enable him to say, "I do not know whether these houses belong to the heir at law, or are personal estate; but, being abroad, and having difficulties in remitting money to *England*, I have laid out the money in such and such securities earmarked—there is the property, and here are the particulars of that property, to which you (some of you the heirs at law, and some the next of kin), are entitled." But, instead of that, he, this Executor, who is charged by the will with the express duty, either by private or public sale, of converting the estate into money, comes over from *India*, and says, "True it is, I did, twenty-one years ago, take upon me the character of Executor—true it is, I did deal with this estate, the particulars of which, real and personal, I admit by accumulation to amount to £30,000 sterling, nay, £40,000; but, having left my papers in *India*. I cannot tell you any one item, [34] or any thing relating to the securities, except what is stated in this my answer."—The answer states, "that he believes the two houses in *Calcutta* are of

“a freehold tenure,—that *Samuel Oldham* (the Testatrix’s husband) died intestate and without issue,—that the Testatrix possessed and received the profits of the “houses during her life,—that he has heard and believes she intermarried with “*Samuel Haigh*, having first had some settlement made upon her, whereby she “reserved to herself the power and disposition of her estates free from the controul “of her husband, and also power to dispose of the same by will,—that he knows of “no settlement, but refers to it when produced, and leaves the Plaintiffs to make “such proof thereof as they are able—but whether the Testatrix had any other “authority than as before mentioned to dispose of the estate he does not know, and “is not able to set forth as to his belief or otherwise.” Now this is the answer of an Executor, who, twenty-one years ago, proved the Will, and who is a Trustee for the persons named in it. He thinks proper to put these persons, for whom he is Trustee, to prove the title of the Testatrix to make such Will, of which he has been Executor twenty-one years. Then he says, “he has heard and believes that the “Testatrix, during her coverture with *Richard Haigh*, being of sound and disposing “mind, memory, and understanding, duly made and published her Will and Codicil ; “but he knows not of the execution or attestation of the said Will and Codicil of his “own knowledge, and leaves the Plaintiffs to make such proof as they may be able.” That is to say, he takes out probate of the Will twenty-one years ago, since which he has had the management of all the property ; and now, at the end of twenty-one years, though his possession must necessarily be in trust, the title of the Plaintiffs is disputed by him on the ground [35] whether the will, which he himself has proved, is duly executed. He says, “that he alone proved the will, and that his house of “business of *Fairlie, Reid, and Co.* on his account possessed themselves of the “Testatrix’s personal estate, consisting of the before-mentioned household furniture “and debts, or the produce thereof, and of the accumulation of the rents and profits “of the said two houses ; but what was the amount of the personal estate of which “the Testatrix was possessed in her life-time, or at the time of her death, or whether “the same were considerable, or consisted of the particulars in the Bill mentioned, “or of what other particulars, or what was the amount or particulars of such estate “and effects of which his house possessed themselves on behalf of the Defendant “as her Executor, he does not know, and is unable to set forth as to his belief or “otherwise, the books and accounts relating thereto, and which contain the account “and particulars of the same, having been left by him in *India* when, in 1809, “he came over to this country, where they still remain.”—So this is an answer (and I am bound to believe it), which states this most monstrous proposition,—that an Executor, who has been dealing with an estate amounting by accumulation to £40,000, at the end of twenty-one years, cannot set forth a single particular further than is here mentioned. Then he proceeds to state, “that he does not recollect “that the Testatrix was possessed of any leasehold estates”—probably they are freehold estates—“and, if he has received the rents and profits of these houses “he has received them in no right but as Executor”: and therefore, if a question should arise between the heir at law and those who are entitled to the personal estate, that is a question which would remain to be settled. But the Court will not permit the Executor to set up the title of the heir at law as between him and the personal [36] representatives.—The Court would have great difficulty in saying that what he has received he has not received as Executor. Then he says, “the “whole of the personal estate and effects which were possessed by his house of “business on his behalf as Executor of the Testatrix, and of the produce thereof, “after payment of her funeral and testamentary expenses, did not amount to more “than £2000 ; but, for the reasons aforesaid, he is unable to set forth the particu- “lars.” He denies, “that the balance or surplus was considerable, or amounted “to £40,000.” He says, “that, since the death of the Testatrix, his house of business “at *Calcutta* has received the rents and profits of the two houses, and invested the “produce of the personal estate and effects, and of the accumulations thereof, from “time to time, in *East India* securities, in which the same still remain invested, “except only that he has caused to be paid out of the said personal estate the funeral “and testamentary expenses, and the legacies after mentioned, and such of her “debts as have come to his knowledge, but to what amount, or whether or not all “her debts due at her decease had been paid, he (for the reason aforesaid)” —that is that his books are left in *India*—“is unable to state, as to his recollection or



"belief, save that he believes all her debts have been paid ; and he apprehends and believes that such personal estate, rents and profits, dividends and interest, have by this time accumulated, under the management of the Defendant's said house, to about £30,000."

Then he says, "that, during his residence at *Calcutta*, applications were made to him, as Executor of the Testatrix, on behalf of persons of the name of *Oldham*, and that, since he arrived in this country, he has been applied to by Mr. *Stephen Moore*, who produced to [37] him a pedigree, representing *Elizabeth* the wife of *Joseph Taylor*, heretofore *Elizabeth Oldham*, and *Charlotte Oldham*, as the two grandchildren of *Thomas Oldham*, the eldest uncle of *Samuel Oldham*, and (as such) the co-heiresses at law of *Samuel Oldham* ; but whether they are so or not he submits to the Court."

These are matters which must remain to be decided ; but they afford no ground for the Defendant's not saying what he has possessed, and what he has paid, of this property.—He denies, "that he, or his house, have, at any time after or since the decease of the Testatrix, possessed himself or themselves of the whole or any part of her personal estate, except as before mentioned."—Now what does that mean, "except as before mentioned ?" The former part of the answer admits that he had received the property, but could give no account of it.—He says, "that, at this distance of time, and for the reasons aforesaid, he does not recollect, and cannot in any manner set forth, whether he invested any of the property in government or other securities, in his own name, or in the names of any other persons, further than that he believes such parts as were possessed by his house of business at *Calcutta* on his behalf were invested in *Indian* Government securities, either in the name of the Defendant, or of his said house, on account of the Testatrix's estate ; but which in particular he does not recollect, and cannot set forth."—Then he admits, "that his house of business has, on his account, received the dividends and interest arising from all such investments and securities, and also the dividends and interest from the securities (if any) which belonged to the Testatrix at her decease, but at what time or times they so received the same, or to what amount, or from or upon what securities or investments in particular, or from whom the same were received, [38] "he, for the reasons aforesaid, is unable to set forth as to his recollection, belief, or otherwise."—Then he states the circumstance of his paying 500 sicca rupees to Mr. *Atkinson*.—He states his application to him to transmit the property to this country, and that, if he refused to comply, it was in consequence of adverse claims.—He states his having paid all the legacies, except the legacy to *Joseph Butt* (and why he excepted that, I do not find any reason) ;—He says he has paid nothing on account of any residue ;—then he goes on to state, "that, without reference to his books and accounts, he is unable to set forth, save as aforesaid, what was the value of the Testatrix's personal estate, or whether the same was or not more than sufficient to pay all her testamentary and funeral expenses, or whether, on investigation, the whole or the greater part of her personal estate ought not to be considered as the personal estate of *Samuel Oldham*."—Now, if it is to be considered as part of the personal estate of *Samuel Oldham*, it will be a debt to be paid in the course of administration ; but, if he had stated what the property consisted of, the Court would have had no difficulty in taking every shilling out of his hands. Since he has thought proper to pay legacies, I apprehend that he must (at least for the security of the fund) stand before the Court in a situation in which the Court will not hear him allege that debts are unpaid. As to the two houses, that is a property which must be administered. He has either received it under no title at all, or under that title which makes him a trustee for the persons who have a right to claim the personal estate.—Then he goes on to say, "that he has heard and believes (although he does not know the same of his own knowledge), that the whole of such personal estate as the Testatrix was possessed of or entitled unto at the time of her marriage was settled as in the bill mentioned." If so, he had no right to touch one shilling of it.—Then [39] he says, "he may have stated, upon the applications which have been made to him on behalf of the Plaintiffs, that the whole amount of the property in *India*, including the value of the two houses, by this time will be near £40,000,"—an aggregate sum of £40,000 sterling, the particulars of which, after having had his observation fixed upon them for twenty-one years, cannot be set forth till some copies or originals of the accounts are got from *India*.—He admits "that he has

"not taken measures to have any part of the property remitted to this country, and that this is in consequence of adverse claims."—He says, "the whole remains vested in the public securities in *India*, either in the name of the Defendant, or of his house of business (which in particular he cannot set forth), but subject to his disposal; unless some part of the produce is in the hands of the said house at interest, which he apprehends may be the case."—It is a very extraordinary thing—it may be that this gentleman may have an apprehension that some part of this is in the hands of one of his houses of trade—but it is extraordinary, that he cannot tell us whether the fact is so.—It is unfortunate; for, if we could only have had the amount in the hands of his house, there would have been no difficulty as to so much.—Where an Executor is doing what is right, it is very fit the Court should give him every indulgence; but if this Executor had told us in his answer what was the money that at any time he had lent to his house, the Court would have said, You have lent this money; you have made yourself the creditor of the house; you are answerable; and the Court has nothing to do with a dealing that has not ear-marked the property. But, if the Defendant cannot say how the fact is, Courts of Justice can do no more than parties enable them to do by their admissions. It is to be observed that this is an important passage in another point of view. He admits [40] "that there may be some part out at interest, which he apprehends may be the case." Then he says, "that he has not lent at any time any part of the estate, or of the produce thereof, upon any security; the same, and the produce thereof, having from time to time been invested as hereinbefore in that behalf mentioned, or interest allowed thereon."—Then follows this—in the answer of an Executor at the end of twenty-one years,—of an Executor, who states that he has laid out this property in *Indian* securities in his own name or in the name of his house:—He says, "that when such investments were made, or at what rate of interest, or what particular sum or sums of money or capital was or were purchased in such securities with such sum of money so invested, for the reasons aforesaid he is unable to set forth as to his knowledge, belief, or otherwise."—So that, with his observation directed to his own administration of the property for twenty-one years, he cannot state the particulars of any one sum in any public security, or that he has lent to his house. With a memory so defective as to these particulars between him and those for whom he is a Trustee, he stands before the Court without having aided that defective memory by bringing one scrap of paper to enable him to say where there is a shilling to administer. Then he says, "he cannot set forth whether his said house of business, at any time or in any manner, employed any sum or sums of money which arose from the Testatrix's personal estate, and were possessed by them on his account, or the interests, dividends, or produce of any part thereof, about their trade or business, or in any other manner for their or his benefit or advantage." Here he states that he cannot tell whether he has employed it for their benefit or his own; and, in a subsequent passage, he denies having made any benefit of it at all.—Then he says, "he [41] believes such monies were from time to time vested in *Indian* securities, and that, previous to such investment, while the monies were in the hands of his house, the same, or a higher, interest was allowed thereupon, than was payable upon the said securities; and therefore he submits that his house was entitled to make use of the monies on which they so paid interest, whether they did or did not in fact make use of the same." That will be a question to be tried when this cause comes on between him and the *cestui que trust*. Then he goes on to state, what is a very extraordinary circumstance,—that "he has no separate account of his transactions as Executor, and that all the accounts are contained in the books" of the two or three houses he mentions. He has, therefore, as Executor, done that which no Executor is justified in doing; he has blended the accounts of his Executorship, supposing him to have kept them, with the accounts of his commercial houses; and it now turns out, not only that he pledges himself by his answer to this,—that he cannot produce that which he ought to have,—separate accounts of his transactions with the estate to which he was to administer as Executor,—but that he does not even give the Plaintiffs any account, or description of the books, accounts, or papers, in which the narrative of his administration is to be found, save that it is to be found in the books of all these houses. Now I have gone through this bill and answer, for the purpose of stating the principles of the Court with respect to motions of this sort,—I mean, as to paying money into

Court,—and to secure myself from a hasty interpretation of what appears to be the contents of the answer, which (like all answers) must be looked at as more or less deserving of credit as they are or are not answers meeting fairly all the inquiries contained in the bill. That there are inquiries in this bill which, in [42] nine hundred and ninety-nine cases out of a thousand, would have produced, on the part of an Executor who had been administering a Testator's estate for twenty-one years, some satisfactory information for those entitled to the property, no one, after what I have read, can deny. The Court is in the habit, and I have never broken in upon it, of looking into questions with respect to Executors and Trustees who have difficulties in executing their trust with an indulgence which hardly deserves that name—for it is no more than strict justice. The Court has every favourable leaning towards Executors and Trustees; keeping their accounts regular, and being at all times willing to inform the Court of the situation of their affairs, and the difficulties they have to meet with and encounter. I am perfectly ready to say that, where persons are living in *England*, and there is an intestacy locally situated in *India*,—where difficulties arise as to the property,—where it is doubtful whether you can safely remove property which is collecting a large interest,—and where an Executor comes forward and says, “there are these circumstances of difficulty which I have to encounter—Here is the state of the fund—it amounts to so much;—I have laid it out in securities, which will be yours, for they are ear-marked,—I have stated it in an account which has been kept separate,—it is in a situation in which it can never meet with accident, let what will come of me or my concerns”;—in such a case, there is not the least doubt the Court would do every thing that could be done to enable such an Executor to extricate himself from his difficulties. But I must really say, and I am sorry to say it, that this is the first case in which I ever met with such an imperfect answer as this is at so distant a period. At the same time, whatever I may think of the Defendant, I am bound to give credit to him:—I must believe him for the purpose of [43] justice.—Then, if I must believe him, the question upon the first part of the motion is, Have I an admission that he has £30,000 in his hands in which the Plaintiffs are interested, solely or together with other persons, enabling me upon such admission, to order him to bring all the money into Court? I am of opinion that I cannot do it; but I think it right to say that, under all the circumstances, I can take the personal estate to have been in 1791 £2000, and that I may add the accumulations to 1812; but I have not in this answer any distinct admission, that he has laid out the money in *East India* securities in such a way as to enable me to ascertain and order him to bring in what is the fair amount of the personal estate.—As to the £30,000, the greatest part must be considered as arising out of a fund to which the Plaintiffs may have difficulties in primarily sustaining their right.

As to the other part of the motion, with respect to bringing the books into Court, it is a case of some novelty and difficulty; but all the difficulty is out of the question with reference to an Executor. It is, and must be understood to be, the bounden duty of an Executor, to keep clear and distinct accounts of the property which he himself is bound to administer; and I have not the slightest difficulty in saying that, if all these books were the books of a banking house in *London*, and an Executor thought proper to put the accounts of a Testator's estate into his banking books, he shall not be allowed to tell me, the *cestui que trust*, that I have no right to see his original accounts of my property.—To an Executor so acting I should say, they shall see every part of these original books which contain any part of this transaction.—The case would be a case of greater nicety with respect to the partners of an Executor who had permitted him to place in the general books his accounts as Executor. I should say, upon the mere fact [44] of their having so permitted him, that this Court would not allow them to withhold a free inspection of the books; and I should say it was clearly due in a case in which an Executor alleges that he may have lent to them money, part of the Testator's estate, at interest, on a loan between him and them, and where the Executor says they have been dealing with it by laying it out on securities. The partners are not before me; and all I can do is to order Mr. *Fairlie* to bring into Court duly attested copies of all the entries in the books and papers relating to this estate; and I add that he shall do so within six months. When I say six months, I consider at the same time that he may not be able to do it within that time. But, if an executor, instead of being able at the end of twenty-one years to put in an answer which will enable the Court to say to him, bring into Court so much

money, states in his answer that the reason why he cannot give a sufficient answer is, that he administered this estate from 1791 to 1809 in *India*—that he came here in 1809—that he left behind him every paper, book and account,—and that he has no memory of the particulars and items of an estate administered under his own observation from 1791 to 1812 ;—I own it does appear to me to be the duty of the Court to put him under the necessity of coming to the Court from time to time to shew that he has done his utmost to supply his own defect, and that, if it is necessary to have the time enlarged, the application should be made by him for that purpose. I shall calculate what is a fair interest of the £2000.

*Order.*—"That the Defendant *William Fairlie* do within two months from this time, pay the sum of £3680 into the Bank, with the privity of the Accountant-General, to the credit of this cause, to be laid out in the purchase of Bank £3 *per Cent.* annuities, [45] and that the said Defendant do, within six months, produce and leave upon oath with his clerk in Court in this cause for the inspection of the Plaintiffs, their solicitors, and agents, copies (duly attested and verified by affidavit) of all entries relating to the estate of *Hannah Haigh* the Testatrix in the pleadings mentioned, in all the books, papers, and writings touching or relating to the matters in question in this cause, in the custody or power of him the said Defendant, or his partners or agents at *Calcutta* in the *East Indies*, or elsewhere."

FISHER v. MEE. July 11, 1817.

Defendant having pleaded in bar to part of the relief sought by the Bill, and answered as to the remainder, is not entitled to an order to put the Plaintiff suing at Law to his Election. A Plea can [not] be considered as an Answer for such a purpose.

The bill filed in *Michaelmas* term 1816, by the Administrator of *Nathaniel Mason* deceased, prayed an account of the personal estate and effects of *Mason* possessed by the Defendant, and of their partnership dealings, together with an injunction to restrain him from collecting any more of the partnership's effects, and a Receiver.

On the 27th *May* 1817, the Defendant put in a plea to such part of the bill as sought to open partnership accounts which had been settled, and an answer to the rest of the bill, setting out other accounts, upon which he admitted sums to a certain amount to be due to the Plaintiff as Administrator.

[46] In *Trinity* term the Plaintiff brought an action in the King's Bench against the Defendant, for part of the amount stated in the schedules to the answer.

On the 25th of *June* 1817, an order was obtained on the part of the Defendant to compel the Plaintiff to elect, in the usual terms of such order, *viz.* "Forasmuch as the Court is informed, &c., that the Plaintiff having filed his bill in this Court against the Defendant, he put in his answer thereto on the 27th of *May* last, and yet the Plaintiff prosecutes the Defendant at law, and in this Court, for one and the same matter, whereby he is doubly vexed; it is hereupon ordered, that the Plaintiff upon notice hereof to his clerk in Court, and attorney at law, do within eight days make his election in which Court he will proceed; and, if the Plaintiff shall elect to proceed in this Court, then the Plaintiff's proceedings at law are hereby stayed by injunction; but in default of such election, or if the Plaintiff shall elect to proceed at law, then it is ordered that the Plaintiff's bill do henceforth stand dismissed, with costs." &c. (Reg. Lib. A. 1816, fo. 1084.)

The Plaintiff now moved to discharge that order, upon the ground of a case in *Moseley* (Anon. p. 304) where a Defendant having put in a plea in bar, and obtained an order for the Plaintiff to make his election whether he would proceed at law or in this Court, the Lord Chancellor (*King*) upon the Plaintiff's motion discharged the order; "for that the order went on a supposition that the Plaintiff had an election, and yet the Defendant pleaded he was entitled to no relief in equity, and therefore the Plaintiff was not obliged to make his election till the plea was argued." And [47] in that case, another was cited, of *Vaughan v. Welsh* (*Mosely*, 210), where, on a plea of the statute of limitations, an order to elect had been discharged for the like reason.

Sir *S. Romilly* in support of the motion to discharge the order.

*Bell* and *Meggison*, contra, insisted that a plea is an answer within the scope of the rule, which is, that a Plaintiff proceeding in law and in equity for the same matter shall be put to his election after the Defendant has answered his bill, but not before. The plea in this case was of a stated account, and went only to part of the bill. The action was in respect of other matters which were contained in the remaining part of the bill, and to that the Defendant had put in an answer.

Sir *S. Romilly*. A plea is to be taken as an answer to no other purpose than to satisfy the terms of an order to answer. This is evident from no plea being ever ordered to stand for an answer without its being added that the Plaintiff shall have liberty to accept. In such a case as this, the Plaintiff cannot except to the answer till the plea is disposed of ;—so that, to disappoint the rule, a Defendant would have only to put in an insufficient answer, upon which he might obtain the order ; unless the meaning of it be that the Defendant shall have first answered fully.

The *Lord Chancellor* [Eldon]. It is impossible to say that a plea and answer is an answer, within the meaning of the rule. Suppose the plea were to the whole bill—could that be an answer [48] for such a purpose as this ? Then, by the same reason, neither can a plea to part of the bill be so held. It is quite erroneous to say that a plea is an answer to all purposes.

[The Order discharged.] (Reg. Lib. 1816, A. fo. 1380.)

POWELL v The ATTORNEY-GENERAL and ROBERT PENDLETON. *Rolls. July 24, 1817.*

Bequest of residue “to the Widows and Children of Seamen belonging to the town of *Liverpool*,” held a valid charitable bequest to be applied in aid of a subsisting charity for such poor sailors’ widows and children as should, in the judgment of the persons appointed to administer, be deserving objects of it.

*James Pendleton*, a trader on the river *Riopongos* in *Africa*, and a native of *Liverpool*, by his Will dated the 10th of *July* 1802, bequeathed the residue of his estate “to the widows and children of seamen belonging to the town of *Liverpool*,” and appointed the Plaintiff his executor. The Bill, filed against the *Attorney-General* and the Testator’s next of kin for the directions of the Court as to the application of this residue, charged that there was no existing charitable institution for the relief of widows and children of seamen belonging to the town of *Liverpool*, but that there were almshouses in the town for widows of seamen, erected by virtue of different charitable bequests, and a hospital, under an act of 20 *Geo. 2, c. 38*, for the relief of maimed and disabled seamen, and the widows and children of such as should be killed, &c., in the merchants’ service.

The Defendant, the next of kin, by his Answer, insisted that the bequest was void for uncertainty, and claimed the residue as undisposed of.

By the Decree made on the hearing (*July* 1809. Reg. Lib. 1808, B. fo. 1091), it was referred to the Master to inquire whether there were any and [49] what charitable institutions for the benefit of the widows and children of seamen belonging to the town of *Liverpool*.

The Master by his Report stated several charities for poor seamen’s widows, and others for the poor of *Liverpool* generally, besides the hospital mentioned in the Bill ; and one under the Will of *Elizabeth Cain*, dated the 8th of *June* 1778, whereby she directed the residue of her estate to be continued at interest or placed out on government securities at the discretion of her Executors, and after their death, of the Rectors of *Liverpool* for the time being ; the interest to be paid and distributed unto and among such poor sailors’ widows and orphans, inhabitants of *Liverpool*, as should in their judgment be deserving objects of charity.

The cause now coming on for further directions, *Bell* for the next of kin stated the question to be, first, whether there was a good charitable bequest, and, if so, whether it was general, or to go in aid of any of these specified charities.

*Milford*, for the *Attorney-General*.

The Master of the *Rolls* [Sir Wm. Grant] held that it was a valid bequest, and that the words were sufficiently descriptive of the last of the charities mentioned in the Master’s Report.

Order.—Residue to be paid to *S. R.* and *R. H. R.* Clerks, the now Rectors of

*Liverpool*, to be by them laid out in their names at interest, and upon their death or resignation to be transferred to their successors, Rectors [50] of *Liverpool* for the time being—the interest to be applied by them for the benefit of widows and children of poor seamen belonging to the port of *Liverpool*, in like manner as to proceeds of the property devised by *Eliz. Cain*, and applied according to her Will.” (Reg. Lib. 1816, B. fo. 1580.)

LE GRICE and OTHERS v. FINCH and ANOTHER. *Rolls. July 29, 30, 1817.*

[See *Barker v. Rayners*, 1820, 5 Madd. 217. Observed upon, *Oliver v. Oliver*, 1871, L. R. 11 Eq. 506. Disapproved, *Harrison v. Jackson*, 1877, 7 Ch. D. 339. Not followed, *In re Robe*, 1889, 61 L. T. 497.]

*E. D.* by will, reciting “that it was the wish of her mother and herself that the £500 they had then out upon mortgage should be given to *S. A. G.* and her family,” bequeaths “the said £500, with interest,” accordingly. The Testatrix, at the time of making her will, had a sum of £50 out on mortgage, which she afterwards called in, and applied to different purposes. The mother being dead, the Testatrix took out administration; and, upon her death, without having altered or revoked her will, the question was, Whether the legacy was adeemed; and held no ademption.

*Elizabeth Dunch*, by her Will, dated Oct. 9, 1805, reciting “that it was the wish and desire of her mother and herself that the £500 they had then out upon mortgage should be given to (the Plaintiff) *Sophia Ann Le Grice* and her family in “manner thereafter mentioned,” gave and bequeathed to (the Defendants) her Executors, immediately after the decease of her mother, the said £500, with all interest due thereon, upon trust for the Plaintiffs as therein mentioned.

The Testatrix’s mother died in June 1809, intestate, upon which her daughter the Testatrix took out administration, and by virtue thereof possessed herself of her property, and died shortly afterwards without having altered her will.

The Bill, praying an account of the Legacy of £500, stated various circumstances, from which it appeared that [51] the Testatrix being previously to the date of her will indebted to her mother in a sum of £536, and being also entitled to £500 out on mortgage, it was agreed between them that the mortgage money should be considered as the property of the mother in part of that debt, and that, after her death, the same should go to the Plaintiffs, Mrs. *Le Grice* and her children; in pursuance of which agreement the will in question was made.

The Answer of the Executors denied all knowledge of this alleged agreement, and stated that the money so out on mortgage at the date of the will was afterwards paid off, being called in by the Testatrix herself, who had applied part thereof to her own immediate purposes, and invested the remainder in stock, which had been sold by the Defendants since her death, and applied in the payment of debts and legacies; the Defendants insisting that this was an ademption of the Legacy, being a specific Legacy of money due on mortgage, and there being no property of the Testatrix at the time of her death to answer that description. *Hambling v. Lister* (Ambl. 401), *Fryer v. Morris* (9 Ves. 360).

Evidence of the agreement alleged by the Bill was entered into on the part of the Plaintiffs, which was objected to on the part of the Defendants as not sufficient to establish the fact sought to be proved; and it was admitted that, if necessary to resort to it for the purpose of deciding the question, there must be an inquiry directed.

Sir *S. Romilly* and *Heald*; *Hart* and *Raithby*, for the Plaintiffs, and for Defendants in the same interest with the Plaintiffs.

[52] *Bell* and *Richards*, for the Defendants the Executors.

The Master of the Rolls, considering that an inquiry might be necessary, desired to look at the pleadings.

The Master of the Rolls [Sir Wm. Grant]. I doubted at first whether it might not be necessary to direct some inquiry with respect to the interest which the mother had in this money. But on further consideration I think the question may be decided upon what appears on the face of the will itself. And, attending to the description of the thing given, it seems to me that the Legacy is not adeemed by calling in the mortgage. The essential characteristic of the Legacy is, that it consists of a

sum, in which the Testatrix admits that her mother and herself had some sort of joint interest, and which they were both desirous of giving to Mrs. *Le Grice* and her family. This characteristic was not at all dependent on the particular security on which the money might be placed. The Testatrix considers the circumstance of its being at that time out on mortgage as merely accidental. She speaks of the £500 "we have now out upon mortgage." That is descriptive of the present situation of the money. The next day it might not be out upon mortgage. But it would still be the £500, in which the mother and the daughter had a joint interest; and which, at the time of the will, they had out upon mortgage. The thing given is not the mortgage, but the money. It is the *said sum* of £500, that she gives to her Executors. What is the *said sum*? That sum of £500, which belonged to her and her mother, and which at a given time was out upon mortgage. Whether it remained out upon mortgage at the time of [53] the Testatrix's death, appears to me to be a matter of indifference. That circumstance is no ingredient in the gift, either by way of condition, or of inherent description. I am therefore of opinion that the Legacy is due.

OGILVIE v. FOLJAMBE. *Rolls. July 22, 23, 25, 1817.*

[See *Clive v. Beaumont*, 1848, 1 De G. & Sm. 406; *Caton v. Caton*, 1867, L. R. 2 H. L. 139; *Murray v. Spicer*, 1868, L. R. 5 Eq. 536; *Naylor v. Goodall*, 1877, 47 L. J. Ch. 55; *Shardlow v. Cotterell*, 1881, 18 Ch. D. 289; 20 Ch. D. 96; *Ellis v. Rogers*, 1885, 29 Ch. D. 670; *Plant v. Bourne*, [1897] 2 Ch. 281; *Bank of New Zealand v. Simpson*, [1900] A. C. 188.]

Agreement to purchase, established upon a correspondence referring to the terms of such agreement. Parol evidence is admissible to explain the subject-matter of an agreement, although not to vary the terms. Provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requisition of the act with respect to signature is complied with, and it does not matter in what part of the instrument the name is found. The right to a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right by going on with the agreement after he has full notice that he is not to expect a good title. This is, in such case, matter of notice, and not of contract. If the vendor of a leasehold interest means to sell without producing his lessor's title, he ought to declare it. There may be waiver without any specific contract, as in cases of carriers, partners, &c. Verbal declarations of an auctioneer at the time of sale not to be received in contradiction to the printed particulars. But *quære* as to the effect of personal information of a mistake in the particular. *Quære*, Whether even a covenant against incumbrances will extend to protect a purchaser against incumbrances of which he has express notice.

The Plaintiff being possessed of the premises in question (a leasehold house in *Grosvenor Place*), by virtue of a lease from Earl *Grosvenor* for eighty-nine years from *Lady-day* 1800, to *Thomas Bannister*, Esq., at a rent of £31, 10s., and of an underlease from *Bannister* to the Plaintiff for eighty-six years and a quarter from *Christmas* 1802, at the same rent, subject to a mortgage for £12,000 to *Coutts*, in the month of *June* 1814, entered into a treaty for sale thereof to the Defendant, which treaty having been broken off, the premises were put up to sale by auction on the 8th of the same month, and bought in for the Plaintiff. The printed particular of sale (with a copy of which the Defendant was proved to have been furnished previous to the sale taking place) contained a full description of the premises, and of the tenure under which they were held; and one of the conditions was, "that, on the 24th of *July* following, the vendor should execute the conveyance, with a good title to the estate; such title to originate and be derived from the lease under which the premises were held by the vendor; and the purchaser should not be entitled to call for the production of, or to inquire into, the title of the lessor."

After the auction was over, the auctioneer (according to his own statement given in evidence) waited upon the Defendant, and furnished him with another

copy of the printed particular, informing him that the Plaintiff had lowered his price for the premises, and at the same time observing, that if he (the Defendant) should purchase, it must be according to the description, and under the conditions contained in the printed particular, except as to auction duty; upon which the Defendant enquired whether it would make any difference if he should write on the subject to the Plaintiff or to the Witness, and was informed that it would be the same thing. Subsequent to this conversation, some discussion took place between the Plaintiff and Defendant, in the course of which the former agreed to abate his price from £16,000 (the sum first asked) to £14,000, and, the Defendant having expressed a desire that the mortgage to *Coutts* should be suffered to continue on the security of the premises, the Plaintiff wrote him the following letter (dated the 26th of *June*). "Mr. O. has the pleasure to acquaint Mr. F. that Mr. *Coutts* agrees to allow the mortgage to continue for a year, if Mr. F. will be so good as to call and promise not to exceed that time without further arrangement. Mr. O. has, by the advice of Mr. *Hermon* (the auctioneer) reduced the price of the [55] house £2000, and he is confident that in a year or two it would sell from £2000 to £4000 more than he offers it at to Mr. F.—And, besides this advantage to Mr. F., he requests him to consider, that the rise of the funds gives a purchaser with a year's credit an additional advantage of £20 per cent. At least, Mr. O., after the fullest consideration, and with every wish to conclude an agreement, cannot come down lower than £14,000 for the house and fixtures of every kind,—three *French* plate chimney glasses, two ditto pier glasses, with satin wood tables, &c.; but, to shew his desire of approximation, he will request Lady *Mary's* acceptance of a pier-table of the same kind, &c. (specifying several articles of furniture)—Mr. F. agreeing to take the window curtains, carpets, and furniture on the principal floor by valuation. In his instructions to Mr. *Hermon* yesterday, Mr. O. had required that Mr. F. should enter from *Midsummer*, allowing Mr. O. a month to clear. He will further give Mr. F. an option to enter the 1st of *August*, the 1st of *September*, or the 29th, Mr. O. paying up interest, rent, and taxes, to the day Mr. F. names." To this letter the Defendant returned an answer, the same day, in the following terms. "Mr. *Foljambe* presents his compliments to Mr. *Ogilvie*, and is extremely obliged to him for his note, and for the very liberal and accommodating terms which he has proposed, and, in consequence of it, although Mr. F. is still of the same opinion as to the value of Mr. O's house, according to the times, he will not trouble Mr. O. with any further discussion, but agree to the terms first proposed—to give £14,000 for the premises, including fixtures of every description, the pier and chimney glasses, &c. Mr. O. to pay the interest of the £12,000 to the 29th of *September*, and the taxes, and to have that time to remove. Lady [56] *Mary* desires particularly to thank Mr. *Ogilvie* for his very obliging offer to her, but, as she does not wish to take the drawing room furniture, she will not encroach upon his liberality further than to request to be allowed to purchase such articles of furniture, which Mr. O. intends to dispose of, as may on further consideration appear desirable. Mr. F. will have the honour of calling on Mr. O. at half-past eleven to-morrow, if not inconvenient to him." The arrangement with Mr. *Coutts* was afterwards completed on the terms desired by the Defendant.

It was also in evidence that the Defendant gave directions to *Hermon* to take measures for disposing of the house he then lived in, in consequence of his having agreed for the purchase from the Plaintiff. The Plaintiff's solicitors immediately afterwards prepared, by his directions, the memorandum of an agreement, upon the terms concluded on, and which ended by making the Defendant expressly agree "not to require any further or other title, or evidence of title, to the premises, than the existing lease, and any assignment or other disposition that might have been made thereof." The Plaintiff signed one part of this agreement, and sent a counterpart for the signature of the Defendant, to the Defendant's solicitors, to whom the Plaintiff's solicitors afterwards (on the 9th of *September*) sent an abstract of the Plaintiff's title, beginning with the original lease from Lord *Grosvenor*, and also copies of the abstract of Lord *Grosvenor's* title, stating, however, in an interview between the solicitors of the respective parties on the 20th of *September*, that they did not consider the Plaintiff bound to produce Lord *Grosvenor's* title, but that, having procured copies from his Lordship's solicitors, they had sent them for the satisfaction of the Defendant, and without prejudice; and subsequently, by letter,



they expressly denied the obligation to do so. On the other hand, [57] the Defendant's solicitors objected to the agreement which had been prepared, on the ground (among others) of its containing no stipulation for the production of the lessor's title; insisting upon having such stipulation inserted; which being refused on the part of the Plaintiff, the Defendant declined to execute the same, and took no further steps towards the completion of the purchase.

On the 29th of September, which was the day for completing the contract, notice was given by the Plaintiff's solicitors that the Plaintiff was ready to carry the agreement into execution; and the Plaintiff afterwards filed his bill for a specific performance, praying, in the alternative, that it might be declared the Plaintiff was not bound to shew the title of the original lessor, or if he were, that he had shewn all that was necessary to establish a good title.

The Defendant died before putting in his answer to this bill, and the suit was revived against his personal representatives, who, by their answer, contended that the treaty by private contract was wholly distinct from the conditions of sale by auction; alleging that the deceased always considered the correspondence between him and the Plaintiff as mere treaty, to be reduced into an agreement, and that he never had it in contemplation to make a purchase of such magnitude without having a good and marketable title to the premises; and further submitting that, if any agreement whatever existed, it could only be derived out of the correspondence; and that, if a sufficient agreement was constituted by the correspondence, in such case the Plaintiff was bound to produce his lessor's title. They denied any special agreement on the part of the deceased to take the vendor's title without such production; insisted that, if a written agreement were to be considered as so constituted, yet any conversation between the auctioneer [58] and the deceased would not be allowed to explain, add to, or vary the same; but nevertheless submitted whether or not, and how far, such letters could be considered as submitting the alleged agreement.

Sir Arthur Piggot, Cooke, and Farrer, for the Plaintiff.

Sir Samuel Romilly, and Bernal, for the Defendants.

An objection was taken on the part of the Defendants to the admissibility of the evidence of the auctioneer. It was insisted that any question as to the terms of an agreement must be decided only by reference to the agreement itself;—that the evidence offered in this case was an attempt to vary the agreement by adding a term not to be found in it;—that there was not a word in the correspondence, which was said to constitute the agreement, about the conditions of sale; and that, from the very silence of the agreement respecting them, the vendor must be held to be bound to make the usual marketable title.

On the other side, it was contended that the evidence was offered, not to add to or vary the agreement, but to shew what it was that the vendor intended to sell, and that the purchaser had notice of the vendor's being able to give him.

The evidence was ordered to be read, without prejudice.

*For the Plaintiff.* As to the sufficiency of the agreement, by letter; *Fowle v. Freeman* (9 Ves. 351; Sugd. V. & P. 74), *Huddleston v. Briscoe* (11 Ves. 583), *Saunders v. Jackson* (2 Bos. & Pull. 238). The insertion of the name in any part of a note or letter, without formal signature, is sufficient.

On the point of notice, *Daniels v. Davison* (16 Ves. 249), *Hick v. Philips* (Pre. Cha. 575).

Whatever may be the right of a purchaser to require the production of the lessor's title, he may by his acts and conduct waive that right without any express stipulation. *White v. Foljambe* (11 Ves. 337), *Deverell v. Lord Bolton* (18 Ves. 505). And see, as to the obligation to produce the Lessor's title, *Fildes v. Hooker*, 2 Mer. 424).

The evidence in this case is only a declaration of what the vendor has to sell—not a freehold, or leasehold generally—but such an interest as Mr. Ogilvie himself had, and no other.

*For the Defendants.* First, the letter which is said to constitute the agreement on the part of Mr. Foljambe, amounts only to a proposition resting on treaty. Secondly, if there is an agreement, still there must be a reference to the Master as to title generally.

The material question, which is as to the production of the lessor's title, will

principally depend upon the evidence of the auctioneer, and to what extent it is to be received. It cannot be received to prove even collateral matters, which are of the essence of the contract. *Rich v. Jackson* (4 Bro. 514; 6 Ves. 334, note). *Brodie v. St. Paul* (1 Ves. Jun. 326). *Clinan v. [60] Cooke* (1 Scho. & Lef. 22, 35. *O'Herlihy v. Hedges*, ib. 123). (*Powell v. Edmunds* (12 East, 6). If an agreement at all, this was a new agreement in substance. The letters do not refer to the conditions of sale, and the expression used by the Defendant, of his agreeing "to the terms first proposed," is entirely unexplained; and, if capable of explanation, it must be by some writing signed, or otherwise not to be admitted. "It is in vain to reduce a contract to writing, if you may afterwards refer to all that has passed by parol." (*Pec Heath, J.*, in *Pickering v. Dowson*, 4 Taunt. 784.) If it rests doubtful whether what has passed in correspondence was only treaty, according to *Huddleston v. Briscoe* (11 Ves. 583, 591), and *Stratford v. Bosworth* (2 Ves. & B. 341), the parties must be left to law. *Daniels v. Davison* has no reference to this case.

The *Master of the Rolls*. Upon the first point, I am satisfied that the letters amount to a complete agreement. The other point may deserve rather more consideration, and I shall defer giving my reasons respecting the first till I am ready to pronounce judgment on both together.

The *Master of the Rolls* [Sir Wm. Grant]. Two questions have been made in this case—first, whether there is a complete agreement between the parties,—secondly, supposing there is, whether the Defendants are entitled to the usual general reference with respect to the title.

I. As to the first, the agreement, supposing it to be properly signed, is reduced to sufficient certainty by the [61] two letters of the 26th of June 1814. I see nothing that remained to be adjusted between the parties—nothing that required explanation—nothing to be the subject of further treaty or correspondence. The subject matter of the agreement is left, indeed, to be ascertained by extrinsic evidence; and, for that purpose, such evidence may be received. The Defendant speaks of "Mr. Ogilvie's house," and agrees "to give £14,000, for the premises"; and parol evidence has always been admitted, in such a case, to shew to what house, and to what premises, the treaty related. In whatever sense Mr. Foljambe may have used the word "first," it creates no ambiguity as to his meaning; for he distinctly specifies what the terms are to which he does agree. Mr. Ogilvie's further offer of throwing certain articles of ornamental furniture into the bargain seems indeed to be accompanied with the condition of Mr. Foljambe's taking the carpets, &c., at a valuation. But that did not at all affect the rest of the agreement. It was merely an offer, which Mr. Foljambe had the option either to accept or decline; and, when he declined it, the business was left in the same state as if that additional offer had not been made. As to the mortgage, Mr. Foljambe appears to have rested satisfied with the information Mr. Ogilvie had given him as to Messrs. Coutts's readiness to continue it for a year, and therefore thought it unnecessary to stipulate any thing further than that the interest should be paid to the 29th of September. It would be a strange objection on his part, to say, I ought not to have been so satisfied, but should have declined concluding the agreement till I had a direct assurance from Messrs. Coutts themselves that they would give the required indulgence.

I hardly know an instance, in which an agreement was to be collected from correspondence, where it has [62] been so clearly made out as it is in this case. It is impossible to say that, in *Huddleston v. Briscoe* (11 Ves. 583), the parties had expressed themselves in such explicit terms as are to be found in the two letters of the 26th of June. Yet the Lord Chancellor agreed with me in opinion that from the correspondence an agreement was to be collected. *Stratford v. Bosworth* (2 Ves. & B. 341) does not bear upon this case: because there was a material term in the treaty, as to which the parties had come to no agreement. The vendor proposed that all expenses should be borne by the purchaser, and to that proposal the purchaser had never assented. But here, there is nothing about which the parties differ. There is no dispute, either as to the subject matter of the agreement, as to its terms, or as to the time of its completion.

Another question is, whether, taking the agreement to be sufficiently explicit in terms, it has the signature which is required by the statute. It is admitted that, provided the name be inserted in such manner as to have the effect of

authenticating the instrument, the provision of the act is complied with, and it does not much signify in what part of the instrument the name is to be found. In *Stokes v. Moore* (1 Cox, 219; 1 Cox P. W. 771, note. And see *Selby v. Selby*, 3 Mer. 5), the objection was that this authentication was wanting, the name being introduced incidentally in the middle of the paper, and referring, in grammatical construction, only to a single term in the conditions. There was no objection on the score of the Christian name being wanting; but the ground of the decision was, that the name, being introduced where it was, did not govern the entire agreement. In *White v. Proctor* (4 Taunt. 209), the Court of Common [63] Pleas held that the auctioneer's writing down "Mr. *Stokes*" in his book as the purchaser was a sufficient signature within the statute. Here, the name begins the note, and governs all that follows. I am therefore of opinion that there is in this case an agreement reduced to a certainty, with such a signature as is required by the statute.

II. As to the second question, it does not appear to me to be decided or affected by any of the cases which have been cited. In *Brodie v. St. Paul* (1 Ves. J. 326), the point was, that the whole substance of the agreement must be in writing. And the agreement in that case was uncertain and incomplete, as it did not specify which of the covenants contained in another instrument were to compose a part of it. It was by parol evidence that it was to be ascertained what covenants had, and what had not, been read, and therefore the essential terms of the agreement were to be ascertained by parol evidence.

Other cases were cited to prove what is clearly established, viz. that parol evidence cannot be admitted to vary a written agreement. In *Powell v. Edmonds* (12 East, 6), and in *Rich v. Jackson* (4 Bro. 514; 6 Ves. 334, note), the parol evidence would clearly have had that effect; for, with respect to the first, an agreement to pay a certain sum for a lot of timber, without reference to the quantity, is different from an agreement to pay that sum, on condition only that a given quantity of timber was contained in the lot. In *Rich v. Jackson* the written agreement only expressed that a certain rent was to be paid for the lease agreed to be taken. The parol evidence would have added a stipulation that the lessee should pay the land tax. This [64] would, in substance, have amounted to a different agreement, being for an increased rent. But here the controversy between the parties is altogether collateral to the agreement. No term in the written agreement is sought to be varied or added to. The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. The Defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it; and the answer is, he has waived it, having chosen to go on with and conclude the agreement after he had full notice that he was not to expect it. I take this to be matter of notice, and not of contract; and so the Lord Chancellor treats it in *White v. Foljambe* (11 Ves. 337) and *Deverell v. Lord Bolton* (18 Ves. 505; and see *Fildes v. Hooker*, 2 Mer. 424). He says, that, if a vendor of a leasehold interest means to sell without production of his lessor's title, he ought to declare it. Here, Mr. *Ogilvie* has declared that his landlord's title is not to be produced; and is he to be left in the same situation as if he had been wholly silent on the subject? If he had given no notice, all that the Defendants would have been entitled to would be a reference as to title; and that is what they require, now that notice has been given. This would therefore be to exclude the effect of notice, and of the distinction made by those decisions, altogether.

Now, it is impossible to have more precise and definite notice than that which has been given to Mr. *Foljambe*. Not only is the particular of sale before him at the time of the auction; but, after the auction, a second copy of the particular is delivered to him, accompanied with an express intimation that he is to treat upon the footing of the terms therein contained. It is [65] matter of every day's practice that a party may, by his acts and conduct, waive a right which he possesses, and that this may be done without its being reduced to the shape of a specific contract. The exemption of common carriers from their legal liability, is affected by notice, without any express contract. So also the authority of one partner to bind another may be limited by notice, as in *Lord Gallway v. Matthew* (10 East, 264). And the notice itself needs not to be in writing. In *Gunnis v. Erhart* (1 H. Black. 289), where the Court of Common Pleas determined—and which determination has been

very properly adhered to ever since—that the verbal declarations of an auctioneer at the time of sale shall not be received as evidence to contradict the printed particulars, the Court did not determine that there might not be room for the admission of such evidence where the purchaser has personal information given him of a mistake in the particulars. (See *Sudg. Vend. and Purch.* 107, fifth ed.) An incumbrance is, *pro tanto*, a defect of title. But, suppose the letters which constitute this agreement had taken no notice of the ground-rent, it would be quite impossible to maintain that Mr. *Foljambe* was to have been indemnified against that incumbrance, when it was expressly stated in the printed particulars. Even in cases where there has been a covenant against incumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice. Suppose Mr. *Ogilvie* had stated in his particular that he would produce his lessor's title, and the agreement itself had been silent with respect to it, could he have been allowed to agitate the question as to the obligation of the vendor of a lease to produce the lessor's title? I apprehend, he would not. He would have been bound by the repre-[66]-sentation, on the footing of which the treaty proceeded. Why is the purchaser to claim against that representation which is made to him, and on the footing of which he is contented to treat? It is to be presumed that he considers, in the price, the difference between the one kind of title and the other.

I am, therefore, of opinion that, although the Defendants have a right to see whether Mr. *Ogilvie* himself has a title, the reference ought to exclude any inquiry into the title of the Lessor.

*Declare*, That the agreement contained in the letters, bearing date respectively the 26th of June 1814, ought to be specifically performed and carried into execution, and the Plaintiff not to be required to produce the title of the Lessor (the Earl of Grosvenor) and his Trustees to grant the Indenture of Lease in the pleadings mentioned.

*Refer. &c.*, to enquire whether the Plaintiff can make a good title to the premises, to be derived under the said Lease, and the Master to state his opinion thereon.

Reserve further directions, &c. (Reg. Lib. 1816, B. fo. 1786.)

[67] JOHN LOCKMAN POTINGER, SARAH FRANCES POTINGER, and HARRIET ANN POTINGER, Infants, by RICHARD POTINGER, their next Friend, *Plaintiffs*; ROBERT WIGHTMAN and HARRIET his Wife (late HARRIET POTINGER, Widow), WILLIAM BROCK, BENJAMIN LE MESURIER, RICHARD POTINGER, MARIA POTINGER, WILLIAM POTINGER and ZELIA POTINGER, Infants, by IRVING BROCK their Guardian, WILLIAM DE JERSEY, and DANIEL DE LISLE BROCK, out of the Jurisdiction of the Court, JOHN THOMAS, SAMUEL DUBREE, MOSES DAVID GETTING, NEWMAN SMITH, and JOHN POINGDESTRE, *Defendants*. *Rolls*. July 1, 21, 1817.

[Discussed and explained, *In re Beaumont*, [1893] 3 Ch. 490.]

*T. P.* a native of *England*, domiciled in *Guernsey*, dies intestate, leaving a widow, and infant children by her, and also by a former wife. The widow, after his death, is appointed guardian of the children by the Royal Court of *Guernsey*, and in conjunction with another person, who is appointed guardian of the children by the former marriage, sells the property of the intestate and invests the produce in the *English* funds, after which she comes to *England* with her children, and is domiciled there. On the death of some of the children under age, a question arises, whether their shares of the property have become distributable according to the law of *England*, or of *Guernsey*; and it was held that the Law of *England* is to govern the succession, the domicile of the children being (according to the opinion of foreign Jurists, our own Law being silent on the subject), to follow the domicile of the surviving mother, where no fraudulent intention can be imputed. But fraud may be presumed, where no reasonable cause appears for the removal.

In December 1805, *Thomas Potinger*, a native of *England*, died in *Guernsey*, the place of his domicile, intestate, leaving seven children living at his decease—four by a former wife (the four infant Defendants), and [68] three (namely, *John Lockman Potinger*, *Sarah Frances Potinger*, the infant Plaintiffs, and *Henry James Potinger*,

deceased before the filing of the Bill), by his widow the Defendant *Harriet Wightman*, who was then pregnant of a fourth child, afterwards born, the Plaintiff, *Harriet Ann Potinger*.

Shortly after the decease of the intestate, the Royal Court in *Guernsey*, on the nomination of the nearest relatives of the children, appointed the Defendant *Daniel De Lisle Brock* guardian for the children of the first marriage, and the widow, guardian for her own children;—and, by permission of the Royal Court, *Daniel De Lisle Brock*, and the widow, in their character of guardians, sold the real and personal estate of the intestate in the island of *Guernsey*, and vested the produce in the *English* funds.

In *September* 1806, the widow quitted the island of *Guernsey*, and came to *England*, bringing with her her four infant children, and from that time established her domicile in *England*. In *May* 1809, *Henry James Potinger* died at the age of six years; and in *April* 1812, *John Lockman Potinger* died at the age of ten years.

The Bill prayed the usual accounts of the real and personal estate of the Intestate. The Decree directed an Inquiry “Whether the Intestate was domiciled in the island of *Guernsey*, and, if the Master should find that he was domiciled there at the time of his death, he was to inquire and state, who was, or were, his heir or heirs at law, at the time of his death, and what was the law of the island with respect to real and personal estates, and who was, or were, and are, according to the law of the said island, entitled to the Intestate’s real and personal estate therein, and in what shares and proportions.”

[69] By his Report, dated 8th *April* 1816, the Master stated that the Intestate was domiciled in *Guernsey* at the time of his death; and he also stated the law of *Guernsey* respecting the descent of the real estate, and the distribution of the personal estate, of persons dying intestate there, as follows:—“When a man, a native of *England*, dies intestate in the said island, seised and possessed of real and personal estate there and in *England*, leaving a widow, and sons and daughters by a former wife, and sons and daughters by his surviving widow, who was at his death ensient with child (which was in due time after his death born alive), the widow of such intestate is entitled to dower, which is the possession, use and enjoyment, during her life, of one third part of the real estate which her said deceased husband was seised and possessed of at the time of his death in the said island of *Guernsey*, unless by some stipulation in the marriage contract it should have been provided otherwise. One third part of the personal estate becomes the widow’s property, and no real estate in *Guernsey* can be devised by will. The real estate in that island is divided after the death of the owner in the following manner, *viz.* one-twentieth part of the land (the buildings thereon included) belongs to the sons, and is taken where the eldest son, purposely, for him and his brothers, places a stake; out of which he is allowed for his eldership according to the quantity of land, or value of the same, *viz.* from 16 to 22 perches of ground adjoining the spot where he has fixed the stake. The rest of the said 20th part, if any, is divided between him and his brothers in equal portions, and the remaining nineteen-twentieths of the land are divided as follows:—two-thirds to the eldest son, and his brothers, in equal portions, and the other third part for the sisters, to be divided equally between them. But, if the sons [70] are more in number than the daughters, and, by claiming one-third of the whole real estate, the sisters would have each more than each of their brothers, the brothers may require that the real estate should be equally divided between all the children, the brothers giving up their claim to the said twentieth part (the eldership, which the eldest son is always entitled to, excepted), to which they would otherwise have been entitled; but the whole to be subject to the widow’s dower as aforesaid.—After the widow has taken one-third out of the personal estate, the elder son is allowed, for his eldership, one-seventh, or at most one-sixth part, of the remaining two-thirds, so far as the same consists of household furniture, plate, jewels and linen, or what is called *mewbles*, *mewblons*; and all the remainder of the personal estate is divided between him, his brothers and sisters, in equal portions. In case any or either of the sons or daughters of such deceased person should die without issue, and unmarried, the real estate, to which such children, so dying, were entitled at their respective deaths in the island, becomes distributable in equal portions between all the surviving brothers, exclusively of the sisters, without distinction, whether they be of the first or last wife; and a similar distribution of

"their personal estate, if they be domiciled in the island, takes place between the brothers, exclusively of the sisters, also without distinction, whether they be of the first or second marriage"; but, if such child or children, whether they be of the first or second marriage, should have acquired a settlement, and be domiciled out of the island, the division of their personal estate should be made in conformity to the laws where such child or children had acquired a settlement, and were domiciled."

[71] After ascertaining the original shares of the respective parties in the Intestate's personal estate, the Master proceeded to certify that, in consequence of the death of *John Lockman Potinger*, and *Henry James Potinger*, their shares in the Intestate's personal estate were become divisible in equal shares between their surviving brothers, the Defendants, *Richard Potinger* and *William Potinger*.

When the cause came on for farther directions, this conclusion was controverted; and it was contended, on the part of the widow and the daughters, that the shares of the deceased children were distributable by the law of *England*. It being admitted that personal property is regulated by the domicile of the proprietor, the question was, whether the deceased children retained their paternal domicile in *Guernsey*, or acquired a new derivative domicile from their mother in *England*.

By an Order dated 26th *July* 1816, it was referred back to the Master to report the domicile of the children at the time of their death, with liberty to state any special circumstances.—By his report, dated 8th *March* 1817, the Master found that the children, at the time of their death, were domiciled in *England*. The cause coming on again for farther directions, the question was argued.

*Bell* and *Heald* (for the Defendants *Richard Potinger* and *William Potinger*, the surviving brothers), argued, against the Master's Report, that there had been no change of domicile. The question had never been positively decided, and there was no law in the island of *Guernsey* applicable to the case. By the law of *England*, it was a question of intention. An infant was incapable of exercising any intention—and to give such a power [72] to a guardian, would be to invest him with an authority greater than the law, in other instances, denies—such as, an authority to change the nature of the infant's property. It would, besides, be holding out a temptation to fraud.

*Sir S. Romilly*, and *Swanston*, for the Plaintiffs. The proposition which we maintain is, that the domicile of the widow, combining (during her widowhood) the characters of guardian and head of the family, is communicated to her minor children.

The power to transfer the domicile of the minor is inherent in the guardian. It is absurd to suppose that the law appointing him to protect the interests of the minor, omits to invest him with powers adapted to afford that protection—nor can it be denied that the interests of the minor may in many events be promoted by the transfer, or prejudiced by the permanence of his domicile.

This case affords an example of a most important benefit consequential on the transfer,—the acquisition of a power of disposition over personal estate.—By the law of *Guernsey*, the children could not dispose of their property, either real or personal, during their minority—By the law of *England*, they are competent to dispose of their personal property by will, at the age of fourteen. (Co. Litt. 89; Harg. Note 6.) The transfer of the domicile therefore, gave to them, at that age, the absolute interest in property, of which they were before only tenants for life; an advantage so substantial that it has frequently been assigned by Courts of Equity, as a reason for permitting the conversion of the real estate of an infant into personalty, and prohibiting the [73] converse, *Pierson v. Shore* (1 Atk. 480), *Earl of Winchelsea v. Norcliffe* (1 Vern. 437), *Thomas v. Hewitt* (2 Ves. J. 264).

It would not be difficult to suggest cases of ordinary occurrence, in which, without a power in the guardian to transfer the domicile of the minor, a *British* subject resident in *England* must continue, during his minority, immutably domiciled in a hostile territory.

Upon principle, therefore, the guardian is competent to transfer the domicile of the minor; but, at least, it seems impossible to deny that power to the Widow, who, succeeding on the death of her husband to the station of head of the family, combines that character with the character of guardian. To deny her power, is to affirm the general proposition, that after the death of the father, the domicile of the

minor, however much his interests may require a change, remains immutable during his minority.

Of authority on this subject, in the *English* law, none exists—The *dictum* of Lord *Alvanley*, that a minor cannot, during his state of pupillage, acquire a domicile of his own (*Somerville v. Somerville* (5 Ves. 787)), obviously refers to a domicile, acquired, according to the expression of *Bynkershoek*, "*proprio Marte*," by the minor's own acts; but it has been much discussed by foreign jurists, to whose opinions (in the absence of domestic authorities) our Courts are accustomed to resort, on questions which (like the present), must be decided rather by general principles of law, than by the peculiar doctrines of any local code.

[74] *Voet* (1) maintains the right of the surviving parent, whether father or mother, to transfer the domicile of the minor; with the exception of cases, in which the transfer is made, not for the benefit of the minor, but in contemplation of his death, and with the purpose of securing a larger share in the succession. In such cases, the attempt to transfer the domicile is fraudulent, and therefore ineffectual; but, in order to raise the presumption of fraud, two circumstances must concur; a change of domicile to a place, the law of succession of which is more favourable to the surviving parent than the law of the place of original domicile, and indisposition of the minor at the time of the change.

*Rodenburg* (De Jure Conj. Tit. 2, cap. 1, s. 6; cap. 2, s. 2, 3), in substance agrees with *Voet*.

[75] *Bynkershoek*, who devotes a whole chapter to the discussion of this particular question, (2) ascribes to the [76] surviving parent an absolute power of transferring the domicile of the minor; and he objects to the exception of cases of fraud, assigning as the ground of his objection, the difficulty of ascertaining the intention of the parent, and of defining the requisite degree of indisposition in the minor.

The *French* law on this subject, as it is to be collected from *Denisart* (Voce Domicile, s. 9, 14, 37), appears involved in some degree of confusion; but *Pothier*, who discusses the question at length, (3) though he differs from other jurists in denying to the guardian, explicitly agrees with them in [77] ascribing to the surviving parent, the power of transferring the minor's domicile. By the *Code Napoleon* (Code Civ. Liv. 1, tit. 3, art. 108) it is declared that the minor, not emancipated, has his domicile at that of his father and mother or guardian; a proposition which would not be true unless the domicile of the minor changed with the domicile of his parent or guardian.

The passage in *Mornac* (Obs. in Cod. lib. 3, tit. 20, p. 129), to which *Bynkershoek* and *Pothier* refer, contains an examination of the question, whether, after the death of both parents, the guardian possesses the power of transferring the domicile of the minor. That question he represents as undecided, himself supporting the negative. The power of the surviving parent is not discussed.

In a Collection of continental Jurisprudence (*Decisiones celeberrimi Sequanorum Senatus Dolani*, authore *Joanne Grivello*, Sequano (Dec. 11, p. 21, 24)); a case is reported, which involved this question. Throughout the argument (and the case appears to have been elaborately argued), it was assumed on one side, and admitted on the other, that the widow is competent to transfer the domicile of her minor children. The decision, proceeding on another ground, left that question untouched.

Upon principle and authority, therefore, it seems clear that the widow is competent to transfer the domicile of her children during their minority.

The only objection opposed to this conclusion is, that by the transfer of the domicile in the event of the minor's death, the rights of his representatives are varied.

[78] In reply to this objection, it is sufficient to recur to the principle, that the office of guardian is instituted for the benefit of the minor.—The conduct of the widow, acting in the characters of guardian and head of the family, is to be regulated by the interests of those whom she is appointed to protect.—To contend that an act performed, *bona fide*, for the benefit of the children, may be impeached, because it happens to affect the heir, or next of kin, is to maintain the absurdity, that the rights of the representatives control the rights of the proprietor.

In the instances of infancy and lunacy, this Court has repeatedly directed, or confirmed, acts beneficial to the interests of the infant or lunatic, but prejudicial to one class of his representatives. *Vernon v. Vernon* (cited in *Ex p. Bromfield*,

3 Bro. C. C. 513), *Pierson v. Shore* (1 Atk. 480), *Jerwood v. Twyne* (Amb. 417), *Oxenden v. Lord Compton* (2 Ves. Sen. 69. But see *Ware v. Polhill*, 11 Ves. 278).

The conclusion at which we thus arrive, on principle, and the authority of foreign jurists, is confirmed by the analogy of a series of decisions in our own Courts.

Under the system of poor laws established in this country, if a widow removes with her infant children, and acquires a new settlement, that settlement is communicated to them, and supersedes their original paternal settlement (*Inhabitants of Woodend v. Inhabitants of Paulspury* (Raym. 1473; Stra. 746, S. C.), *Rex v. Inhabitants of Barton Turfe* (Burr. Sett. Ca. 49), *Rex v. Inhabitants of Oulton* (Burr. Sett. Ca. 64).

[79] This doctrine is founded, not on positive statute, but on general principles of law. (See Woodeson's Lectures, p. 278, 279, and the History of the Law of Settlements, in 1 Nolan's Poor Laws, 236, and seq. to 276.) The statute determines the settlement of the parent; but the conclusion that the settlement of the parent is communicated to the children, is deduced from a course of reasoning precisely analogous to that by which the foreign jurists establish the like conclusion in the law of domicile. In effect, therefore, these decisions amount to a recognition of the reasoning from which that doctrine is a necessary inference; and in words they declare, that by the *English* law, the widow, on the death of her husband, becomes the head of the family.

*Hart, Shadwell, and Girdlestone*, for Defendants in the same interest.

The *Master of the Rolls* [Sir Wm. Grant]. On the subject of domicile, there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise concerning it. The *dictum* of Lord *Alvanley* in *Somerville v. Somerville* (5 Ves. 787) has no relation to the point now in dispute. He is speaking of the power of a minor to acquire a domicile by his own acts. Here the question is, whether, after the death of the father, children remaining under the care of the mother, follow the domicile which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is certainly in favour of the former proposition. It has the sanction both of *Voet* and *Bynkershoek*; the former however qualifying it by [80] a condition that the domicile shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession. *Pothier*, whose authority is equal to that of either, maintains the proposition as thus qualified. There is an introductory chapter to his treatise on the Custom of *Orleans*, in which he considers several points that are common to all the customs of *France*, and, among others, the law of domicile. He holds, in opposition to the opinion of some Jurists, that a tutor cannot change the domicile of his pupil, but he considers it as clear that the domicile of the surviving mother is also the domicile of the children, provided it be not with a fraudulent view to their succession that she shifts the place of her abode. And he says, that such fraud would be presumed, if no reasonable motive could be assigned for the change.

There never was a case in which there could be less suspicion of fraud than the present. The father and mother were both natives of *England*. They had no long residence in *Guernsey*, and, after the father's death, there was an end of the only tie which connected the family with that island. That the mother should return to this country, and bring her children with her, was so much a matter of course that the fact of her doing so can excite no suspicion of an improper motive. I think therefore the Master has rightly found the deceased children to have been domiciled in *England*. It is consequently by the law of this country that the succession to their personal property must be regulated.

(1) Comm. ad Pand. Lib. 5, tit. 1, s. 100. The case put by *Voet* in the passage referred to explains clearly the nature of the fraud intended.

"Quid enim, si pater materve ex ea *Hollandiæ* parte quæ jure *Scabinico* regitur, et in qua, soluto per mortem conjugis matrimonio, superstes liberis nequit ab intestato hæres esse, in alteram ejusdem *Hollandiæ* partem, quæ jure *Æsdomico*, parentem superstitem ad luctuosam filii hæreditatem vocante, utitur, domicilium transtulerit, quod impuberem languentem videt, ac propediem turbato mortalitatis ordine sibi orbitatem superventuram veretur, quo possit ex novi domicilii jure impuberi succedere?"—But he goes on afterwards to say, "*Contra*.



si nulla talis hæreditatis aut alterius commodi, cum tertii detrimento captandi, ratio appareat; si *cum parente, justam aut probabilem causam migrandi habente, liberi sani vegetique migrent*; &c., nihil impedimento est, quo minus talis migratio parentis superstitis, bona fide facta, etiam ad domicilii pupillaris translationem efficax foret, etiamsi deinde ipsis sine testamento decedentibus parens superstes ex novi domicilii jure hæres sit," &c.

(2) Quæst. Jur. Priv. Lib. 1. c. 16. The Chapter is thus entitled.

"De domicilio impuberis vel minoris, et an superstes parens vel tutor id mutare posset, et quo effectum circa successionem ab intestato?"

And he puts a case which came under his cognizance as a member of the Supreme Council of *Holland*, and which appears decisive of the present question.

"Pater *Amsterdammensis* et matrem et *Titium* qui *Amsterdam*i habitabat, liberis suis tutores dedit. Mater eademque vidua, mense Maj. 1714 cum liberis quinque, quos penes se habebat, *Amsterdam*o abit, et *Liedam* domicilium transfert, ut minori sumptu ibi se suosque exhiberet, nihil quicquam contradicente tutore *Amsterdammensi*. Mense Nov. ejusd. anni, *Titia* (quæ erat ex quinque liberis), *Amsterdam*um redit, et ibi educanda traditur Matronæ cuidam in scholapuellari. Mense Aug. 1773, illa *Titia*, *Leidam* reversa, moliebatur nuptias cum *Mævio*. Cum Mater dissentiret, a *Titia* et *Mævio* vocatur ad magistratum *Leidensem*, ut redderet dissensus sui rationes. Superveniunt magistri pupillares, qui *Amsterdam*i sunt, et contendunt illas rationes apud se esse reddendas;—*Titiam* enim minorem nunquam domicilium mutasse. Cum ea res unice penderet a mutatione domicilii, placuit partibus de illa prætermisissis aliis judicibus, statim litigare apud Senatum Supremum. Senatus nihil verius esse putavit, quam viduam, quinque liberorum matrem, eandemque tutricem, potuisse, quo vellet, domicilium transferre, et revera cum *Titia* minore, et reliquis fratribus et sororibus transtulisse *Leidam*, ubi simul adhuc habitabant. Patris domicilium morte extinctum erat, et mater nunc sui juris, parsimonie consulens, cum liberis suis *Leidæ* edere, quam *Amsterdam*i esurire, maluit. Quod autem *Titia*, ad scholam puellarem frequentandam, novem fere menses *Amsterdam*i morata fuerit, eo ipso domicilium mutasse, nemo facile dixerit, et contra quoque responsum est. Atque ita Senatus, 21 Jul. 1716, judicavit *Titiam* *Leidæ* habitare, et ibi, si vellet, matrem posse matrimonio contradicere."

*Bynkershoek* afterwards states the case put by *Voet* and *Rodenburg*, and dis-  
countenances, even so far as to ridicule, the distinction made by them of a *fraudulent*  
change of domicil, as to its authorizing an inquiry *quo animo* the change was effected.

(3) Coutumes d'*Orleans*, p. 6, 8.

Introd. Generale. Chap. 1, s. 1, No. 16-20.

After denying to the Tutor or Guardian the power of changing the domicil of his Ward or Pupil, this Writer goes on to say as to the surviving mother,

"Il n'en est pas de meme de la mere : la puissance paternelle etant, dans notre droit (different en cela du droit Romain), commune au pere et a la mere : la mere, apres la mort de son mari, succede aux droits et a la qualite de chef de la famille qu'avoit son mari vis-a-vis de leurs enfans : son domicile, *quelque part qu'elle juge de le transferer sans fraude*, doit donc etre celui de ses enfans, jusqu'a ce qu'ils aient pu s'en choisir un qui leur soit propre.

Il y auroit fraude, s'il ne paroisoit aucune raison de sa translation de domicile que celle de procurer des avantages dans les successions mobiliaries de ses enfans.

Les enfans suivent le domicile que leur mere s'etablit, sans fraude, lorsque ce domicile lui est propre, et que, demeurant en viduite, elle conserve la qualite de chef de famille."

[81] Z. LEVY and E. PACIFICO, *Plaintiffs, against* E. LINDO, and HOGGART and PHILLIPS (Auctioneers), *Defendants*. June 25, 1817.

On a Bill for specific performance, the questions, whether time was originally of the essence of the contract, and whether, being so, the Defendant has done any act whereby he has waived it as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing. Motion for an Injunction to restrain proceeding in an action for recovery of the deposit, opposed upon that ground, and upon the ground of other objections to the title, which could not be disposed of except at the hearing, was therefore granted.

The Plaintiffs, who, together with *Macirone*, were Devises in trust for sale under the will of *Angelo Levy*, put up the premises in question to auction in the month of *May* 1816, when the Defendant *Lindo* became the purchaser upon the conditions of the sale, one of which was, that the purchaser should pay a part of his purchase money by way of deposit at the time of sale, and sign an agreement to pay the remainder on the 24th of *June* following, upon having a good title. The abstract being delivered, several objections were taken on the part of the purchaser; one of which objections was, that *Macirone* (one of the Devises) being an alien, one-third of the estate fell to the crown on the death of the Testator; another, that the son and heir at law was an Infant, and the will could not be established during his minority; and a third objection was, that the Testator had committed an act of suicide by throwing himself out of window, in consequence of which he died, and the Coroner's Inquest had found a verdict of Insanity,—that, during the interval between the commission of the act and his death, the will in question was made,—and it was therefore at least doubtful if that will could be established. These objections not having been removed to the Defendant's satisfaction, his solicitor, in the month of *December* 1816 gave notice in writing to the [82] solicitor for the Plaintiffs, that he considered the contract at an end, and should require his deposit to be returned. After receiving this notice, the Plaintiffs proceeded to remove the first of the objections by obtaining a warrant under the sign manual for a grant of the third part of the premises which had fallen to the Crown. But a doubt then arose whether this grant was effectual, upon the ground that a right to an undivided third part having fallen to the Crown, would draw after it the entirety; in which case the grant of that third part only, would not cure the defect of title. With the view of removing the doubt as to the validity of the will, a bill had been filed by the Plaintiffs to have the trusts of the will established.

Under these circumstances, the Defendant (the purchaser) brought his action against the auctioneers to recover back the deposit; whereupon the present Plaintiffs filed their bill for a specific performance of the agreement, and for an injunction to stay proceedings in the action so commenced. The Defendant (the purchaser), by his answer, relied on the validity of his objection on the ground of alienage, insisting on an abatement, in respect of the deterioration of the premises, in case the Court should be of opinion that a good title could be made.

*Bell* and *Perkins*, for the Plaintiffs, now moved for an injunction.

*Sugden* and *Pemberton*, contra, opposed the motion on the ground, first, that time was, in this case, of the essence of the contract; the conditions of sale providing for the completion of the title within a month from the time of the sale; the premises consisting of a house, the value of which was considerably diminished, and [83] which would continue from day to day to deteriorate, in consequence of its being left untenanted, which it had been ever since *Midsummer*;—that it was clearly settled (as in *Lloyd v. Collett*, 4 Bro. C. C. 469; 4 Ves. 689; *Sugd. Vend. and Purch.* 307, (4th ed.)), that a specific performance shall not be enforced, not only where no steps have been taken by the vendor, but even (in cases of unreasonable delay), after steps have been taken, and where the purchaser has been actually let into possession; as in *Dickenson v. Heron* (*Sugd. Vend. & Purch.* 397), where the *Master of the Rolls* said that the Defendant might have waived the agreement, if, upon the delay in the first instance, he had resisted the specific performance. And they also relied on the objections before mentioned.

*Bell*, in reply. These objections to the title cannot be allowed to prevail. The manner of the Testator's death was publicly known—the death itself was announced

by advertisement in the regular way. The purchaser cannot be taken to have been ignorant of it, or of the circumstances attending it ; and he must be presumed to have been satisfied.

Besides, a bill has since been filed to have the trusts of the will established, and the contract cannot be said to be at an end on that ground of objection. Time cannot be established as a valid ground of objection to a specific performance, except at the hearing of the cause, because whether it is an objection or not, depends on a variety of circumstances. And it has for this reason been repeatedly decided, that a Court will not entertain the question on a demurrer.

[84] The *Lord Chancellor* [Eldon]. With regard to the form of this application : generally speaking, it is almost of course to entertain such a motion on the part of the vendor ; the auctioneer, who is the nominal Defendant at law, being merely in the situation of a stake-holder. There may be cases in which the Court would refuse to interfere, but this must be by reason of the particular circumstances.

As to the objections which have been made to the performance of the contract, that on the ground of the heir at law being an infant, might appear to have some weight in it, but for the decisions which have established that, on a contract under a devise in trust to sell, the purchaser is bound, notwithstanding the infancy of the heir at law. Then as to time—Lord *Thurlo*w has said, on occasions without number, that time is not of the essence of the contract, and that not even the agreement of the parties can make it so. (1) I have deviated from that rule, so far as to say that time may, in certain cases, be of the essence of the contract ; and there is no species of purchase to which the reason of this deviation is more applicable than to that of a house for residence. But, in order to this, it must be shewn that the terms of the contract made time of the essence of the contract, and also that the conduct of the parties has not been such as to alter it in that point ; for the benefit of the objection in respect of time may be waived, even although it was originally made essential. Therefore the question, whether time was originally of the essence of the contract, and whether (if it were), it continued to be [85] so, are questions depending on evidence, and not to be determined on the present application. Neither am I able to decide upon the objection with respect to the insanity of the testator. For, admitting that by the coroner's verdict he must be taken to have been insane at the time of the act committed, in consequence of which he died, it does not follow that he continued insane during the whole interval from the commission of that act to his death, or that he was so at the time of making his will. There are cases of wills being established, which were made during the intervals of delirium, because they have contained internal evidence of their being reasonable and such as a man in his senses may be supposed to have made. So the question in this case must materially depend on the will itself—the circumstances of its attestation, and its reasonableness—which may be such as to establish the will without any dispute.

*Order for an injunction to restrain the Defendant, the purchaser, from proceeding in his action ; and the deposit to be paid into Court.*

(1) See *Seton v. Slade*, 7 Ves. 265–268–273, 4, &c., and the cases there referred to. *Hearne v. Tenant*, 13 Ves. 287. *Lennon v. Napper*, 2 Scho. & Lef. 682 ; *Sugd. Vend. & Purch.* 303, 4.

[86] JACOB PRIDY and OTHERS, *Plaintiffs*, and The Right Hon. GEORGE ROSE (Treasurer of the Navy), JOSEPH HUNT, WILLIAM MACKWORTH PRAED, CHARLES SHORT, and The ATTORNEY-GENERAL, *Defendants*. *Rolls. April 29, May 1, 6, July 29, 1817.*

[See *Courtenay v. Williams*, 1844, 3 Hare, 554 ; *Jones v. Mossop*, 1844, 3 Hare, 572 ; *Smith v. Parkes*, 1852, 16 Beav. 119 ; *Cole v. Muddle*, 1852, 10 Hare, 190 ; *Ballard v. Marsden*, 1880, 14 Ch. D. 377 ; *In re Weston*, [1900] 2 Ch. 169.]

A., by marriage settlement, covenants for payment within four years, to the trustees, of a sum of £4000, the dividends whereof, and of other funds thereby settled, are made payable to himself for life. He afterwards obtains a pension from Government, by warrant of the Treasury, made payable to him and his assigns

by the Treasurer of the Navy out of a certain fund, during the life of the grantee. A. subsequently absconds, being largely indebted to the Crown, and not having paid the £4000 according to the covenant in his settlement; and, upon his departure, the pension is withdrawn by order of Council, and the trustees of the settlement stop the payment of the dividends of the other funds to which he was entitled for life under the settlement. A. having granted annuities secured by assignment of his pension and of these dividends, on a Bill by the annuitants against the Treasurer of the Navy and the *Attorney-General*, for recovery of what was in the hands of the former on account of the pension, and against the trustee of the settlement for dividends accrued since A.'s departure; held, as to the first, that this Court has no jurisdiction; and, as to the second, that the trustees, who had no notice of the assignment, were entitled to retain the dividends in satisfaction of the covenant; and the Bill was therefore dismissed against all the Defendants. The equity of the trustees was to stop the dividends, not only immediately on failure of performance of the covenant, but at any time after, at their discretion. The assignee of a chose in action takes its subject to all the equities to which it was liable in the hands of the original grantee. *Quære*, Whether the pension from Government in this case is assignable within the policy of the law. *Quære*, as to the right of the Crown to retain the pension in discharge of a debt due from the grantee in a different capacity from that in which it was granted him.

By settlement, made previous to the marriage of the Defendant *Hunt* with *Catherine Davie*, dated the 4th of April 1795, reciting that *C. D.* was entitled to [87] two several sums of £5145 and £1029, and that it had been agreed that the said sums should be assigned to the Defendants *Praed* and *Short*, their executors, &c., upon the trusts thereof, and had been further agreed that the Defendant *Hunt*, should previous to the marriage, lay out and invest £4000, and should enter into a covenant for investing, within four years, a further sum of £4000, in the purchase of stock, in the names of the said trustees, upon the same trusts; and that, in part performance of the agreement, the first £4000 had been already invested in the purchase of £6438 3 *per cents.*, which then stood in the names of the said trustees at the Bank; it was witnessed, that the said *C. D.* thereby assigned to the said trustees, their executors, &c., the sums of £5145 and £1029, and all interest, &c., and Sir *John Davie* (her father) covenanted within two years to raise and pay the same, with interest in the mean time; and the trusts thereof, and also of the said £6438 stock, were declared, to pay to the Defendant *Hunt*, or permit him to receive, the interest and dividends thereof for his life, and, after his decease, in trust for the wife and children of the marriage as therein mentioned. And the Defendant *Hunt* thereby covenanted as to the further sum of £4000, to be invested as aforesaid, according to the recital.

The marriage took place, and the two sums of £5145 and £1029 were paid to the trustees at different times, and invested by them in stock, making, together with the £6438, in all, £15,585 3 *per cents.*, standing in their names on the trusts of the settlement; the dividends whereof the Defendant *Hunt* received up to the 5th of January 1810, when he absconded, without having ever paid the second £4000 according to his covenant; after which time the trustees received the dividends, and invested the same from time to time in stock, [88] in satisfaction, as they themselves alleged, of that covenant.

In 1802, by grant under his sign manual, His Majesty, "in consideration of "the long and faithful services of the Defendant *Hunt* as a Commissioner for conducting the Transport service," granted to him an annuity, or yearly pension, of £500, payable out of monies to arise from the sale of naval stores, to commence from the 15th of May 1802, and to continue during his life; "to be suspended, "nevertheless, when and so long as he should be and continue in possession of any "office, place, or employment, or offices, places, or employments, the annual value "of which, taken separately or together, should amount to £1000 or upwards—" or not amounting to £1000 *per annum*, then, as to so much of the said pension, as, together with the annual value aforesaid, should exceed £1000 *per annum*—and, by a warrant dated the 17th of the same month, signed by the Commissioners of the Treasury, and directed to the Treasurer of the Navy, it was ordered that, "out of "any monies that might or should from time to time be and remain in the said

"Treasurer's hands, or in the hands of his cashier, to arise by the sale of old naval stores, he the said Treasurer should pay or cause to be paid to the Defendant or his assigns" the said annuity or pension, "to continue during his natural life, but to be suspended nevertheless in the case and in the manner before mentioned."

By indenture, dated the 3d of *October* 1802, the Defendant *Hunt*, in consideration of £4000, granted to the Plaintiff *Priddy*, his executors, &c., an annuity of £500 during the life of the Defendant, for securing the payment whereof, he assigned to a trustee for the [89] Plaintiff the said pension of £500, and all powers and remedies which he had for recovering or obtaining payment thereof, appointing him his attorney "to demand, recover, and receive the same from the Treasurer of the Navy for the time being, or other person or persons who should be warranted or authorised to pay the same," and also to receive from the Trustees of his marriage settlement, the dividends of the stock to which he was entitled for life as aforesaid, upon the trusts therein mentioned.

The Defendant *Hunt* afterwards surrendered his pension and obtained a new grant, by warrant under the sign manual, also addressed to the Treasurer of the Navy, of a pension of £537, 18s. payable in like manner and subject to similar conditions, with the former, but to be suspended only in case of the Defendant's being in possession of any office, &c., to the amount of £1500 *per annum*.

By indenture dated the 8th of *July* 1806, the Defendant granted two other annuities, of £305, 14s. to the Plaintiffs *Holme* and *Pollard*, secured in like manner with the former, by an assignment of the pension and dividends of stock.

The three annuities so granted were regularly paid up to the 18th of *June* 1809, since which no further payment had been received in respect thereof. The bill, alleging the above facts, further stated that, by reason of the regular payment of the annuities to the time aforesaid, the Defendant *Hunt* had been suffered to continue in receipt of the dividends of stock, and of the pension; that he received the latter to the 23d of *June* 1809, and the former to the 5th of *January* 1810, since which he had received nothing in respect of [90] either; and that in *February* 1810 he went abroad, and had ever since continued abroad; charging that the Defendant *Rose*, as Treasurer of the Navy, received the pension which became due on the 23d of *June* 1810, out of the money applicable to the payment thereof, and had, in pursuance of his Majesty's warrant, appropriated the same; that the Plaintiffs had caused notices to be served on the trustees of the settlement, and applications to be made to them, and to the Treasurer of the Navy, with which they had respectively refused to comply; therefore praying that accounts might be taken of what was due on the annuities, and of the arrears of pension, and dividends; that the Plaintiffs might be paid thereout, &c.; and for an injunction to restrain the Treasurer of the Navy, and the Trustees, from paying away any of the monies coming to their hands respectively.

From the answers of the Treasurer of the Navy and of the *Attorney-General*, it appeared that the Defendant *Hunt* was, in *April* 1807, appointed to the office of Treasurer of the Ordnance, which he held till *January* 1810, when he absconded, and, upon investigation of his debts, was found to be indebted to the Crown in £93,834, in respect of monies received as Treasurer; upon which extents were issued, and the balance still remaining due was £90,000 and upwards; and that by an Order in Council dated the 4th of *March* 1812, it was ordered that his pension be withdrawn and no longer allowed, and such part thereof as remained unpaid up to the 30th of *December* 1811 be withheld, and considered as applicable to the liquidation of his debt to the public.

The Defendants, the trustees of the settlement, by their answer, said they had had no notice, or know-[91]-ledge, of the annuities, until *February* 1810 (after *Hunt* had absconded), when they were first served with a written notice of the deeds of 1802 and 1806. They put in issue the validity of those instruments, stating different objections thereto, on the grounds of inadequacy of price, and defect of memorials; and, as to the second, of its containing in fact two grants of distinct annuities, with only one stamp for both. They alleged that *Hunt*, having broken his covenant to invest the £4000, had become a debtor to them for that amount, and that they were therefore entitled to retain, as against him and all claiming under him, the dividends of stock, until that sum should be raised, the money due in respect of dividends being a just debt at law, and upon a covenant entered into for valuable consideration. They

insisted that the Plaintiffs could be in no better situation than *Hunt* himself, claiming through him ; alleging that the Plaintiffs had notice of the covenant from the indenture of settlement, and that they had made no inquiry respecting the same previous to the grants of their respective annuities.

*Hart, Bell, and Heald*, for the Plaintiffs. The first question is as to the right of the Crown to retain the pension, either on the ground of set-off, against the debt due to the Crown from its grantee, or by virtue of the Order in Council for its revocation.

This pension is an annuity granted by the Crown for the life of the grantee ; and it was at one time doubted (Co. Litt. 20 a, 144 b) whether such an annuity was assignable, being only a *chose in action* (*Baker v. Brooke*, Moor, 5 ; 2 Vin. Ab. 515 ; Annuity F. 6, pl. 3), without express words [92] so to render it. (1) But this has been long since settled (*Gerrard v. Boden*, 2 Vin. Ab. 515) ; and, in the case of *York v. Twine*, in the Court of Wards (Cro. Jac. 78), where the queen had granted under her great seal an annuity for twenty-one years, to be paid by the receiver of the Court of Wards, which was afterwards sold under an extent ; and the question was, Whether the sale was good : it was resolved that the pension was well extendable, and well sold by the Sheriff ; for, being an annuity certain, and for years certain, and payable by the Receiver, it was in the nature of a rent-charge for twenty-one years, and was well grantable over and vendible, and not like to an annuity which chargeth the person only.

Then, if in its nature assignable, this pension had been actually assigned before the extents issued,—there is no evidence when the debt to the Crown accrued ; and such an annuity is merely personal property, and not liable to an extent, so as to defeat a prior *bona fide* purchaser, as appears from *Allen v. Dundas* (3 T. R. 125), where it was held that the Defendant, as Treasurer of the Navy, being indebted to a person who died intestate, for the arrears of his pension, and having paid it to one who claimed as executor under a forged will, was not bound to pay it over again to the true claimant. So in *The Earl of Stafford v. Buckley* (2 Ves. Sen. 170), an annuity granted by the Crown out of the *Barbadoes* duties, was determined not to be a rent within the statute *de donis* or the statute of frauds, but that being entailed on the grantee [93] and the heirs of his body, with remainder over, that was a fee-simple conditional at the common law, and the remainder over void. And in *The Countess of Holderness v. Marquis Carmarthen* (1 Bro. C. C. 377), an annuity of £4000 charged on the post-office revenue, to continue until £100,000 should be raised, to be laid out in land, was resolved to be a mere personal annuity, and, as such, that it was capable of passing by grant or transfer. This does not fall within the cases in which it has been held that Government pay and pensions are not assignable, upon the ground of public policy. The true question is, Whether, as an annuity, it is within the statute 13 Eliz. c. 7 ; and, if so, it was clearly assignable, and the Crown had no power to revoke the grant, which was absolutely for life, or defeat the prior claim of the assignee for a valuable consideration. (2) The case much resembles that of *The Earl of Stafford v. Buckley*. The [94] annuity is not revocable—not dependent on the pleasure of the Crown—expressly made to the grantee and his assigns—and assignable like any other annuity so made payable.

Then, as to the claim of the trustees, they might have retained the dividends from the moment when default was made in performance of the covenant to invest the £4000 ; and their *laches* in not availing themselves of the remedy within their reach, affords an equity to the Plaintiffs, who took the assignment at a period long subsequent, and without notice that the covenant was yet remaining unsatisfied. The conduct of the trustees has been indefensible. They have been guilty of a direct breach of trust, and they come forward and say they have a right to be reimbursed to the extent of their liability by reason of the breach of trust they have committed. This cannot be allowed them, so as to defeat the rights of a subsequent *bona fide* purchaser.

Sir A. Piggott and Mitford, for the Attorney-General. This is an entirely new case, and in which the Court has no jurisdiction. If the funds in question had passed out of the hands of the Crown, and had been with a third person, as a stake-holder, such third person might have been made a party to a suit here. But the money out of which this pension was granted is in the hands of the officer of the Crown, and is therefore under the jurisdiction of the Court of Exchequer ; unless it were sought to

be recovered upon a petition of right, or *monstrans de droit*, which might be prosecuted in either court. (Bro. Ab. tit. Prerogative le Roy, pl. 2; Fitzh. Ab. tit. Error, pl. 8; Skinn. 609.)

[95] Independent of the question, Whether the grant of a pension will admit of an assignment in equity, this is only an equitable assignment—and what remedy is there at law if the pension is not paid? There can be no remedy against the Crown, and the fund out of which it is payable is a fund belonging to the Crown. True, an equitable interest may be the subject of assignment—but it has been decided in many cases (see note, p. 93) that a pension from the Crown is not assignable. No voluntary sanction from the Crown can be assigned; according to what is said by *Ashhurst, J.*, in the case of the half-pay officer. (*Flarty v. Oldum*, 3 T. R. 683.) “All voluntary donations of the Crown are for the honour and service of the state.”

It is the fault of the annuitant if he has contented himself with taking an insufficient security for the payment of his annuity. Suppose, in this case, instead of a pension from the Crown, it had been an annuity granted by an individual, subject to the same conditions—that the grantee, after having assigned it as a security to another, had accepted an office within the terms provided for the cessation of his annuity, and then made default to his assignee—what remedy could his assignee have by virtue of that assignment? As long as the original annuity remained payable, so long, and no longer, did his security continue. Then has this pension ceased? The grant has been revoked by the Order in Council; and it is impossible to contend that the Crown has not authority to revoke its own grant; the grantee being a public accountant, and having made default. How could he have a specific performance of a voluntary grant from the Crown? The Order in Council not only goes to future payments, but withholds money in the hands of the officer of the Crown [96] for payments already due, and directs that the whole shall be considered as applicable to the reduction of *Hunt's* debt to the public. The Treasurer of the Navy is not like an ordinary stake-holder.—He is the King's receiver, and amenable to the Court of Exchequer. The word “assigns” in the grant—to him and his assigns—constitutes no obligation on the part of the Crown towards such assigns. It is still no more than a voluntary act on the part of the Crown, the performance of which can be only during its own will and pleasure. It is the intention of the Crown that it shall continue during the life of the grantee—but if the Crown afterward thinks fit to change that intention and revoke the gift, how is the performance of that voluntary act to be enforced? Could the grantee of the pension himself, having made default in his own accounts with Government, have compelled payment notwithstanding? If not, how could he communicate to another a right which he has not himself? Can he call upon the Treasurer of the Navy, an officer of the Crown, to make payment, against the express order of the Crown? Can he compel the servant to disobey the command of his master?

[The *Master of the Rolls*. Suppose this pension were legally assignable, what effect would the Order of Council have had?]

Sir A. Piggott. The question in that case would certainly be difficult. But this cannot be treated as a legal assignment.—And if it were, where could be the legal remedy?

To return to the point of jurisdiction—“Chancery,” says *Blackstone* (Comm. Book 3, ch. 27, p. 428), “can give no relief against the [97] King, or direct any act to be done by him, or make any decree disposing of or affecting his property. Such causes must be determined in the Court of Exchequer, as a Court of Revenue, which alone has power over the King's treasure, and the officers employed in its management.” And so in the case of the *York Buildings Company*, (3) Lord *Hardwicke* said, that an account between the King and a subject cannot be taken in any case in this Court, but in the Exchequer only. And in *Reeve v. The Attorney-General* (2 Atk. 223. See *Hovenden v. Lord Annesley*, 2 Scho. & Lef. 617), where, the question being, Whether an estate escheated to the Crown could be affected with a trust, his Lordship said, “Suppose the land had been seized and put in charge, could he make a decree that it should be sold?—No—he could not;—but the Court of Exchequer might, as “it is a Court of Revenue.”

[98] *Jarvis* and *Wyatt*, for the Defendant, the Treasurer of the Navy. This is no more than an attempt to obtain indirectly a Decree against the Crown through the medium of the Crown's officers. Whether an action would lie at the suit of the

Grantee himself, for the arrears of the Pension actually due at the time of the date of the Order in Council, may admit of some question, though the Order in Council would probably be a sufficient answer even to such a demand as that.

If there were no doubt as to the jurisdiction, still the policy of the law would be conclusive against such a Pension being assignable. This Pension is in the nature not only of a reward for past, but a retainer for future, services; and it is as contrary to policy to permit the assignment of it, as of the half pay or full pay of an officer. In the case cited of *Flarty v. Odum*, Buller, J., says, "If the question had been, Whether 'or no the pay then actually due might be assigned, he should have thought it, like 'any other existing debt, assignable; but that does not extend to future accruing 'payments.' The grant of this pension evidently looks to the future employment of the grantee, and is in the strictest sense 'a voluntary donation of the Crown, for the 'honour and service of the state.'" In *Barwick v. Reade* (1 H. Blackst. 628), where it was decided that an officer's full pay is not assignable, Gould, J., refers to a case in *Dyer* (4) as confirming the general principle.

[99] If it is in respect of the term "Assigns" that the Pension is to be held assignable, the Crown has still the right of retainer against its own debtor. The cases referred to from *Viner* prove no more than that an annuity is a chose in action, and assignable in equity. Undoubtedly it is so. But has not the Crown a right to retain it to satisfy its own debt? The fact of the Extent issued is introduced only to shew that, prior either to the time of filing the Bill, or notice of the Assignment, *Hunt* was a debtor to the Crown to a greater amount than the arrears of his Pension. We do not even put it on the ground of the right in the Crown to a preference or priority. The case might have been different had notice been given; but the present Bill, which alone gave notice, was not filed until after *Hunt* had absconded.

Sir *S. Romilly* and *Winthrop* for the Defendants, the Trustees in the Settlement. *Turton v. Benson* (2 Vern. 764; 1 P. Wms. 496), *Coles v. Jones*. (5) A Bond is a chose in action, assignable only in Equity; and, when assigned, is liable to the same Equity as if it were still remaining with the Obligee. The purchaser of a chose in action must always abide by the title of the person of whom he purchases.

*Hart* in reply. The defence on the part of the Officers of the Crown is threefold. First, that this Court has no jurisdiction;—Secondly, that the Pension is not in its nature assignable; [100]—Thirdly, that the Crown had a right to retain against the Assignees, even supposing the Assignment otherwise valid.

I admit that the Exchequer is the only Court of competent jurisdiction in questions upon matters of Revenue. But that peculiar jurisdiction does not obtain in any but mere Revenue cases. Here the question is, Whether, under the grant of this Pension, the money out of which it is made payable is not in the hands of the Treasurer of the Navy as a Trustee for the Plaintiffs. It may be a question at law whether the grant itself was such as the Crown is competent to make—but, being made, our proposition is that, from that instant, it was held in trust for the Grantee and his Assigns; and, if so, this is no question of Revenue—it is simply a question, Whether the Crown has a right to stop the payment *in transitu* for the discharge of its own debt. In *Burgess v. Wheate*, (6) where the question first arose whether there was not an escheat to the Crown, the Court did not refuse to entertain it, but the cause was ordered to stand over, to make the Attorney-General a party, who afterwards filed an Information. So there was no objection to the jurisdiction in the case of *The Attorney-General v. Duplessis* (2 Ves. Sen. 286), and many others. Where the rights of [101] the Crown are only incidentally brought in question, they may as well be discussed in this Court as in the Court of Exchequer.

This is the case of a Pension given as a compensation for past services; and the distinction as to the assignability of a Pension is between its being a reward for past, and in the nature of pay, or wages, for concurrent services. The question is, Whether the Crown has any right to withdraw a Pension of the former description.

[Mr. *Hart* then reverted to the case before cited, of *The Earl of Stafford v. Buckley*, and to the proceedings in a case of *Aubin v. Daly* (at the Rolls, Feb. 17, 1817). in which a Decree was lately made by consent, on a Bill by a Mortgagee, for sale of the very Annuity which was the subject in question before Lord *Hardwicke* in the former case; in order further to prove the assignability of such an Annuity.]

Then as to the trustees in the settlement—true, the assignee of a chose in action takes it subject to all the equities with which it is invested. But this is only where



he has express notice of those equities. Here, the Settlement could not give the Plaintiffs such notice ; for they were not to suppose that the covenant had not been performed ; and the trustees were, in the due execution of their trust, bound to have seen to the performance of it, and to have exacted the debt at the moment when it became due. After remaining inactive for so many years, they shall not be allowed to take the benefit of their own *laches* to defeat the claims of *bona fide creditors* upon the funds, which they now insist upon having a right to retain.

[102] *July 29. The Master of the Rolls* [Sir Wm. Grant]. The Plaintiffs in this case are certain annuitants of Mr. *Joseph Hunt*, who, as a security for the annuities which he granted them, assigned to them a pension he had from the crown, and the dividends of certain funds, to which he was entitled for his life under his marriage settlement. The bill is filed against the Treasurer of the Navy, and the *Attorney-General*, for the recovery of what is in the hands of the former on account of Mr. *Hunt's* pension, and against the trustees in the settlement, for the dividends that have accrued on the funds since the time when Mr. *Hunt* himself ceased to receive them. On the part of the Treasurer of the Navy, and the *Attorney-General*, it is objected, that the Court has no jurisdiction to order the payment of this money.—On the part of the trustees, it is stated, that although by the settlement Mr. *Hunt* was entitled to the dividends in question for his life, yet by the same settlement he had covenanted to pay them £4000, to be laid out on the like trusts as the other funds—that as he has never performed his covenant, they have a right to stop the dividends, and to apply them as far as they will go, to make good the sum which Mr. *Hunt* ought to have paid them.

As to the first demand,—where a public officer has in his hands money issued by the Government for the use of an individual, it is clear, that a suit may be maintained against the officer for the recovery of such money. For it is his duty towards the Crown, as well as towards the individual, to apply the money to its destined purpose. But here the officer is commanded by Government to withhold the money from Mr. *Hunt*, and to apply it towards satisfaction of a debt which Mr. *Hunt* owes the public. Then the question is between Government and Mr. [103] *Hunt*, or Mr. *Hunt's* assignee ; and it is not, I apprehend, in this Court, that such a question can be decided. In the case of *Row v. Dawson* (1 Ves. Sen. 331), Lord *Hardwicke* entertained the jurisdiction singly on the ground that the officer admitted the money to be in his hands for the use of the person under whom the litigating parties made their claim. That was the case of a public officer who had given a draft, for payment of a sum which he had borrowed, upon money due to him out of the *exchequer*, and afterwards became bankrupt ; and the question was “ whether the Defendants ” (to whom the draft had been given) “ were first entitled by a specific lien upon the sum due to the bankrupt's estate ; or whether the Plaintiffs, the assignees under the Commission, were entitled to have the whole sum paid to them ; it being insisted for them, that this draft was in nature of a bill of exchange, and that the property “ was not divested out of the bankrupt at the time of his bankruptcy.” The Lord Chancellor said, he at first doubted his own jurisdiction, and whether the Plaintiffs (the assignees) ought not to have gone into the *Exchequer* as being a Court of Revenue ; for this was not a personal credit given to, or demand upon, the officer, but to be paid out of the money issued out of the *Exchequer* to that officer, on warrant to be paid out of the Revenue of the Crown for public services. “ But,” he adds, “ there is something in the present case delivering it from that ; the officer admits, he has received a sum of money applicable to this demand ; which brings it to the old case of a *Liberate*, which a person has under the Great Seal for the payment of money, upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give Courts of law a jurisdiction ; so that an action of debt might be maintained on the *Liberate*.”

[104] It is sufficiently evident, that, if the officer had, on behalf of Government, disputed *Gibson's* right to the fund, Lord *Hardwicke* would not have proceeded in the cause ; but *Gibson's* right being admitted, it was a merely equitable question, which of the parties claiming under him had the best title to the money. Besides, if, in this case, the assignment (as is contended by the Plaintiffs), passed not merely the equitable, but the legal title to the pension, why does the assignee come into a Court of Equity ? If, on the other hand, he be only an equitable assignee, and as such stands precisely in *Hunt's* place, he would probably find it difficult, in any

Court, to maintain that the pension can be claimed from Government, while the debt to Government remained unsatisfied. However, that is a question which I do not think this Court ought to determine. The bill must be dismissed as against the *Attorney-General* and the *Treasurer of the Navy*.

II. As to the question between the Plaintiffs and the trustees, it arises on the following facts.—Mr. *Hunt's* marriage settlement was in April 1795. The £4000 became payable in four years afterwards, that is, in April 1799. It does not appear that the trustees ever made any application for the payment of the money. The first annuity was granted in 1802; the others in 1806; Mr. *Hunt* absconded in 1810; down to which time he had received the dividends under a power of *Attorney* from the trustees, and had paid the annuities as they became due. No notice had ever been given to the trustees, of the assignment of the dividends, until after *Hunt* had absconded. The question is, whether the dividends can be stopped. See how the case would have stood between the trustees and *Hunt* himself. I apprehend it to be clear that he could not have claimed a benefit under the settlement without making [105] good his part of it. The trustees might give him what credit they chose, subject to their responsibility to their *cestui que trusts*; but they might, at any time after the £4000 became due, have stopped the dividends, if the money was not paid. Supposing he had become a bankrupt, the trustees would have this equity as against the assignees, as was determined by Lord *Thurlow* in *Ex parte Mitford* (1 Bro. C. C. 398).

I have had a copy of the order in that case from the bankrupt's office, in order to see whether the case be correctly stated by Mr. *Brown*.

Mr. *Mitford*, under the marriage settlement, was entitled to an annuity of £24 *per annum*, and to the dividends of certain stock during his life. He had covenanted to pay £6000 in the whole to the trustees, at different periods, and on different events. It became a question, whether the whole of this sum had become a debt at the time of the bankruptcy. The trustees in the settlement presented a petition praying to be at liberty to prove the whole sum under the commission, and to be permitted to retain the interest the bankrupt took under the settlement, in part satisfaction of the debt. The Order made was as follows. It was "declared that the petitioners were, at the time of issuing the commission, creditors of the bankrupt for the sum of £3000 only, which, by the settlement, was payable at the times and in the manner mentioned in the petition, free from any contingency; and that the petitioners were entitled to retain the value of the bankrupt's equitable interest under the settlement in the annuity of £24 and a sum of £2047 bank annuities towards satisfaction of the said £3000." And "it was referred to the commissioners to compute interest on the sum of £1000 (part of the £3000) from [106] the date of the commission to the 14th of *October* then next, when the said £1000 would become payable under the settlement, and on the sum of £1000 (other part of the £3000) from the same date to the 14th of *October* 1785, when the last-mentioned £1000 would become payable under the settlement, and on £1000 (residue of the £3000) from the same date of the 14th of *October* 1786, when the last-mentioned sum would become payable as aforesaid; what should be found the amount of such interest to be deducted from the £3000. The commissioners to set a value on the bankrupt's interest under the settlement in the annuity of £24 and sum of £2074 bank annuities, and what should be found to be the value thereof to be deducted from what should remain due in respect of the £3000, after such rebate of interest as aforesaid. The petitioners to be admitted creditors under the commission for what should be the then residue of the £3000. And, in regard to the £24 annuity during the joint lives of the bankrupt and his wife, and the interest to accrue on the £2074 bank annuities during the life of the bankrupt," it was "ordered that they be respectively retained by the petitioners towards satisfaction of the £3000—and that the dividends from time to time to be made under the commission upon the sum of money for which they should be so admitted creditors, should be laid out by them in the purchase of 3 *per cent.* bank annuities in their names; and the interest to accrue thereon during the life of the bankrupt, to be paid from time to time by the petitioners to the assignees under the commission, as part of the estate and effects of the bankrupt." (In the Matter of *Robert Mitford*, a Bankrupt, 11 Aug. 1784. Orders in Bankruptcy, 1784, fo. 211.

Now, if, as against *Hunt*, the Trustees had the Equity of stopping the dividends to make good the debt of [107] £4000, could he by this act, without their knowledge or consent, deprive them of that Equity? The Assignee for the Annuitants, taking no legal interest in the funds, could only take subject to the same Equity to which the Assignor was liable. What was the original Equity of the Trustees?—Not to stop the dividends merely at the first moment the debt became due, but whensoever they might think the interests of the trust required that step to be taken. They had no room to imagine that it signified to any but their *cestui que trusts*, whether this debt was, or was not exacted, when it became due. Why is a third person, who asked no question upon the subject, and gave no notice of his having any interest in the matter, to tell the trustees that it was their duty towards him to have called in the debt sooner, and that they are not now to be permitted to resort to any means which they may have in their own hands, of satisfying any portion of that debt? Nobody could take any assignment of Mr. *Hunt's* interest under the settlement, without seeing the covenant for the payment of the £4000. Now the person proposing to take the assignment could ask the trustees whether that money was paid; but the trustees had no opportunity of apprising him that it was not paid; for they knew nothing of the transaction. They have been guilty of no bad faith towards the Plaintiffs, but the Plaintiffs have been wanting in common prudence in not consulting the trustees before they took the assignment. It was surely a rash conclusion, that the money must necessarily have been paid, because the period of payment was past. But did the annuitants really believe that this money was paid? They were evidently getting from Mr. *Hunt* the security of every fund he could give them. If the £4000 had been paid, it would have been invested, and additional dividends would in all probability have been included in the Security.

[108] However, it is enough that the Trustees have done nothing to mislead the Plaintiffs, or to forfeit the right, which originally they had, of applying Mr. *Hunt's* dividends to the satisfaction of Mr. *Hunt's* debt. I presume, there is no question, that the dividends received prior to Mr. *Hunt's* death are insufficient to satisfy the debt; and therefore the Bill must be dismissed. (Reg. Lib. B. 1816, fo. 1679.)

(1) *Maund's case*, 7 Co. 28 b. Rent-charge granted to one and his assigns, *pro concilio impendendo*, may be assigned over by the express words of the grantor, who granted "to him and his assigns"—for *modus et conventio vincunt legem*.

(2) In *Ex parte Butler*, 1 Atk. 210, the question was, Whether the office of City-Marshall was saleable for the benefit of creditors under the 13 *Eliz.*; and Lord *Hardwicke* held that it was, not being within the statute of *Edward 6.* concerning offices connected with the administration of Justice; and, in giving his Judgment, his Lordship said, "If an officer in the army should become bankrupt, he should have no doubt but he had a power to lay his hands on his pay for the benefit of his creditors. But Mr. *Cooke* (Bankr. Laws, 284, edit. 5) observes that this is only *obiter dictum*, and it had been determined otherwise, in the House of Lords on an appeal from Scotland, in the case of *Cathcart v. Blackwood*. See also *Flarty v. Odlum*, 3 T. R. 681. *Lidderdale v. Duke of Montrose*, 4 T. R. 248. Emoluments of this sort are granted for the dignity of the state, and the support of those who are engaged in the service of it, and it would be therefore impolitic to permit it to be assigned: besides, an officer has no *certain interest* in his half-pay; for the King may at any time strike him off the list." Dict. per Lord Kenyon.

(3) 2 Atk. 56, *Huggins v. The York Buildings Company*, Reg. Lib. A. 1739, fol. 552, A. 1740, fol. 139, from which I have been favoured with the following extract. "Bill by Creditors of the Company against the Company and the Attorney-General and the Trustees, under the deed for the payment of debts. The Company had purchased the forfeited estates, and had not paid for them; and the Attorney-General claimed what remained due to the Crown for the purchase-money of the said forfeited estates.

"The cause was heard on several days, and the Court took time to consider. One of the Plaintiffs, of the name of *Blackwell*, died. Abatement. Two bills of revivor by *Blackwell's* representative. Plea to the second of a former bill pending. Reference to the Master to see which bill ought to be prosecuted—and divers other proceedings.

"It seems that what the *Chancellor* is reported, in 2 Atk. 56, to have said respecting the jurisdiction, took place during the hearing, and arose in consequence of the *Attorney-General's* claims; but the *Chancellor* afterwards decreed the estates to be sold, and the purchase-money owing to the Crown to be paid out of the produce of the sale."

(4) Dyer, 1 b. stated in the note to the above case, where is also noticed the distinction made in *Stuart v. Tucker*, 2 Blackst. 1137, between full pay and half pay, as the subject of assignment, the one being *pro servitio impendendo*, the other *pro servitio impenso*.

(5) 2 Vern. 692. See *Davies v. Austen*, 1 Ves. Jun. 249; Sugd. Vend. and Purch. 600 (5th edit.). *Daubeny v. Cockburn*, 1 Mer. 633. *Cholmondeley v. Clinton*, 2 Mer. 241.

(6) Blackst. Rep. 123; 1 Eden, Cases in the time of Lord Northington, 177, 181. "The cause came on to be heard before Lord Hardwicke, C., who, on the pleadings being opened, objected to the *Attorney-General's* not being a party. Both parties were desirous that there should be no question about the escheat, and the *Attorney General* did not insist upon it. But the *Lord Chancellor* asking him if he waved any right the Crown might have, and would consent that it might be so entered, the cause stood over, and the *Attorney-General* was made a party."

CHRISTOPHER ALDERSON LLOYD, KITTY ALDERSON LLOYD, MARGARET LLOYD, and EMMA LLOYD, *Plaintiffs*, and JOHN BRANTON, JOHN PEARSON, CHRISTOPHER ALDERSON HARKER, and W. P. BARNARD and SARAH his Wife, *Defendants*. *Rolls*. March 5, April 28, 1817.

[See *In re Nourse*, [1899] 1 Ch. 70.]

Testator gives £24,000, upon trust, as to £6000, to pay the interest to *S. B.* (his niece) during her life, and, after her decease, the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of £6000 (making the remainder of the £24,000), for his three other nieces and their children. Proviso, that, in case any of his said nieces should marry without such consent as therein prescribed, each, &c., so marrying, should forfeit the interest of her £6000, and all other sums to which she may be entitled under his will; and the respective sums of £6000, and all such other sums, &c., should fall into his residue. And he gives the residue in trust for his two nephews and their children—in case of the death of either without issue, his moiety to go over to and be divided among his said nieces. Afterwards, by codicil, he gives to each of his nieces £2000 in addition, "subject to the same powers, provisos, directions, and limitations, as are contained in the will respecting the sums of £6000." *S. B.* who was of age at the date of the will, marries without the consent required. Held, a forfeiture; extending not only to the future interest of her £6000, but to the capital, and also to the £2000 given by the codicil, and to a fund set apart to answer an annuity, to which *S. B.* would otherwise have been entitled on the death of the annuitant. Whether the forfeiture would also extend to her share of the residue, in the event of the contingency upon which it is given over to the testator's nieces, *quære*.

Christopher Alderson, by his will, dated the 24th of July 1810, gave and bequeathed to the Defendants, *Branton*, *Pearson*, and *Harker*, £24,000, [109] upon trust, as to £6000 (part thereof) to invest the same in their names, or in the names or name of the survivors or survivor, his executors or administrators, upon government or real securities, and to pay the dividends or interest to his great niece the Defendant *Sarah Barnard* (then *Sarah Alderson*, spinster) by half yearly payments, during her life, and after her decease to transfer and pay the capital unto and amongst her children as therein mentioned; and, in case she should die without issue, then upon trust for her brother the Defendant *Harker*. Similar trusts were declared as to three other sons of £6000 each (residue of the said sum of £24,000) for the benefit of the testator's three infant great nieces (the Plaintiffs *Kitty Alderson Lloyd*, *Margaret Lloyd*, and *Emma Lloyd*), and their children; and the testator directed that his four great nieces should have and be entitled to

the dividends and interest of the said respective sums of £6000, and to all and every sum and sums of money which they should respectively have or become entitled to under his will, for their respective sole and separate use. The testator then declared it to be his will that his trustees, or the survivors, &c., should pay and apply any part of the dividends or interest payable to such of his said great nieces as should at the time of his decease be under the age of twenty-one years, in or toward her or their respective maintenance, &c., or otherwise, until she or they should respectively attain the age of twenty-one years, or be married with such consent as thereafter mentioned, as his said trustees should in their discretion think proper. The testator also gave to his said trustees an annuity of £50 for the life of his niece *Jane Harker* (the Defendant *Sarah Barnard's* mother), upon trust to pay the same to his said niece for her life; and he directed that a sufficient part of his personal estate should be invested for securing the said annuity, and [110] that his trustees should stand possessed of the funds in which the same should be invested, from and after the decease of his said niece, upon trust for her daughter *Sarah Barnard*. The will contained also a specific bequest of books and other articles to *Sarah Barnard*; and there then followed a proviso that, in case of the marriage of any of the testator's four great nieces with the consent of his said trustees, or of the trustees and executors for the time being of his will, in writing for that purpose given, but not otherwise, his said trustees or the survivors, &c., should pay to each of the said great nieces so marrying, or otherwise settle upon her, or her issue, in such manner as they in their discretion should think adviseable, the sum of £2000, to be raised and paid out of the £6000, to the dividends and interest whereof his said great niece so marrying was under his will entitled for her life as before mentioned; and another proviso, that if any of his great nieces should marry without the consent of his said trustees or trustee for the time being, testified by writing under their or his hands or hand first given, then and in such case, his said great nieces, each and every of them, so marrying without such consent, should, from thenceforward, forfeit, and be no longer entitled to, the dividends or interest of the respective sums of £6000 payable to them respectively for life as before mentioned, or to any other sums which they might respectively become entitled to under his will, and should not have received; and that the said interest and dividends, and the respective sums of £6000, or the securities for the same, and all such other sums to which they respectively might become entitled as aforesaid, should thereupon sink into, and constitute part of, the residue of his Estate. And he gave and bequeathed the residue of his said Estate and Effects unto his said Trustees, upon trust to invest the same upon Government or real securities, and to pay to his [111] great Nephews) the Plaintiff *Christopher Alderson Lloyd* and the Defendant *Harker*), the dividends or interest of the same, in equal shares, for their respective lives; and after the decease of either, as to one moiety, upon trust for his children; or in case either should die without leaving issue, then upon trust to pay the dividends or interest of his moiety to the Testator's four great Nieces, share and share alike, during their respective lives; and after the decease of any and each of them, as to one fourth part of the said moiety, upon trust for the Child or Children of her so dying; but in case any of them should die without leaving issue, then upon trust for the survivors of his said Nieces, and the respective issue of any that should be dead, in equal shares.

By a Codicil to his Will, dated the 14th of *December* 1810, the Testator revoked the said Legacies of £6000 to his great Nieces, and gave to each of them £5000, to be invested in like manner as directed by his will as to the £6000; and directed that the dividends or interest thereof respectively should be paid to his said Nieces for their respective separate use, and that the Legacies of £5000 each, and the dividends or interest of the same, should be subject to the same trusts, conditions, powers, provisos and directions, as by his will declared concerning the legacies of £6000.

By another Codicil, dated the 20th of *December* 1810, he gave to each of his grand Nieces £2000 in addition to what he had before given them, and directed that the same should be invested in the names of his Trustees, and the dividends and interest go and be paid and payable to his said Nieces respectively, and their respective Children, subject to the same powers, provisos, directions, and limitations, as contained in his [112] Will respecting the £6000, except as to the payment of £2000 on their respective marriages.

At the death of the Testator, which happened in 1810, the Defendant Mrs. *Barnard* (then *Sarah Alderson*, spinster), was twenty-six years of age, and shortly afterwards she married the Defendant *W. P. Barnard*.

On the hearing of the Cause, it was referred to the Master to enquire (among other things) at what time, and under what circumstances, the marriage took place, what was the age of Mrs. *Barnard* at the time of the marriage, and whether the same was had with such Consent as required by the Will of the Testator. The Master by his Report certified the facts of the case accordingly, from which he found that the marriage was not had with such consent as aforesaid. The Report was not excepted to, and, the Cause now coming on for further directions, the question was, whether, in consequence of such marriage without consent, a Forfeiture had been incurred of all or any of the bequests to Mrs. *Barnard* contained in the Will and Codicils.

*Bell* and *Palmer*, for the Defendants Mr. and Mrs. *Barnard*, contended against the forfeiture, upon two grounds, *first*, that there was no sufficient bequest over, and *secondly*, that the condition could not be held to extend to a marriage without consent after the party had attained the age of twenty-one.

I. It is a clearly established rule, that, in the case of a Legacy liable to be defeated by a condition subsequent in restraint of marriage, where there is only a general residuary bequest, that is not sufficient to support the condition; which is void, as being held *in terrorem*, unless there is a good bequest over of the particular legacy. This point was regarded as settled by Lord *Thurlow*, as appears from the written Judgment pronounced by him in *Scott v. Tyler*.(1)

There are two cases exactly in point with the present, as to a mere declaration that the legacy shall sink into the residue on the condition happening not being sufficient to alter this rule. The first is a case cited by the *Master of the Rolls* in *Reves v. Herne*; (2) the other, the case of *Garret v. Pritty*.(3) In *Harvey v. Aston* (1 Atk. 361), indeed, it is said by Mr. Justice *Comyns* that it was held otherwise in *Amos v. Horner* (1 Eq. Ab. 112; Forr. 216), which was a later case than *Garret v. Pritty*, and appears by him to have been regarded as over-ruling the last-mentioned case. But *Amos v. Horner* was never decided.(4) If the [114] cases above cited are Law (and it has never been determined otherwise), the present is clearly within them: but if it should be held, notwithstanding these cases, that the mere direction that, on the happening of the condition, the legacy shall fall into the residue, is sufficient to form an Exception to the rule of the Civil Law that such a condition is void, as operating only *in terrorem*, we have then to consider how this condition is to be construed with reference to the particular circumstances of the case.

II. The clause of forfeiture on marriage without consent must be construed to relate to the time when the Legacy would become vested. *Pullen v. Ready*, 2 Atk. 587. In this case, it is declared that, by marriage without consent, the Legatee shall forfeit, not only one particular legacy, but all the benefits intended her by the Will. Now, by the Will, she takes, besides the legacy of £6000, and the additional £2000 given by the Codicil, a specific bequest of books and household furniture, an annuity of £50 after the death of her mother Mrs. *Harker*, and lastly her contingent share of the Residue. In this case, therefore, there are different times appointed for the vesting of the several legacies, all of which are to become forfeited on the same event happening; and, where there are different times for vesting, it seems reasonable to fix upon a certain limited period as that to which the condition is meant to be restricted, and then there is no period so obvious as that of legal competency. If not to the age of twenty-one, to what other period could the condition be limited? A condition in restraint of marriage under twenty-one, even where there is no gift over, is held a reasonable and good condition; because it imposes no other restraint upon the liberty of marriage than was before imposed by the Law of the Land. If otherwise, this is a condition in restraint of marriage generally, which [115] is within the policy upon which the Exception to the rule of the Civil Law is founded. Thus, in *Stackpole v. Beaumont* (3 Ves. 89, see p. 97), Lord *Loughborough* says, "I am perfectly free in this Court, in a case where the condition only operates up to the age of twenty-one, and requires no more than the general policy of the Law and course of the Court hold to be proper, to say there is nothing illegal in such a condition.—Confined to such cases, where the restraint operates only up to the age, till which, by the law and policy of the

"country, consent is necessary, I have no difficulty to say, there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid." And see *Reynish v. Martin* (3 Atk. 330), and cases there cited. See also *Fry v. Porter* (1 Mod. 86, 300), *Semphill v. Bayley* (Pre. Cha. 562), *Elton v. Elton* (3 Atk. 504; 1 Ves. Sen. 4; 1 Wils. 159), *Knapp v. Noyes* (Ambl. 662), where Lord Camden said, "It is very unnatural for a parent to impose a consent to marriage during his daughter's whole life;" and he held that, in that case, "the condition of marriage with consent must mean, at an earlier time than twenty-one." So *Osborn v. Brown* (5 Ves. 527), where the Legacy was made payable within twelve months after the Testator's death, but, if the Legatee should marry a certain person, then the legacy was revoked; and the Legatee having married that person after the twelve months had expired, it was held the legacy vested at that period, and the Condition referred only to the time of the vesting.

If it be said that, in this case, there was no time appointed for the vesting of the principal legacy, yet those bequests, which were made payable immediately, must be [116] held to have vested accordingly, and the condition, as to those, to have reference only to the period of vesting. And in this respect the additional sums given by the Codicil are so circumstanced, and the condition must therefore be held not to apply to them, whatever it may do as to the sums of £6000.

The *Master of the Rolls* [Sir Wm. Grant]. It is now too late to raise a doubt on the legality of the condition on which Mrs. *Barnard's* right to the bequests given her by the will is made to cease.

In the modern case of *Dashwood v. Lord Bulkley* (10 Ves. 230) the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under twenty-one.

Then the question is only upon the import and effect of the condition which the testator has in this case imposed.

It was contended, in the first place, that, in fair construction, it may be understood as applying only to a marriage under the age of twenty-one. When a legacy is to vest, or be paid, at a particular age, and then there is a clause of forfeiture on marriage without consent, the Court, I agree, will construe such clause as having relation to a marriage under the specified age. But there is nothing in this will which can make that doctrine applicable to the case of Mrs. *Barnard*. The testator has not, with regard to her, spoken of twenty-one, or of any other age or period, at which the bequests made to her were to take effect. He does make some specific provision with respect to the event of any of his grand-nieces being [117] under the age of twenty-one at his death—and, with regard to them, the argument might have some application; but Mrs. *Barnard* was above that age before the will was made, and yet the testator has thought proper to include her in the condition, by extending it to all his grand-nieces. The bequests to her vested at the testator's death, liable to be divested by her marriage without consent.

As the condition in this case is certainly a condition subsequent, it was contended, in the next place, that, without a devise over, it can produce no effect, and that here there is nothing which can be considered as a devise over in the event of a breach of the condition.

Whatever diversity of opinion there may have been with respect to the necessity of a devise over in the case of conditions precedent, I apprehend that, without such a devise, a subsequent condition of forfeiture on marriage without consent has never been enforced. Different reasons have been assigned by different judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the devisee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect. Whatever might be the ground of decision, it was held that, where the testator only declared that, in case of marriage without consent, the legatee should forfeit what had been before given, but did not say what should become of the legacy, such declaration would remain wholly inoperative.

[118] Whether a mere residuary bequest amounted to a disposition of the legacy, has been matter of much controversy. In *Harvey v. Aston* (1 Atk. 375), Lord

Chief Justice Willes, and Lord Chief Baron Comyn, held that it did. Lord *Hardwicke* did not there express any opinion on the point—but in the subsequent case of *Wheeler v. Bingham* (3 Atk. 364), he decided that a residuary bequest was not such a devise over as the rule required. The case of *Scott v. Tyller* (2 Bro. C. C. 431, 487; Dick. 723) has been sometimes considered as a contrary decision. But it appears from the copy of Lord *Thurlow's* judgment in *Dickens*, that he thought it had been properly held that a residuary bequest left the conditional legacy in *statu quo*, and that the ground of his decision was, that Mrs. *Scott* never came under the description to which the gift of the £10,000 was attached. In the present case, there is a direction that the forfeited bequests shall sink into and constitute part of the residue therein afterwards bequeathed. It does not rest therefore on a mere declaration of forfeiture. There is an express disposition made of what is to be forfeited. It was said that a direction that it shall fall into the residue is no more than the law would imply, and cannot therefore amount to a bequest over. But when it was decided that a residuary clause did not carry such a legacy, it was by consequence decided that it did not fall into the residue—for if it did, the residuary legatee would be entitled to it. What is here declared is, that that residue which is thereafter given shall include in it the legacies declared to be forfeited. In the case of *Wheeler v. Bingham* (3 Atk. 364), Lord *Hardwicke* held that there was a clear distinction between a mere residuary bequest, and a direction that the legacy should sink into and constitute a part of the residue. And the contrary had not been decided in *Garret [119] v. Pritty* (2 Vern. 293); for the will contained no such direction, and the Decree could not therefore proceed on the ground stated by the Reporter.(5)

I am of opinion that there is in this case a valid devise over; and, as the marriage appears by the master's report to have been had without consent, it follows that the forfeiture takes place. And there is no question but the forfeiture extends, not only to the future interest and dividends, but to the capital of the principal legacy, and likewise to the fund directed to be set apart to answer the annuity to the mother of Mrs. *Barnard*, to which the daughter would otherwise have been entitled at her decease.

It is impossible to make any distinction as to the £2000 given by the Codicil. For that is given subject to the same powers, provisos, directions and limitations, as are contained in the will with respect to the £6000. It is by a proviso that the forfeiture is declared; and to that proviso the £2000 must be subject, as also to the direction that the forfeited shares shall sink into the residue.

It is unnecessary to say whether Mrs. *Barnard* would be excluded from a share of the residue, if the contingency on which it is given to the grand-nieces should happen. It may never happen, and therefore there is no question upon it which the Court ought at present to decide.

(1) Dick. 712. Vid. p. 723. "The Will before us contains a residuary bequest; but that has been repeatedly and well enough determined to leave the conditional legacy in *statu quo*: it only prevents that which has not been disposed of already, whatever be its amount, from falling by order of law, to the Executor or next of kin."

(2) "Where a Legacy was given upon such condition of marrying with Consent, and, if not, that it should sink into the residue of the Testator's estate, which he gave to *I. S.* it was held, that though the marriage was without the consent, yet the legacy was not lost; because it would have been the same if the Testator had said nothing about its sinking into the residue, and therefore was construed only *in terrorem*." 5 Vin. Ab. 343. Tit. Condition, Z. d. pl. 41.

(3) 2 Vern. 293. "The Court decreed the Legacy, with Interest, principally because it was not expressly devised over, but to fall into the residue."

(4) "In *Amos v. Horner* the Master of the *Rolls* thought that a residuary disposition was enough; but it seems that no resolution was made, as the case went off for want of parties, and never came on again, and it has been considered of no authority by subsequent judges." Roper on Legacies, vol. I. p. 326.

(5) It having been suggested by His Honor that the Decree in the case of *Garrett v. Pritty* could not, for the reason assigned, have proceeded on the ground assigned by the Reporter, I have consulted the Register's Book, and find that, although no reason for the Decree is there stated, it may [120] rather be inferred from the cir-



cumstances (which are very peculiar) that the case really turned on the *subsequent approbation* of the person whose consent was required (as in *Pollock v. Croft* (1 Mer. 181), and others of that class of cases there cited), coupled perhaps with the ignorance of the party as to the restriction in her Father's Will, and the suspicious conduct of the Son, to whom the Legacy would otherwise have gone over by virtue of the residuary clause. It will be observed that the condition was a condition subsequent.

The material circumstances of the case were as follows :

"Reg. Lib. 1692, A. fo. 821. *John Garrett*, and *Eliz.* his Wife, Plaintiffs; *John Pretty* (Executor of *Richard Pretty*, deceased), *Joseph Scriven*, *Henry Nesbit*, and *John Peirson*, Defendants.

"The Testator (who was the father of the Plaintiff *Elizabeth* and of the Defendant *John Pretty*), by his Will, after appointing his son (the Defendant) sole Executor, and the Defendant *Scriven*, and another, *Overseers* thereof, bequeathed to the Plaintiff *Elizabeth* (then *Elizabeth Pretty*, spinster), £3000, to be paid to her in manner following; that is, £2000 (part thereof) when she should attain twenty-one or upon her day of marriage, which should first happen after his (the Testator's) decease, and £1000 (the remainder) at the end of two years after her attaining such age or her marriage, which should first happen. But, in case she should die before attaining her age of twenty-one or marriage, then he gave all the said £3000 to the Defendant her brother. He further willed that, until her said Legacy should become due and payable, she should have, for her maintenance, the sum of £40 per annum, and he directed *Scriven*, "as he had been an extraordinary kind "friend to him, to continue his love and kindness towards his children, in advising "and directing them in their whole concerns; and thereby obliged the Plaintiff "and her brother to follow his advice and counsel in all things." Then followed the clause, "that, if, and in case, the Plaintiff should be married before she attained "twenty-one, without the [121] consent of his said worthy good friend (in case he "be then living), then the legacy of £3000 before given to her should cease and be "void, and in lieu thereof he gave to her £500 only."

The Bill, after setting forth so much of the Will, proceeded to state that, after the Testator's death, the Plaintiff, with the knowledge and at the desire of her brother, went to reside with the Defendant *Peirson*, who was their nearest relation, and, while at his house, a marriage was treated by *Peirson* with her present husband, the other Plaintiff, whom she married accordingly. That the Plaintiffs had applied to her Brother, as Executor, for payment of the legacy, which he refused, pretending that the marriage was had without *Scriven's* consent, and that the Plaintiffs knew of the proviso in the Will; whereas the Plaintiffs charged that they were kept in ignorance of the proviso till after their marriage, "which was done with the greater "haste to avoid the importunity of the Defendant *Pretty's* Wife's near relation, "whose fortune was far inferior to the Plaintiff's portion, and against whom she "was wholly advised." That she had been often told she had £3000 for her fortune, and might marry whom she liked. That *Scriven* "was afterwards consenting, "and rejoiced that she had escaped the Defendant's Wife's said relation." The Bill then insisted, "that if any formal assent of *Scriven* be wanting, as is pretended, "yet, having taken the advice of the relations she was placed with at her Brother's "request, the Plaintiffs were nevertheless entitled to their legacies by the *Justice of "the Court."*

The Defendant *Pretty*, by his Answer, did not deny that the Plaintiffs were ignorant of the clause in the Will till after their marriage; but he said that, the Will having been proved in the prerogative Court of Canterbury, they *might have* resorted to it for information as to its contents, "and he doubts not that the Plaintiff "John perused the same, he being a Scrivener, and a man in years, and versed in "business, and the words of the Will being very plain and express." He insisted that by the Will the Testator had given to him (the Defendant) all the rest and residue of his Estate; that the Plaintiff's maintenance of £40 per ann. [122] determined by her marriage; and that, as to the principal legacy, "in regard they "had intermarried without the knowledge or approbation of *Scriven*, therefore the "Legacy ceased and became void, and £500 was due in lieu thereof, which he was "ready to pay, and prayed it might be disposed of for his sister's best advantage."

The Defendant *Scriven* said that the Testator having made him Overseer of his Will, he was always ready to give the best advice and assistance to the infants—

that, after the Testator's death, he took the Plaintiff *Elizabeth* home to his house, intending to have the care of her person, but was disappointed by the improvident marriage of the Defendant *Pretty*, who, being then an apprentice not yet out of his time, within a month after his Father's death was prevailed on to marry one *Judith Pattle*, and, together with his Wife's Father, took possession of the property and managed it themselves; whereupon he (*Scriven*) told them, "that, since they had got the Plaintiff's portion into their hands, it would be convenient they should also have the care of her person;" and she was then accordingly removed to *Pattle's* house.—That *Pattle*, "having a Son towards the Law," designed to marry him to the Plaintiff, and that the Plaintiff was importuned by her Brother's Wife for that purpose; but he (*Scriven*) was not consulted in it, and, if he had, "believes he should not have consented." That the Plaintiff was afterwards removed to *Peirson's* house, as he believed, by her Brother's consent; and that, "the day after her marriage, *Peirson*, together with the Defendant *Pretty*, came to his (*Scriven's*) house, and acquainted him therewith, at which he was surprised, but said, since she had married without his consent, he was very glad she had disposed of herself to so worthy a person, whom he had known so long, having done much better, in his judgment, than her brother, whom he had reproved for marrying without his consent, telling him it might be an example for his sister to follow."

The Defendants *Peirson* and *Nesbit* also spoke of the design formed by *Pattle* to marry his Son (an Attorney) to the Plaintiff, "in order whereto it was contrived that this Son should go along with the Defendant *Pretty* into the [123] West Country, and make some excuse and leave him, and return to marry the Plaintiff before her Brother should come to town; but *Pretty* having intimation of the plot, and by experience knowing that *Pattle* was not capable of giving his son any thing answerable to his Sister's fortune, before his journey desired *Peirson* that his Sister might be kept at his house, to avoid any such attempt, declaring his aversion and his Sister's dislike to it.—That young *Pattle* wrote a letter of love to her on the journey, but Plaintiff understanding the plot, removed herself to *Peirson's* house, where the marriage soon after took place."

*Peirson* said further that he knew nothing of the clause of restriction in the Will, "being that *Pattle* the father declared, her portion was £3000, and none could hinder her from it. That *Scriven*, when the Defendant *Pretty* complained of such design, declared that, if *Pattle's* Son should marry her, he would have her portion whether they would or no." He added that the Testator had a far "greater love for the Plaintiff than for her Brother."

The Court declared that the Plaintiffs were well entitled, notwithstanding the clause of restriction, to the Legacy of £3000; and ordered that the Defendant *Pretty* should pay the same with interest on £2000 since the marriage; referring it to the Master to compute interest thereon, and also what was due to the Plaintiff for maintenance until the marriage, and to look into the settlement made on her marriage, and, if he should find it to be not answerable to her fortune, to see that a proper settlement might be made by her husband.

[124] Sir EDWARD KNATCHBULL, Bart. and Dame MARY his Wife, HENRY CURSON and BRIDGET his Wife, GEORGE DE BILLINGHURST and ANN his Wife, HENRY MICHAEL GOOLD and ELEANOR his Wife, Plaintiffs, and STEPHEN HENRY GRUEBER, Defendant. July 28, 1817.

[See *Colly v. Gadsden*, 1865, 34 Beav. 419; *In re Arnold*, 1880, 14 Ch. D. 279; *Jacobs v. Revell*, [1900] 2 Ch. 863.]

[This case was very fully argued before the Lord Chancellor at different times, both on the general doctrine of the Court as to the Execution of a Contract with Compensation for a partial defect of Title, and on the particular circumstances of the Case itself; but, from the view which his Lordship has taken of it, it seems unnecessary to report those Arguments.] On a Bill by Vendor, for specific performance, with an allowance to the Defendant by way of compensation for a part of the Estate to which the Plaintiff is unable to make a good title; the Defendant having taken possession under the Agreement, one of the terms of

which was "that immediate possession should be given"; and, in the course of disputes which arose subsequently as to the title to this part of the Estate, having been turned out of the possession so taken; *held*, that the Vendor, in so turning him out of possession, has abandoned his right to a specific performance; and the Bill dismissed accordingly: without going into the question as to the materiality of the defective part.

The *Lord Chancellor* [Eldon]. This Case (reported, 1 Madd. 153) comes before the Court upon an Appeal from a Decree pronounced by the *Vice-Chancellor*.

It appears by the Bill, that, in *October* 1811, the Plaintiffs, who were seised of the Estate in question, had [125] proposed to sell it by auction, in lots, as described in the printed particular, and under certain conditions. The Particular (which was referred to in the Contract afterwards entered into between the Plaintiffs and Defendant), pointed out a somewhat more prudent mode of dealing between the Vendors and any person who should happen to become the Purchaser at the Auction, than seemed to be afterwards thought of in framing the Contract, of which this Bill seeks the performance. By that Particular the property was distinguished into three lots, the first of which was represented as a valuable freehold Estate, containing a spacious mansion-house and several pieces of land—some of them (as, I now understand, is admitted on all hands) forming a part of the Estate called *Cole Nash* (a circumstance which seems not to have been ascertained to the satisfaction of both parties when the Bill was filed): the second of which lots was described under the name of *The Manor-Farm*, but which, in the proceedings, is denominated *The Stone-Stile Farm*, and is part of the premises afterwards sold to *Wildman*: and the third is called *Marsh Land*, and is described as distinct from all the rest of the property, and as constituting the third lot entirely by itself.

This Sale by Auction, however, being intended to take place only in case the Estate should not be sold by private contract, it is admitted that an Agreement was entered into on the 15th of *October* 1811, between the Plaintiffs and Defendant, for a sale of the Estate to the Defendant: but it was nevertheless agreed (and I now mention the circumstance because the Bill alleges that it was at the suggestion of the Defendant, who wished to become purchaser of a part only, and not the whole of the property; while the Answer insists, as I think is also established in Evidence, that it was not at the instance of the Defendant, but of *Sir Edward Knatchbull*) [126] that the Estate should still be made the subject of a Sale by Auction, notwithstanding the Contract.

It is necessary to attend very particularly to the terms of the Agreement so entered into between the parties. It begins by stating, that the Plaintiffs (parties to the Agreement of the first part) "have sold by private contract to the (Defendant) for £52,000, and the (Defendant) hath agreed to purchase for that sum, the fee-simple of Estates of the late Mr. *Hawkins*, advertised to be sold by auction at *Faversham* on the 16th inst. in three lots, including the timber and underwood, free from all incumbrances, except the quit-rents and reliefs, the land-tax, the existing lease of *Stone-Stile Farm*, and the other incumbrances set forth in the printed particulars of sale. That the (Defendant) shall pay Mr. *J. Humphries* (the agent of the vendors) on the execution of this agreement, as and by way of deposit, the sum of £5000, to be paid to the vendors on the title being approved of; the sum of £12,300 to the vendors on the 1st of *February* next; the further sum of £17,300 to the vendors on the 1st of *August* next; and the sum of £17,400 (being the remainder of the said sum of £52,000) on the 29th of *September* next; with interest upon the unpaid instalments, from the date of this agreement, until paid, after the rate of £5 per cent. per ann."

Then follows this part of the agreement—and a very material part, in my view of the case, it is—"That the (Defendant) shall have immediate possession of the mansion-house, gardens, and back-orchard at *Nash*, and also of the wood-land and marsh-land on hand, and shall receive the rents of *Stone Stile Farm*, and of the farm at *Nash*, and other parts of the Estates, which are let, from *Michaelmas day last*, to which [127] time all outgoing shall be paid by the vendors; but the vendors shall attain possession of the title-deeds until the above consideration money and interest shall be fully paid, and the purchase completed; and, in the

"mean time, the unpaid part of the consideration money shall stand charged and secured upon the Estate."

The first of the terms of this agreement therefore is, that immediate possession shall be given to the purchaser; and then follows this stipulation—"That the taking possession, and receipt of the rents, shall not be considered as an acceptance of the title; but the (Defendant) shall, notwithstanding, have a good and marketable title made out to him."

The agreement then goes on—"That the vendors shall, at their expense, forthwith furnish to (the Defendant) an abstract of the title to the Estates, and make out a good and marketable title to the same, free from incumbrances. That this agreement shall, on or before the 1st of *February* next, be carried into execution by such conveyances and assurances as shall be advised by and on behalf of the (Defendant), and such part of the purchase-money as shall remain unpaid shall be secured according to the intent of this agreement, in such manner as shall be advised and approved by *C. Butler* of *Lincoln's Inn*, on the part of the vendors, and by *G. Cooke*, of the *Temple*, on the part of the (Defendant). That the expenses of all fines and recoveries (if any necessary), and the making out the title, and such other expenses as are usually paid by vendors upon sale by private contract, shall be borne by the vendors; and the expenses of the conveyances and such other deeds as shall be deemed necessary for securing the payment of the in-[128]stalments shall be borne by the (Defendant). That the (Defendant) shall, if he thinks proper, have the furniture and fixtures in and about the mansion-house, upon paying for the same according to valuation, in the usual way; otherwise the said furniture and fixtures shall be forthwith removed from the premises. That the sale of the Estates shall take place as advertised; but the same shall be bought in on the part of the vendors; and, if any part is sold, such sale shall be on the account and at the risk of the (Defendant), as well in respect of the auction duty (if any shall be incurred) as in all other respects, except with regard to the expenses already incurred, by advertizing, by catalogues, and for the commission of the Auctioneer; and, if by any accident or oversight the auction duty for what is bought in shall become payable, it shall be referred to two persons, one to be chosen by the vendors, the other by the (Defendant), to consider and decide by whom the said auction duty shall be borne,—whether by the vendors, or by the (Defendant); and, in case they differ, the arbitrators shall chuse an umpire, whose decision shall be final. That, upon the delivering up of *Nash Farm* by the present occupier, who is Tenant at will, such part of the stock and crops as is usually taken by landlords shall be taken by the (Defendant) at a valuation, according to the custom of the country. That, if the (Defendant) shall neglect or fail in the above agreement, the deposit of £5000 shall be forfeited, and the vendors be at liberty to resell the Estate, either by private contract or public auction, and the deficiency of the aforesaid sum of £52,000 on such sale (if any), together with all charges attending the same, shall be made good by the (Defendant). That, in case the (Defendant) shall sell either of the said lots at the present auction, the [129] auctioneer's commission on such lot or lots shall be paid by the (Defendant); and, in that case, the vendors hereby agree to convey such lot or lots to the (Defendant), or the purchaser or purchasers, on payment to the parties of the first part, of the sum or sums of money for which the same shall be so sold, in payment *pro tanto* of the aforesaid instalments. That the vendors shall join in all such notices to quit, or to repair, as shall be required by the (Defendant) to be given to the Tenants of the Estates." And it is signed in the usual manner.

It was intended, then, by this Agreement, that the sale by auction should take place, and that at such sale the Estate should be dealt with as being divided into three lots, which may be called, for distinction, *Nash Court* (including *Nash Farm*), *Stone-Stile Farm*, and *Marsh Land*.

In the first of these lots, as I understand, are included the twelve acres which constitute *Cole-Nash*. It appears from the Evidence that *Cole-Nash* had been purchased by Mr. *Hawkins* (the ancestor of the Plaintiffs) in 1770, not only with a very imperfect title, but without the pretence of a marketable title; and, if the papers and title deeds of the Estate had been looked into at any time before the sale by auction, they would have furnished the means of ascertaining that fact. It is quite clear that the vendors themselves knew nothing of their title to *Cole-Nash*.

whatever they may have known as to that which they possessed to the rest of the premises,—not only, that they were ignorant of the nature of their title to it, but that they could not tell where *Cole-Nash* itself was to be found ; as to which, even now, many years after the date of the agreement, they state that certain parts of the Park were pointed out as constitut[130]-ing that property, though nothing can be more clear than that no part of that property is situated in the Park, but that its true situation is as I shall presently describe it to be.

The Deposit stipulated by the agreement was paid. The Defendant, who had the option of taking the furniture, declined it ; and, shortly afterwards, upon a question arising, by which party the taxes were to be paid, Sir *Edward Knatchbull* was required to take away the furniture, which he did, but not “*forthwith*,” according to the express terms of the agreement. However, as he did remove it, no inference is to be drawn from his not having done so “*forthwith*,” as was there stipulated.

The Sale by Auction took place ; and Mr. *Wildman* became the purchaser of the *Stone-Stile Farm*, at a price which, together with the value of the timber, amounted to £11,900. The Defendant’s concurrence in this purchase (which purchase could not be completed without that concurrence) is held out by the Bill as a proof of his acquiescence in the title, which was the same to *Stone-Stile Farm* and to the other parts of the Estate, except *Cole-Nash* ; but, as far as I am able to collect from the Answer and the Evidence in the cause, the Defendant’s concurrence cannot be stated to amount to more than a concurrence in that single act, with an express protest that it should be without prejudice to any objection he might himself have to the title.

The Bill proceeds to state that the Defendant treated the Estates as his own, with such title as the Abstract discloses, and that the mansion-house and garden are still in his possession—not saying, however, that any other parts of the Estate are in his possession—but alleging, nevertheless, that he treated the whole as his [131] own, and had made a Map of it as of his own Estate. The Plaintiffs also insist that a good title can be made to the whole—or, if not to the whole, at least to all except about twelve acres, “in respect of which, if the Defendant is entitled to avail himself of any objection, a reasonable deduction or abatement may be made from “the purchase money” ; that the agreement has never in any manner been waived or abandoned, but is a good and binding agreement, and ought to be carried into execution—and that, upon the Defendant’s refusal to comply with their proposal of a reference to arbitration, they served him with a notice that they (the Vendors) were in a situation to deliver possession to him agreeably to the contract, and required him forthwith to place his purchase money in Exchequer Bills, there to remain pending the proceedings which his refusal had rendered necessary—but neither had he complied with that last requisition. This Notice is dated the 3d of *November* 1812 ; and the date is material, because I do not find, throughout the Bill, any statement of the transactions which took place between the parties, as to taking or retaking possession, or with relation to the correspondence, from the time of the execution of the agreement, to this 3d of *November* 1812. All that is put in issue by the Bill, is, that the Defendant never made any objection to the title, except to this small piece called *Cole-Nash*—that this small piece “is separate and detached “from the rest of the Estate, or may be separated from it without any material “inconvenience or injury ; being a plot of ground on which there is no building “whatever, and lying without the gates or inclosure of *Nash Court*, the principal “mansion-house and Estate, consisting of about 320 acres, and from which it is “entirely divided by a road.” The prayer of the Bill, therefore, is, for a specific performance of the agreement, and an account and pay-[132]-ment of what remains due for principal and interest of the purchase money—“and, if the Court shall be “of opinion, that the Defendant is not bound to take the twelve acres called *Cole-Nash*, then that it may be ascertained how much ought to be allowed him by “way of deduction out of his purchase money in respect of such premises, and that “the same may be allowed him accordingly in taking the account.”

To this Bill the Defendant has put in an Answer, the substance of which it is difficult to state shortly, because, having reference to all the correspondence which took place, that correspondence must be treated as part of the answer itself, and it is impossible to come at any true knowledge of the nature of this transaction, without going at great length into the facts which that correspondence discloses.

After admitting the agreement, and payment of the £5000 as a deposit, the Defendant represents that he declined to take the furniture and fixtures in and about the mansion-house, according to the option given him by the agreement, and gave notice to the Plaintiffs, or their agents, that, if he (the Defendant) became liable to any taxes in consequence of the same remaining on the premises, he should consider the Plaintiffs as liable—but did not otherwise insist on the removal; and the same had since been disposed of. He then states the sale by auction, and says, “he admits that, immediately, or soon afterwards, he (the Defendant) under and “by virtue of the agreement, and by the authority of the Plaintiff Sir *E. Knatchbull*, “entered into possession of the mansion-house and gardens, though not by way of “a residence for his family; but he is not now in possession thereof, nor did he “continue in possession thereof longer than as after mentioned, nor [133] was “he ever able effectually to avail himself of such possession, by reason of the difficulties “as to the title after mentioned.”

It appears that, on the 14th of *November* 1811, an application was made by the Defendant's solicitors to the solicitor of the Plaintiff Sir *E. Knatchbull*, requiring “the abstract of the premises purchased by Mr. *Grueber*”—and adding, “Mr. *H.* “will be pleased to furnish a general abstract of the whole property, as first con- “tracted for.” They write again on the 11th of *December* 1811, to remind him; and, on the 26th of *December*, the Plaintiff's solicitor acquaints them “that he “has sent the abstract of Mr. *Grueber*'s purchase according to their desire—the “larger abstract containing *Stone-Stile*, as well as *Nash*,—though an abstract of “*Stone-Stile* exclusively had been furnished by him to Mr. *Wildman*'s solicitor— “the lesser abstract forming a part of *Nash*, but being in fact a purchase under “Mr. *Hawkins*'s Will, distinct from the purchase of *Nash*, from his Co-heiresses.” He adds, “Some of the Co-tenants have incumbered their shares, of which separate “abstracts will be delivered without delay, and it is intended to pay off these incum- “brances previous to the completion of the purchase.”

On the 23d of *January* 1812, the Defendant's solicitors laid the abstracts first sent before Counsel; and it was not till the 24th of *April* that the *Supplemental Abstracts* promised in the letter of the 26th of *December* were furnished; but in the mean time the Defendant had caused notices to quit, signed by Sir *E. Knatchbull*, to be served on the Tenants. It is also stated in the answer that several of the deeds mentioned in the two first abstracts were not produced—that many of the statements in those abstracts were unsupported by [134] evidence—and that considerable difficulty arose in identifying the property. Then there is another objection taken—that, as to the marsh lands comprised in lot 3, there was a deficiency on the abstract of 32 acres out of 95; and it is stated, that on the 5th and 7th of *May* conferences were held between the respective solicitors on this deficiency, as well as on the title to *Cole-Nash*, and other difficulties appearing on the face of the abstracts, when the solicitor for the Plaintiffs informed the Defendant's solicitor, in answer to such objections, that *Cole-Nash* had been laid open and thrown into the park belonging to *Nash Court*—that the deficiency in the quantity of the marsh lands arose from the difference between an old estimate and recent admeasurement—and that the statements in the abstracts which were unsupported by evidence were matters of undoubted fact, although no evidence could be obtained respecting them.

On the 13th of *May* 1812, the solicitor for the Plaintiffs makes to the Defendant's solicitor a new representation in writing respecting *Cole-Nash*, which had before been described as a part of the Park, and is now stated as consisting of the premises comprised in five several numbers, forming component parts of lot one, in the printed particulars.

On the 15th of *May*, the Counsel before whom the abstracts were laid, returns them to the Defendant's solicitors with several Queries and Observations on the margin of the first abstract, and written at the foot, as follows:—“The Recovery “suffered by *I. C.* in 1758 did not bar his Estate tail, or the Remainder over. Unless, “therefore, the vendors can shew, either that all his Children are dead without “issue, and that Sir *I. C.*'s Daughters died without issue (which I take not to be “the fact), or that they are barred by the [135] Statute of Limitations, they cannot “make a good title to the premises in question.” On the 16th of *May*, this Opinion, and the marginal Observations, were communicated to the solicitor for the Plaintiffs, who on the 23d returned the abstract. with answers to the observations,

which answers, or many of them, the Defendant says he has been informed and believes were very unsatisfactory.

The Answer then states some material transactions between the Defendant and *Rutton*, who then occupied *Nash Court Farm*, comprising the greatest part of lot one, with the Exception of the mansion-house, stating himself to be tenant thereof at a rent of £500 a year; which, it may be said, was holding it on very favourable terms to himself, though he appears to have originally thought otherwise; and it is intimated that one of the Plaintiffs had an interest in his keeping possession; but *Rutton* at an early period gave notice to the Defendant that, at Michaelmas, when he was to quit, he should sell the stock and crops of grass and corn, and manure, and every thing due that could be sold, and even more than was usual (according to the custom of the country) for an occupier to sell, off the premises; making him an offer to purchase. Some difficulties having arisen as to *Rutton's* right to do this, a Remonstrance was made to Sir *E. Knatchbull*, who recommended an Arbitration, and the Arbitrator determined in favour of *Rutton*. Upon this, the Defendant purchases; and in his answer he complains of his being forced to do so, and speaks of the Arbitrator's not having done justice. However, there is the Arbitration; and it does not seem material to the present question to consider whether the Arbitrator was right or wrong in his decision. The Defendant paid about £5500 for the articles; and he conceives himself to have been injured in this respect to the extent [136] of £400 or £500; but, for the reason already stated,—viz. that it is not material to the present question,—I pass over the correspondence between the Defendant and *Rutton* on this subject, and also that which passed on the subject of Sir *E. Knatchbull's* taking possession of the furniture.

On the 13th of *June* 1812, the Plaintiff's solicitor returns the Abstract of the title to *Cole-Nash*, with a letter, informing the Defendant's solicitor that he is unable to throw any material light upon it, but that a fine levied in 1778 had been considered at that time, when Mr. *Hawkins* (from whom the Plaintiffs claimed) made his purchase, to make a good title, and, if otherwise, still that the price objected to formed so small a portion of the entire purchase, that the defect of title ought to be overlooked.

On the 23d of *July*, he writes again, saying that Mr. *Wildman's* purchase is ready for completion, and that the Plaintiffs are ready to sign, but decline to proceed till they have the Defendant's approval of the title, and an assurance that he is prepared with his Instalments on the 1st of *August*. This letter is followed by another on the 24th pressing dispatch, and by a note on the 27th, containing an appointment for a meeting on the next day between the Counsel of the respective parties; and then comes a letter written on the same day, which appears to be merely an endeavour on the part of the solicitor for the Plaintiffs to set the purchaser right as to the Objections taken with regard to quantity, on certain points which were only imperfectly shewn by the Abstract; and I do not find in the subsequent correspondence any notice of those objections, except in general terms that a good title had not been sufficiently shewn.

[137] The meeting between the professional gentlemen took place, and their opinion is communicated to the Defendant by his Solicitor, at the request (as it is stated) of one of the Plaintiffs, in a letter dated the 29th of *July* (which appears to me an extremely proper letter). "We have had a consultation at Mr. *Butler's* Chambers, and both he and Mr. *Cooke* are decidedly of opinion that the title to "*Cole-Nash* is irremediably bad, or (at least) that it is absolutely bad unless further inquiries are made, and the result of those inquiries turn out favourable. The parties think it would be extremely imprudent, as well as an useless loss of time, to institute any further inquiry" (by which seems to be meant that such inquiry might bring forward a title of some other person better than that either of the vendor or purchaser), "and propose, with a view to the speedy completion of the purchase, that they either indemnify you, or take *Cole-Nash* back at a fair valuation, or relieve you altogether from the purchase";—and it ends with recommending "an honourable arrangement between the parties," as "the only course that can be adopted without having recourse to litigation, which the proprietors are equally anxious with yourself to avoid."

Here then are three alternatives—but, whatever may be my opinion as an individual, I am bound, as a Judge, to say, that, where a man makes a purchase of

an Estate to which the Vendor represents that he has a good title, in such a case the Purchaser has a right to insist that the question, whether he have, or have not a good title, shall be sifted to the bottom, before he can be called upon to adopt either alternative, and before the Vendor can be let off from his original contract. Accordingly, the Defendant had a right to say, if he [138] chose—"I will have these inquiries made, before I determine whether to take the property at all, or in the qualified mode in which you now propose that I shall take it."

It appears that, after this, several arrangements were proposed as to Mr. Wildman's purchase, and on this subject I shall say nothing but that, having read the papers over and over again with the greatest attention, the result is, that the Defendant has a right to see that that purchase is made good by the Vendors, without prejudice to his right to dispute the title to the other parts of the Estate.

The Answer, after stating so much of the transactions as leads to this result, goes on with the correspondence, and states a letter from the solicitor for the Plaintiffs to the Defendant's solicitors, dated the 31st of July 1812, referring to a proposal from them "that the purchase shall be suspended for twelve months in order to make inquiries respecting the title to the twelve acres";—and, if nothing should be found, the Defendant to take the title on absolute covenants. This letter goes on:—"I can hardly form a judgment upon these proposals, as you don't say how much of the purchase money Mr. G. proposes to pay, and how the remainder is to be secured. I see no good that can arise from the search," &c. (stating reasons why it should not be required).—"It is too much to say that a purchase of such magnitude should be stopped for such a trifle, when we offer to take the twelve acres off your Client's hands, or give him an absolute covenant respecting them. There hardly ever was a large estate without some corner of it being in a similar situation, and it is the first time I ever saw such an objection persisted in by a gentleman who professes to be a wil-[139]-ling purchaser. I trust Mr. G.'s having possession forms no part of the inducement to the line of conduct he adopts. The proposal amounts to no more than a postponement of the payment, which he had better ask in a direct way. How far the parties could accommodate him I cannot pretend to say, though I think it might be managed upon mortgage of the premises," &c. It states that the second instalment is then become due, the first not having yet been paid, and dwells on the great inconvenience sustained by the parties in consequence of so trivial an objection. He writes again on the 3d and 5th of August, pressing for some definitive answer, and stating further circumstances of embarrassment and serious injury to some of the parties by reason of the delay. On the 7th, the Defendant's solicitors write an answer as follows:—"We saw Mr. G. yesterday, and communicated to him your letters, in answer to which he can do little more than refer to what has been before stated. He has no objection to the Stone-Style purchase being completed, *without prejudice to the title to the other Estates*" (a qualification of his consent to that purchase being completed which, it also appears, was acknowledged on the part of the Vendors),—"and he is willing to consent to his £5000 deposit being appropriated in any way that suits best the convenience of the proprietors. He is also quite willing to advance part of his purchase money, notwithstanding no pains, or next to none, have been yet taken to clear the difficulties in the title. He also confirms what Mr. Preston" (one of the Defendant's solicitors) "stated, in answer to the obvious apprehension of the proprietors that he wished to relinquish the purchase, that he has no such intention. nor ever had. If, after diligent inquiries have been made in order to perfect the title, the result should not be favourable, he will then [140] be willing to take such title to Cole-Nash as the proprietors will be able to give him, *upon having absolute covenants and a compensation*."—(what is precisely meant by these last words it is difficult to ascertain)—"with respect to the time necessary to prosecute the inquiries with effect, we mentioned twelve months to Col. De Billinghamst (one of the Plaintiffs), because he desired us to name some period—you must be perfectly satisfied that that time is little enough for such an inquiry as the title requires. All the other parts of your letter are provided for by the Agreement," &c.

On the 10th of August, the solicitor for the Plaintiffs acquaints the Defendant's solicitor with some inquiries made respecting the title to Cole-Nash of a Mr. Tappenden, whose answer to those inquiries is enclosed; and it contains one passage which I think material, first, because it shews what was Mr. Hawkins's opinion, when he was



owner of the estate, as to the nature and materiality of the property, and next, because it does not quite come up to what is here represented. "Mr. *Hawkins* was a willing purchaser of *Cole-Nash*. He was informed that the title was only under a mortgage in fee, and his reply (I well remember) was, that it was good enough for him, and he would not miss the purchase, as the land was close to his property, on any account whatever." Taking this, then, to be an accurate statement as to *Hawkins's* feelings on the subject of this property, it shews that it was thought material for him to become the owner of it. Then follow statements as to other considerable purchases made under the same title; but, as to those, it is enough to say that this Court does not sit to determine that men shall be willing purchasers whether they will or not, but to judge whether they have got a title; and, if they [141] have not got a title to part of the premises, there is no principle of equity more artificial than that which goes to determine whether the part to which no title can be made is material, and whether the Purchaser, willing or not willing, shall be bound to take the remainder, with any and what compensation for the want of title to the defective part.

On the 19th of *August* the solicitor for the Plaintiffs writes again to urge the completion of the purchase, upon the strength of Mr. *Tappenden's* representations, and referring to the alternatives formerly offered. And here, a circumstance occurs, which I will mention lest it should escape me; and which is extremely material in my view of the case—namely, that, if this is to be represented as the case of a purchase of an estate consisting of a large number of acres, with a defect of title to a very small proportion of it—to the extent of twelve acres only,—it must at the same time be recollected that it is a purchase, of which, according to the terms of the contract, possession was to be given immediately; and, possession having been taken under the contract, the effect of it is to enable the Vendor to say, "You having taken possession under the contract, I am entitled to enforce the contract";—and, if then it should happen that there turns out to be a defect of title as to a part which is immaterial both in quantity and situation, yet the Vendor is not at liberty to disturb the possession, but he must come here, and, leaving the possession as it is, must lay his case before the Court to decide whether there shall or shall not be a specific performance.

Some further correspondence afterwards passed, leaving the question in the same state; and then follows the letter of the 5th of *October* 1812, where commences the transaction, which I think is the most important of [142] any that passed between the parties—for, by his letter of that day, instead of representing to the Defendant (who was in possession, and who was in possession under the contract, which, if it were in any way to be performed, gave him a title to the possession), that, if he had taken possession with a knowledge of the title being defective to that part of the Estate, he had fallen within many of the decided authorities—instead of insisting (as they now insist), that the twelve acres are so immaterial that he is bound to take the property at the price stipulated, only with a reasonable compensation for the value of those twelve acres—the solicitor for the Plaintiffs writes thus to the Defendant's solicitor:—"Without entering again into the motives of Mr. *G.'s* conduct, I will thank you to inform him that I am directed to tender his deposit money with interest, and to demand from him that part of the Estate of which the Vendors have given him possession; and, for these purposes, I shall, on behalf of my clients, attend at Mr. *G.'s* house in *Coleman Street*, on Wednesday next, at twelve o'clock." Now, if the Plaintiffs had a right to insist on the performance of the contract, what right could they have to turn the Defendant out of possession which was taken under that very contract? The Defendant had a right to retain possession under the contract till a conveyance should be executed, provided the difficulty about the title could be set right, which was still a point in question. But the Plaintiffs, by this act, destroy the contract;—and how can they now pretend to have reserved a right to its performance, when by their own act it has been rendered incapable of being performed?

On the 12th of *October*, that stock which *Rutton* had sold to the Defendant for £5500, in order that the Defendant might have the benefit of immediate possession [143] intended by the contract (which immediate possession was certainly meant to be a continuing possession),—that very stock so sold to the Defendant was driven off the premises by order of the Vendors, who had given notice to the Tenants not to pay their rents to the Defendant.

Now, if the case rested here, the question would be simply this—whether the Vendors can insist that the Purchaser shall specifically execute the contract, when, if he were specifically to execute the contract, it is rendered impossible for him to have the full benefit intended him by the contract, and that, through the act of the Vendors themselves? Their difficulty on this part of the case is this—it was incumbent on them, if they meant to have the contract carried into execution upon the principle of compensation adopted in this Court in the case of a defective title as to an immaterial part of the purchase, to have left the property in the enjoyment of the Purchaser so that he should not be deprived of any part of the benefit intended him by that contract; and I cannot see how it would be possible for the Vendors, if nothing more had passed subsequently, to say,—The title shall be good as far as we chuse, and bad as far as we chuse—you shall not have the benefit of the original contract—but you shall be bound to take the Estate with a compensation for so much of it to which we are unable to make a title—and to say this, after they have by their own act placed him in a situation different from that in which he was entitled to stand by the terms of that very contract.

There is a great deal more correspondence, which I can represent only as a negotiation between the parties as to the management of the farms, the Plaintiffs struggling to shew that the Defendant ought to be considered as still in possession, while the Defendant is *fencing* [144] against such a possession. I have looked very minutely into this correspondence, but cannot come to the conclusion that the parties have, by the effect of it, been restored to that state in which they were before the turning out of possession.

It only remains to be seen how the materiality of these twelve acres is put in issue—and that is represented by the Answer to depend, not only on the nature and quality of the land, but on the use to be made of it with regard to the rest of the purchase. I do not, however, think it necessary to go into the cases on the subject; for, if the parties are not restored by the subsequent correspondence to the state in which they stood prior to the 5th of *October*—(and I have expressed my opinion that the subsequent correspondence does not restore them to that condition)—the Plaintiffs cannot make a case to enable them to say, If we did wrong upon that occasion, we are nevertheless entitled to the same relief as if we had acted otherwise. Where parties enter into a contract for the sale and purchase of an Estate, and the Vendor is unwise enough to make it part of the contract that the Purchaser shall take immediate possession, and the question afterwards arises whether it is a case for compensation as to a part to which he is unable to make a title, the Vendor cannot, in such a case (to use the language of this Defendant), turn the Purchaser in and out of possession just as and when he thinks proper.

Upon that part of the case, then, I think the transaction of the 5th of *October* is alone sufficient to put an end to the question. If it were necessary to go into the other part of the case, although I apprehend that the Court is not always bound to send such matters to the Master in the shape of a reference, but may decide for itself upon the Evidence before it, if sufficient to enable [145] it so to do;—I should nevertheless hesitate long before I could determine (regard being had to all the circumstances, as the question of materiality is here put in issue), that these twelve acres of land do not form, in the sense of the Court, a material part of the purchase; as to which there is the evidence of what was *Hawkins's* opinion at the time when he became the purchaser, and there is also the material fact that a considerable part of the Estate is intersected by these twelve acres. I have looked into the case of *Drewe v. Hanson* (6 Ves. 675. *Drewe v. Corp.* 9 Ves. 368), and that other case before the present *Master of the Rolls* (10 Ves. 505), where, the representation being that the house was in good repair, and the land in a state of high cultivation and in a ring fence, the *Master of the Rolls* thought that, as to the House not being in repair, that might be compensated by its being put into repair, unless it could be shewn that the purchaser wanted possession of the house to live in within a certain time—and so also as to the marsh land not being in so good a state of cultivation as had been represented. But, as to the Estate not being in a ring fence, it was not quite so certain that a pecuniary value could be set upon the difference between a farm so situated, and one which is scattered and dispersed with other lands. I know by experience that a small piece of land running through one person's ground to another's may occasion as sensible an inconvenience as a landlord is capable of sustaining.

Still, I agree that a mere speculative objection as to the mischief likely to result, is not that which the Court will proceed upon, and that I must ask, what is the nature of this land ?—and, in answer to this question, I do not find that the nature of the land is so put in issue as to enable the Court to determine as to its materiality. But, considering that all the witnesses for the Defendant [146] speak as to its being material, and that nothing is said with regard to the question on the part of the Plaintiff ; and, regard being had to the decided cases, and to the circumstance that this Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have,—I should be going much too far in saying that the twelve acres are not material, and that he shall be compelled to take the Estate without them.

In the case of the Estate sold as freehold with leasehold adjoining, which turned out to be almost all leasehold (*Fordyce v. Ford*, 4 Bro. C. C. 494) ; the abstract having been delivered, upon which no objection was made by the purchaser, the *Master of the Rolls* held that, if the purchaser had made the objection, he could not have been bound to perform the contract ; but that, having known the fact as it appeared by the abstract, and yet made no such objection, it became a question whether the quality of the land at all entered into the intention with which he made the purchase. So, where the contract was for land lying within a ring fence, and the Defendant purchased, knowing that it was not within a ring fence, the *Master of the Rolls* held that he could not be admitted to say afterwards that he would not perform the contract for want of a ring fence, when he probably bought the land for less money on that very account. (*Dyer v. Hargrave*, 10 Ves. 505. See Sugd. Vend. and Purch. chap. 6, sect. 2.)

But, without entering into those cases, the ground upon which I rest the present case is this—that nothing was done previous to the 5th of *October* 1812, amounting to a waiver on the part of the Defendant of his [147] right to the possession, and that the turning him out of possession at that time was an act, however meant, which has rendered it impossible for the vendors specifically to perform their part of the contract, even if they would otherwise have been entitled to a specific performance with a compensation to be made for the defect of title to *Cole-Nash*. And, upon this ground, I am of opinion that the decree of the *Vice-Chancellor* should be affirmed.

Decree affirmed.

[148] PARTINGTON and ANOTHER v. BOOTH and ANOTHER. *July* 15, 1817.

Injunction to restrain the Defendant (Plaintiff at law) from taking possession under a verdict obtained by him in an action of Ejectment. Previous to the issuing of the Injunction, the costs of the action had been taxed, and a writ of possession executed. The Plaintiff at law afterwards procured an attachment for non-payment of the costs taxed. This is a breach of the Injunction—but, as the Injunction had been improperly issued, the Lord Chancellor would make no order as to committing the party for the contempt.

The Bill was filed on the 12th of *November* 1817, and on the 28th of *November* an injunction was granted (for want of appearance) to restrain the Defendant Booth from taking possession under the verdict obtained by him in an action of Ejectment against the Plaintiff *Partington*, and from proceeding in an action on a Bond against the said Plaintiff, and also from commencing any other action on the Bond or respecting the matters in the Bill mentioned.

Previous to this Injunction being issued, the Costs had been taxed in the action of Ejectment, and a writ of possession sent down to *Manchester* (where the Plaintiff resided), which had also been duly executed ; and, in *May* following, the Defendant's attorney *Dicas* (who was also a Co-Defendant) instructed his agents in town to forward an attachment for non-payment of Costs, which was sent down accordingly, and lodged with the sheriff's officer, who had the Defendant already in custody for a contempt in not putting in his answer to a Bill in the Exchequer.

The Plaintiffs now moved that the Defendants *Booth* and *Dicas*, and their agents in London, may be severally committed for a breach of the Injunction—and the

question was, Whether, under the circumstances, a breach of Injunction had been incurred by issuing the Attachment.

*Wingfield*, for the Defendants, insisted, that the Injunction did not extend to a proceeding for costs in an [149] action whereon judgment had already been obtained, and which costs had been taxed before the issuing of the Injunction.

*Sir S. Romilly*, contra, in support of the motion.

The *Lord Chancellor* [*Eldon*] was decidedly of opinion that a breach of Injunction had been incurred by the issuing of the attachment for costs. If the circumstances of the case had been fully explained to the Court at the time when the Injunction was granted, that Injunction would not have been allowed to extend so far as it did. But, as the case then stood, the Injunction, however erroneously granted, was an order of the Court, and must be obeyed.

His Lordship made no order as to the commitment ; but ordered the Defendants and their solicitors to pay the costs occasioned by the breach of the Injunction, and of the present application. (Reg. Lib. 1816, B. fo. 1368.)

The Injunction was afterwards dissolved on a motion by the Defendants.

[150] GIRAUD and OTHERS, *Plaintiffs*, and HANBURY and OTHERS, *Defendants*.  
*Rolls. July 21, 22, 1817.*

[See *Briggs v. Penny*, 1849, 3 De G. & S. 543.]

Testator appoints A. and B. his executors, together with his wife, "hoping they will be so good, out of respect to his wife, to accept the office." And *as to what worldly property he had*, "I dispose of the same in manner following." The testator then gave several specific and pecuniary legacies, but made no disposition of the residue. Held, that the intention was clearly expressed, by the clause requesting the executors to accept the office, followed by the declaration as to his disposal of his whole property, that the executors should not take the residue beneficially.

This case arose on the Will of Major *Woolhead*, whereby he appointed the Defendant *Hanbury* and another, in conjunction with his (the Testator's) wife. Executors and Executrix of his Will, "hoping they will be so good out of respect to my wife to accept the same." And then went on—"As to what worldly property it has pleased Providence to bestow upon me, I dispose of the same in the following manner"; viz. To his (the Testator's) said wife, his furniture, plate, &c. To the Defendant *Hanbury* and his wife, and to the other Executor, ten guineas each for mourning, and a ring of the value of two guineas. He then gave to his wife the interest during her life of all sums he had, or might at the time of his decease have invested in the Bank of England and elsewhere. And, after some other pecuniary legacies, gave to *John Samson* and *Margaret* his wife, after the decease of his (Testator's) widow, the interest of £1000 5 *per cents.* during their lives, and after their deaths, the principal equally to be divided between their two daughters, the Plaintiffs. But he made no disposition of the residue.

Mrs. *Sampson* (who was the testator's sister and next of kin living at his death) having died in the life-time of the widow, who was since also deceased, the Bill was filed by the daughters and their respective husbands, claiming to be the next of kin of the Testator living at the death of the Widow, for an account, and that the residue [151]-due might be ascertained, and the Plaintiffs declared entitled there to, and be paid the same in equal moieties. The Defendants, the surviving Executor (who was also Executor of Mrs. *Woolhead*), and the representatives of their deceased Co-Executor, insisted that the Plaintiffs were not entitled, as next of kin of the Testator at the death of his widow, the Testator having already devised to them what he intended they should have ; but that, according to the true construction of the Will, the Executrix and Executors became entitled to such residue for their own use and benefit, subject to the life interest of the widow.

*Sir Samuel Romilly* and *Parker*, for the Plaintiffs.

*Hart* and *Barber*, for the Defendants, *Hanbury* and the representatives of the deceased Executor, contended that, the legacies to the executors being unequal, they were not excluded from the residue ; and referred to the rule in *Blinkhorne v. Feast* (2 Ves. Sen. 27, 28) and to *Pratt v. Sladden* (14 Ves. 193, and the references. See

also *Langham v. Sanford*, 17 Ves. 435 ; 2 Mer. 6, &c.) In this Will, there were no words to convert the Executors into mere Trustees, which could never be held to be the effect of the Testator's expressing merely his hope that they would except the office ; nor was there any attempt to dispose of the residue, which, though the gift were imperfect, had been held in some cases to afford a presumption for their exclusion.

*Bell and Richards*, for other Defendants.

[152] *Sir Samuel Romilly*, in reply. All the cases proceed upon the intention of the Testator ; and the rule of exclusion is itself founded upon intention. The only question is, Whether such intention is sufficiently apparent upon the face of the Will. Here the Testator begins with the appointment of his Executors, and then proceeds to make a disposition of his worldly estate. This, in itself, is enough to prove that he did not conceive himself to have already disposed of it by naming his executors, and, added to the inference from that circumstance, the words of request afford a very strong confirmation of the intention not to give them a beneficial interest beyond the legacies expressly provided for them.

The *Master of the Rolls* [*Sir Wm. Grant*]. The words used by this Testator in appointing his executors are strongly indicative of an intention to impose a burthen, not to confer a benefit upon them. If they were to take beneficially after the wife's death, they would have had a sufficiently strong inducement to accept the trust, and to manage the estate to the best advantage.—The more they served her in the first instance, the more they would eventually serve themselves. But the Testator seems to conceive that he is appointing them to an office which, but for their respect to his wife, they might possibly decline. It is from that motive only that he hopes for their acceptance.

In *Lord North v. Purdon* (2 Ves. Sen. 495), the expression used by the Testator was “ that he heartily requested the Defendants to take upon them the execution of his Will. But the case did not depend altogether [153] upon that clause, there having been a bequest over of the residue with a blank for the name of the person to take. And *Sir John Strange*, after observing upon that inchoate clause, adds, that “ when the Testatrix mentions her executors by name, and only as such, in the following sentence, she plainly intended them no further favour ; and there are added pathetic, supplicatory words addressed to her executors, to take on them the execution and burthen of the will ; which words she could not be supposed to have used had she intended them so great a benefit as the residue.” So, in this case, the Testator declares in the clause immediately following the appointment of his executors, that he means to dispose of the whole of his property ; and then, can it be supposed that he would have expressed a *hope* that they would consent to accept the bulk of his property, and have the kindness to take care of it till it becomes their own ? The intention is plain, to dispose of the whole. He does not fully execute that intention, but still this shews that he meant the whole to be the subject of subsequent disposition, and did not conceive that by the appointment of executors he had already disposed of it. I am therefore of opinion that the executors were intended to take the office only, and not the beneficial interest.

[154] *COOPER and OTHERS v. DAY and OTHERS. Rolls. July 21, 1817.*

Testator gives £4000 to trustees upon trust for his two daughters at twenty-one ; and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue. By codicil, reciting this bequest, and that he is desirous of increasing the same to £5000, he revokes the gift of £4000, and gives £5000, upon the same trusts, &c. By a second codicil, reciting the former, and that he is desirous of further increasing to £6000, he revokes the gift of £5000, and gives in lieu thereof £6000, upon the same trusts. This is not a revocation, but substitution, in each instance ; and the £6000 is therefore exempt from the legacy duty.

The testator in this case, by his will, bequeathed to A. B. (widow) £800, to be paid to her within three months after his decease ; and declared it to be his Will that the legacy duty which might be due and payable in respect of the said £800, and of £4000 thereafter bequeathed to trustees therein named for the benefit of his two daughters by the said A. B., should be paid by his executors out of the residue of his personal estate. The testator then bequeathed to the Plaintiff *Cooper* and another £4000, to be paid to them within six months after his decease, upon trust to invest the same

in Government securities, and pay and apply the dividends for the maintenance and education of his said two daughters in such manner as A. B. should direct ; the principal sum of £2000 (part thereof) to be paid to the eldest on her attaining twenty-one, and the remainder to the youngest daughter on her attaining the same age.

The testator made two codicils to his will, by the first whereof, after reciting that he had given to A. B. £800, payable as aforesaid, he gave to her £200 in addition to the said £800, which additional sum he declared to be free from all legacy duty payable thereon or in respect thereof, and which duty he directed in like manner to be paid out of the residue ; and then went on as follows :—" And whereas I have given to (the trustees named in his will) £4000, upon the trusts therein mentioned, and am desirous of increasing the same to £5000, I revoke the said gift of £4000, and give to (the said trustees) [155] £5000, upon the trusts, and to and for the same intents and purposes, and under and subject to the same powers, provisos, and limitations, as are expressed and declared in and by my said will of and concerning the said legacy or sum of £4000, and upon or for no other trust or purpose whatsoever.

By the second codicil, reciting that by his will he had given £4000, upon the trusts therein mentioned, and that by the former codicil he had increased the said legacy to £5000, and that he was then desirous of further increasing the said legacy of £5000 to £6000, he went on, " Now I do hereby revoke the said gift of £5000, and give and bequeath in lieu thereof to (the said trustees) the legacy or sum of £6000, upon the same trusts, and to and for the same intents and purposes, and under and subject to the same powers," &c., as before."

This was an amicable suit, instituted for the purpose of taking the opinion of the Court whether the £6000 bequeathed by the last codicil was to be paid to the Plaintiffs (the Trustees) by the Defendants (the Executors) free from the legacy duty or not.

*Bell and Cooper*, for the Plaintiffs, contended that the legacies of £5000 and £6000, given by the two codicils, must be clearly taken with reference to the original legacy of £4000, by way of increase or augmentation, and in like manner, clear from the legacy duty ; and that this more evidently appeared to be the testator's intention from his having expressed it to be so in the case of the £200 given by the first codicil in addition to the £800 to A. B.

*Horne and Blake*, contra, said that the £200 was expressed to be in addition ; but that the £5000 and £6000 were merely substituted [156] for the £4000 ; and, being substituted legacies, there was no pretence for saying that the testator intended they should, like the original legacy, be clear from deduction in respect of the duty ; and they referred to *The Duke of St. Albans v. Beauclerk* (2 Atk. 636), to shew that they could not be taken otherwise than as a substitution.

The *Master of the Rolls* [Sir Wm. Grant]. The difficulty in this case arises from the contrariety of expression in different parts of the same codicils. The question is, Whether the testator meant to revoke the first legacy, and substitute others, or merely to augment the first to the extent of the others. If his words in one part of the second codicil are to be construed strictly, they amount to a total revocation of the first legacy. But then, in another part of the same codicil, come the expressions, that he has *increased*, and is desirous of farther *increasing*, &c., which seem to imply an augmentation in amount, without any alteration in circumstances.

On a subsequent day His Honour said that, upon the authority of *Leacock v. Maynard* (3 Bro. C. C. 233 ; 1 Ves. J. 279), and *Crouder v. Clowes* (2 Ves. J. 449, 450), he was of opinion that the substituted legacy of £6000 was to be taken as exempted from the legacy duty, in like manner with the original legacy in the place of which it was substituted ; and decreed accordingly.

" Declare, the legacy of £6000, according to the true construction of the will and codicils, not liable to any deduction on account of legacy duty. Decree, such legacy duty as may be payable thereon, to be paid out of the residue."

Reg. Lib. 1816, A. fo. 1546.

[157] JOHN WILLIAMS, *Plaintiff*; and J. T. BRAMWELL WILLIAMS and CAROLINE his WIFE, and JOHN HARRIS, *Defendants*. August 6, 1817.

[See *Morrisson v. Moat*, 1851, 9 Hare, 256.]

*Quære*. Whether a Court of Equity, in the exercise of its jurisdiction to decree the specific performance of an agreement, can interfere by Injunction to restrain a party from divulging a secret in Medicine, which is unprotected by patent. In this case an Injunction which had been granted for that and other purposes was dissolved upon the affidavit of the Defendant (an infant) denying the facts of the case as represented by the Plaintiff's affidavit in support of the Injunction, and upon the ground that there was no secret in the alleged invention.

This was a motion to dissolve an Injunction which had been granted by the *Vice-Chancellor* to restrain the Defendants and their agents "from divulging or exposing the secrets in the Bill mentioned or either of them, and from making, preparing, vending, or selling the Medicines or Remedies therein mentioned, or either of them, or otherwise disposing thereof or interfering therein in any manner howsoever." The Injunction had been obtained upon an affidavit stating that the Plaintiff had for several years carried on an extensive practice in the cure of diseases of the eye, and was the sole inventor and owner of recipes for preparing medicines for those purposes;—that, being desirous of promoting the success in life of his son the Defendant *Bramwell Williams*, he acquainted him with the secret of making such medicines, and gave him the management of his dispensary with a view of taking him into partnership, if he should conduct the business from *March* 1817, to *February* 1818 (the day on which he would come of age) to the Plaintiff's satisfaction;—that he made a proposal to the Defendant to such an effect, which the Defendant accepted, and promised so to conduct himself with a view to its completion;—that, having confidence in the Defendant's integrity, he thereupon put him in possession of his floating stock of medicines and other things, and actually caused a draft of partnership articles to be prepared by his solicitor;—that, after the Defendant had so taken upon himself the [158] management of the business, instead of conducting himself according to his engagement with the Plaintiff, he assumed the entire dominion over the concern, and endeavoured to exclude the Plaintiff from all controul therein, and, instead of keeping the secret communicated to him by the Plaintiff for making the eye medicine, as he ought to have done, he communicated the same to his wife and to the Defendant *Harris*, with a view to injure and ruin the plaintiff, and, upon his remonstrating with him, not only set him at defiance, but removed the various articles committed to his custody, and sold large quantities of such articles, and offered the medicines to sale, and threatened to prepare such medicines and to vend the same, and to sell and distribute various publications of the Plaintiff relative thereto, and to divulge the secret;—having, by such acts, deprived the Plaintiff of the means of carrying on his business.

The Bill prayed that the Defendant *Bramwell Williams* might deliver to the Plaintiff all and singular the articles so removed by him as aforesaid, or such as then remained undisposed of, and an account of such as had been disposed of, and of the money received, for the sale of the medicines &c. ; and an Injunction in the terms above stated.

The Defendant *Harris*, by his answer, denied that the other Defendant had communicated the secret to him, and disclaimed all interest in and concern with the matters in dispute.

The Defendants *Bramwell Williams* (who was an infant) and his Wife (who was of age) had appeared, but put in no answer to the Bill; and, by an affidavit filed by them in support of the present application to dissolve the Injunction, denied the claim of the Plaintiff to be the sole inventor of the secret in question, alleging [159] that the Defendant (the Infant) had been early in life instructed in it by his mother, who had herself received it from another, and communicated it to the Plaintiff her husband. With regard to the other objects of the Injunction, the affidavit went on to deny the truth of the case made by the Plaintiff's affidavit, stating that the Defendant had never assumed any dominion over the property entrusted to him, but had sold such parts as were disposed of under and by the

express directions of the Plaintiff;—admitting, however, that he had prepared some medicines according to the secret communicated to him by his mother, and insisting that he was justified in so doing. It also set up an undertaking by the father to admit his son a partner, with one half of the profits of sale, as an inducement held out by him for the intermarriage of the Defendants.

Sir Arthur Piggott and Wilson, in support of the motion to dissolve the Injunction.

*Leach and Moore, contra.*

The Lord Chancellor [Eldon] (stopping the reply). There can be no doubt that the Court was strictly regular in granting the Injunction, except so far as it goes to restrain the Defendant from divulging the secret.—If on a treaty with the son, while an infant, for his becoming a partner when of age, the Plaintiff had, in the confidence of a trust reposed in him, communicated to him this secret, and at the same time given him the possession of the articles mentioned in the Bill; and, instead of acting according to his trust, the son had taken to himself the exclusive dominion over these articles, and begun to vend them without permission, it must be said that he had no right in any case so to act—and that he was bound, either to abide by, or to waive, the agreement. If then he had intended to abide by the agreement, the injunction was so far right—[160] and, if to waive it, he was bound to return the articles, and so far the injunction was also right in that case. Upon the Plaintiff's affidavit, therefore, the injunction was properly granted as to this part of the case.

But so far as the injunction goes to restrain the Defendant from communicating the secret, upon general principles, I do not think that the Court ought to struggle to protect this sort of secrets in medicine. (See *Newberry v. James*, 2 Mer. p. 446.) The Court is bound indeed to protect them in cases of patents, to the full extent of what was intended by the grant of the patent, because the patentee is a purchaser from the public, and bound to communicate his secret to the public at the expiration of the patent. Then, whether the principle can be extended to such a case as this—whether a contracting party is entitled to the protection of the Court in the exercise of its jurisdiction, to decree the specific performance of agreements, by restraining a party to the contract from divulging the secret he has promised to keep, that is a question which would require very great consideration. But the present case is not one which calls for the determination of it. If the Defendant has already disclosed the secret, the injunction can be of no use. If he only threatens to disclose, it then becomes necessary to look at his affidavit; and by that he insists that what he has to disclose is no secret at all.—Then how is the Court to try this question? or what can the Court do with the case altogether?

Upon the other part of the case there appears, by the Defendant's affidavit, to be no ground for supporting the injunction.

Injunction dissolved.

[161] JOHN JONES, Plaintiff, and WILLIAM JONES, THOMAS JONES, HENRY JONES, WILLIAM TAYLOR, and WILLIAM COKER, and JOSEPH JONES, and OTHERS (Infants), Defendants. *The Master of the Rolls for the Lord Chancellor.* March 17, July 29, 1817.

A Court of Equity has no jurisdiction to determine on the validity of a Will, either of real or personal estate. Demurrer to bill by heir at law, for a discovery, seeking also relief, allowed; the relief sought being, *first*, that an issue might be directed to try the question in a different county, on an allegation of undue influence—an heir at law not being entitled to any issue except by consent, and a bill in equity not lying to change the venue. *Secondly*, for the production of title-deeds, without its being shewn how they can be of service in assisting him to recover at law. *Thirdly*, to restrain the Defendant (Devisee) from setting up outstanding terms, unsupported by allegation that there are any outstanding terms which may be set up. *Fourthly*, for an injunction to stay waste and destruction, &c., and for a receiver,—there being no instance of the Court so interfering, as between heir at law and devisee, where there adverse rights are in litigation; and on the ground of negligence and delay; the bill having been filed more than



two years after the death of the presumed testator ; and no action yet brought ; although the commission of the alleged acts of waste and destruction stated to have been immediately after his death. *Fifthly*, that the Plaintiff may be let into possession of copyholds unsundered to the use of the will ; that being mere legal relief, although he might have been entitled to the discovery whether there were any copyholds unsundered. The bill also going on to pray, in the character of one of the next of kin, for an injunction from interfering with the personal estate, and a receiver ; the injunction asked being for an indefinite period, and no allegation of a suit depending in the Ecclesiastical Court. And, although some of the discovery sought might have been proper to be obtained on a bill for discovery only, yet the Demurrer allowed as to that also, upon the ground that, to support a general Demurrer to a bill seeking discovery and relief, it is sufficient to shew that the Plaintiff is not entitled to the relief he prays.

The Bill, filed *July 3, 1816*, stated that *William Jones* (deceased) was at the time of his death seised of large freehold and copyhold estates in the county of [162] *Suffolk*, and had contracted to purchase other estates in the same county, and was also possessed of leaseholds and of a considerable other personal estate ; and that he died on the *31st January 1814*, intestate and without issue, leaving the Plaintiff his heir at law, who at his death became entitled to all his said real estates. The bill further stated that the Testator was very old and infirm, and for some time previous to his death not of disposing mind, but that, after his death, one *Frost* an attorney produced to some of the relations who were assembled at the house of the deceased, several loose sheets, which he informed them were the Testator's will, made by him only two days before his death ; one only of these sheets being signed with his name, and not attested so as to pass real estates, by which it appeared that he had given large parts of his real estates to his nephews (the three first named Defendants), and other parts thereof (together with his personal property), to the Defendants *Taylor* and *Coker* (whom he also appointed executors) upon trust to sell, and pay divers legacies and annuities ; and, as to the residue, in trust for the Defendant *Thomas Jones*. That this will had never been proved ; but the Devises had entered into possession of the estates thereby given to them respectively, [163] and the trustees and executors had also proceeded to act under the trusts thereby reposed in them. The bill further alleged that the Plaintiff intended to bring actions for the recovery of the estates, but that he could not safely proceed without a discovery of the matters aforesaid, especially of any outstanding terms or other incumbrances which might be set up to defeat him at law, and also that, from the extent of the property, and the number and influence of the persons claiming under the will, he could not hope for a trial within the county ; for which reason the bill claimed the assistance of the Court in directing an issue *Devisavit vel non* to be tried in another county. The prayer of the bill was as follows—" That the Defendants may answer the premises, and that after a full discovery of the matters aforesaid it may be declared that the said pretended will was not the true last will of the said *William Jones*, and that the said rough draft bearing date the 29th day of *January 1814* may be declared to have been obtained from the said *William Jones* by fraud, if signed by him in mistake and ignorance of its contents, and that the same may be delivered up to be cancelled, or that an issue, whether the said *William Jones* made any will or not, may be directed to be tried at the assizes to be holden in and for any county adjoining the said county of *Suffolk* ; and that all proper and usual directions may be given for the trial of such issue ; and that the Defendants may produce all the title-deeds, evidences, and writings relating to the said *William Jones's* real estates, or such of them as may be necessary on such trial, and that they may be restrained from setting up any outstanding mortgage term or terms so as to defeat the Plaintiff's claim in any issue or action directed by the Court, or which the Plaintiff may be advised to bring for the recovery of any of the said real estates, or the rents or profits thereof ; and that, in the mean [164] time, the Defendants (particularly the trustees and executors and also the said *Henry Jones*) may be restrained by injunction, from committing any spoil, waste or destruction on the said *William Jones's* real estate, or any part thereof, and from selling and disposing of the same real estates, or any part or parts thereof, or charging or incumbering the same, to any person or persons ; and that an

account may be taken of the rents and profits of the said *William Jones's* real estates possessed or received by the Defendants, &c., since the death of the said *William Jones*; and that a receiver may be appointed thereof; and that the Plaintiff may be immediately let into possession of all such parts of the said copyhold estates of the said *William Jones* as was not surrendered to the uses of his will; and that an account may also be taken of the said *William Jones's* personal estate and chattels come to the hands or use of the said Defendants, &c., and also an account of the said *William Jones's* debts and funeral expences; and that the said personal estate may be applied in the payment of his debts and funeral expences in a course of administration; and that the clear surplus thereof, and the names and shares of the Plaintiff and of the other parties who, whether as the next of kin, or representatives of the next of kin of the Intestate, shall be entitled to a distributive share and shares thereof, may be ascertained; and that for those purposes it may be referred to the Master to enquire who were the next of kin of the said *William Jones* at the time of his death, or who were or are the representatives of such next of kin, being brothers or sisters; and if such or any of such next of kin, a child or children of a brother or sister, are or is since that time dead, who are or is their or his or her personal representatives or representative; and that all usual and proper directions may be given for taking the accounts, and making the en-[166]-quiries aforesaid; and that the Defendants, the pretended executors, may be restrained from interfering with the personal estate; and that the receiver to be appointed as aforesaid may be as well the receiver of the personal estate and effects, and the interest, dividends, and produce thereof, as of the rents and profits of the real estate."

To this Bill general demurrers were put in by the several Defendants.

*Bell* and *Barber* in support of the demurrers. This is a mere Ejectment Bill,—a bill by an heir at law seeking to impeach a will of real property. On such a question this Court has no jurisdiction. *Kerrich v. Bransby* (3 Bro. P. C. 358 [2nd ed. 7 Bro. P. C. 437]), *Ex parte Fearon* (5 Ves. 647; and see note), *Pemberton v. Pemberton* (13 Ves. 290). All the Court can do in such a case is to direct an action, or the trial of an issue *Devisavit vel non*. Nothing is here wanted in aid of proceedings at law—no account—no production of title-deeds. The alleged ground of waste and destruction will not support the case, for a bill in equity will not lie to restrain waste under an adverse title. But, if there is any equity at all in the bill, at best it is multifarious, and, upon that ground, not to be sustained. The *Vice Chancellor*, in a recent case,<sup>(1)</sup> has decided in favour of a negative plea to a bill of this sort stating outstanding terms, and praying relief as founded upon such a statement. A party out of possession praying the production of title-deeds must allege that they are necessary to enable him to maintain [166] an action at law. But here the Plaintiff has prayed consequential relief as if the title-deeds were already in his possession. There is a difference between waste and destruction or trespass; and though the Court has sometimes interfered by injunction in the latter case, as in *Crockford v. Alexander* (2) there is no instance of its so interfering as between Heir and Devisee (see *Smith v. Collyer*, 8 Ves. 89), and the Court will not go further in such cases than it has gone already. To entitle a party to relief in case of waste, there must be a privity of possession. The bill does not pray a receiver in the only way in which the Court will grant a receiver in such a case,—that is, pending an action at law—and if it had so prayed, it must have failed; because coupled with a prayer for relief to which the Plaintiff is clearly not entitled.

*Hart*, *Agar*, and *Heys*, in support of the Bill. The Bill is not objectionable on the ground of multifariousness, which is only when unconnected portions of right are sought against different Defendants who ought not severally to be burthened with the expence of defending themselves against claims to which only one of them is strictly liable.

It was formerly the practice that, where a Plaintiff was entitled to discovery though not to relief, the Defendant was bound to answer, although he might demur to the relief sought; and when this practice was altered by Lord *Thurlow*, the alteration was certainly not meant to extend to a case of this description, where the objection [167]-tion to the relief only arises out of the jurisdiction. Admitting that the Court cannot decide on the validity of a will in the first instance, yet, if the will be once proved at law to be a forgery, a party afterwards coming into this Court has a right

to have the instrument delivered up on the ground that it is against equity to permit the holder to retain it, as a future possible cloud upon the title. But in this case the Plaintiff is entitled to some, if not to all, the relief he seeks. In the case of *Shewen v. Lewis* (3) lately decided at the Rolls, [168] which was a bill like the present, the Court directed an issue. This is a general demurrer for want of equity, not objecting to the bill specifically in point of form. The Plaintiff has a right to know whether there are any outstanding terms, that they may be removed out of the way of his action. He has a right to the production of title-deeds for this purpose, and that he may know what are the estates of which he wishes to possess himself by ejectment. He is entitled to an issue to be specially directed upon the ground here stated of probable fraud and imposition attending the trial of his action in the ordinary way. Destruction of the property is averred, and interlocutory relief prayed thereon, to which he is also entitled. The Court will interfere in a case of irreparable mischief even where the title is contested. In *Smith v. Collyer* (18 Ves. 89), and other cases, indeed, the Court has refused so to interfere between a devisee and heir; but those were cases where the waste committed was in the usual exercise of the right of enjoyment, as cutting timber, &c. If the subject of contention were a house of considerable value, and the party in possession were about to pull it down, would not the Court interfere to prevent him?

*Bell* in reply. The rule adopted by Lord *Thurlow* is most judicious as to a bill praying relief where the party is entitled only to a discovery; and it has accordingly been considered as the settled practice of the Court ever since its first introduction.

With regard to the relief sought in this case, *Powis v. Andrews* (2 Bro. P. C. 476, [2d Ed. 504]) has decided that a will cannot be set aside in this Court upon the ground of fraud, because the [169] question of fraud constitutes a part of the *Animus testandi*, as to which the Court has no jurisdiction. If *Marriott v. Marriott* (1 Stra. 666) were law, a Court of Equity would be always interfering in such cases; but that case, whatever may be its authority, was antecedent to *Kerrick v. Bransby* (3 Bro. P. C. 358; [2d ed. 7 Bro. P. C. 437]), and the question is completely set at rest by the subsequent cases which have been referred to. In *Atkinson v. Henshaw* (2 Ves. & B. 85), and *Oliver v. Ball* (2 Ves. & B. 96. *Gallivan v. Evans*, 1 Ball & B. 191. *Lowe v. Fairlie*, 2 Mad. 102), a receiver was granted to protect the property pending litigation in the Ecclesiastical Court, and this is a ground on which equity will interfere; but it is not the ground upon which the prayer for such interference is here founded. In *Shewen v. Lewis* (see note 2) outstanding terms were alleged, and admitted. The right to the production of title-deeds is only incidental to the discovery, but forms no ground of distinct relief—not such relief as to take the case out of the principle of Lord *Thurlow's* rule. Waste not only gives no right to the interference of the Court in a case of adverse possession, but, if it did, no case is here made for such interference.

Then as to the interference by injunction to prevent the setting up of outstanding terms; if the bill had been properly framed for that purpose, the relief prayed would have been right as to that, and could only have been met by a plea denying the existence of any. But here is an allegation which can be met by such a denial, and, if we had pleaded to this bill, our plea must have been over-ruled for want of sufficient averment. In *Lady Shaftsbury v. Arrowsmith* (4 Ves. 66) the Court ordered an inspection of all deeds admitted to be in the Defendant's possession, creating such incumbrances as [170] were alleged to be in the way of the Plaintiff's title at law; but it would go no farther. In an unreported case of *Barber v. Hunter* (see 3 Mer. 173), though the bill was properly framed in other respects, the Lord Chancellor held that it is not enough to say that the Defendant threatened to set up outstanding terms, but an actual case must be made out.

Then, as to the copyholds—what right can there be to a production of title which may be discovered by inspection of the Court Rolls?

The change of venue is not a sufficient ground to give jurisdiction to a Court of Equity, because, upon a proper representation, the Court of Law will itself give such a direction.

But, if the ground of Demurrer for want of equity is held not to extend to all the relief sought, the bill is evidently multifarious, as mixing the questions of real and personal property; and a party is entitled to demur *ore tenus*. Another ground of demurrer is, that no affidavit is annexed to the bill seeking to have the instrument in question delivered up to be cancelled; and, though that is a ground not upon

the record, it has been decided that it is not necessary it should be so, to entitle a party to the benefit of a demurrer.

*July 29. The Master of the Rolls* [Sir Wm. Grant]. If this had been a bill merely for a discovery, there are several parts of it to which an answer must undoubtedly have been given. In the body of the bill there is [171] a statement "that the Plaintiff intended to bring an action or actions at law for the recovery of "the freehold and copyhold estates devised by the pretended will"; but it is alleged "that, without the aid and assistance of this Court in compelling a discovery, he "cannot safely proceed to trial in such action or actions."

But he concludes with praying relief, upon the same objects, with regard to which he had before stated that he only wanted a discovery in aid of an action. For he prays, that this Court will declare, "that the pretended will was not the "true will of the late *William Jones*, and that the same may be delivered up to be "cancelled"; and, as consequential on that relief, he prays an account of rents and profits of the real estate—an account of the personal estate—of debts and funeral expenses—an enquiry as to next of kin, and a distribution of the clear surplus.

It is impossible that, at this time of day, it can be made a serious question, whether it be in this Court that the validity of a will, either of real or personal estate, is to be determined. There is, however, an alternative prayer, that the Court will direct an issue to be tried; and then certain other directions are sought, as applicable to that alternative. Now, although there may have been instances of issues directed on the bill of an heir at law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment; and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment. If he can have no issue, can he have those consequential directions that are asked [172] only on the supposition that an issue is to be granted? Although the intention to bring an action had been stated in the bill, it is not with reference to an action, but to an issue, that some of the directions are prayed for, as necessary for a proper trial of the merits. It is prayed, that *the issue* may not be tried in *Suffolk*, but in some adjoining county; and that the Defendants may produce all the title-deeds, evidences, and writings relating to the said *William Jones's* real estates, on *such trial*. But, supposing an action had been brought, and that the prayer referred to such action; does a bill in equity lie to change the venue on the ground that no fair trial can be had in the county where the lands are situated?

As to the title-deeds, the bill merely states the fact, that the Defendants have the possession of them, but not that they are in any way necessary to enable the Plaintiff to recover at law. He stands solely on his title as heir, and does not shew how the required production could be of the least service to him. As *Lord Rosslyn* says in *Lady Shaftsbury v. Arrowsmith* (4 Ves. 66),—"The title of the heir is a "plain one, and it is a legal title.—All the family deeds together would not make "his title better or worse. If he cannot set aside the will, he has nothing to do "with the deeds."

When the Plaintiff comes to ask that the Defendants may be restrained from setting up any outstanding terms, the language is varied: for it is, "so as to defeat the "Plaintiff's claim in any issue or action directed by the Court, or which the Plaintiff "may be advised to bring, for recovery of any of the real estates, or the rents and "profits thereof." This undoubtedly would be proper relief to ask, if it had been averred that [173] there were any outstanding terms. But the case of *Barber v. Hunter* (see 3 Mer. 170) is a direct authority that the Court will not proceed on a mere vague allegation that the action may be defeated by setting up outstanding terms. The case before the *Vice-Chancellor* of *Armitage v. Wadsworth* (1 Madd. 189) shews, that, if the assertion were made, it might be met by a negative plea.

Then there is a prayer, "that, in the mean time" (that is, I suppose, till the trial "of such issue or action), the Defendants may be restrained from committing any "spoil, waste, or destruction on the said *William Jones's* real estates, and from "setting or disposing of or charging and encumbering the same, and that a receiver "may be appointed." No case was cited in which the Court has interfered at the suit of heir or devisee, to restrain waste, spoil, or destruction, by either, while they are litigating their adverse rights in a Court of Law. One should think the case of

the devisee a stronger one than that of the heir; because, till the will is set aside, the *prima facie* title is in the Devisee. Yet in *Smith v. Collyer* (18 Ves. 89) an injunction was refused, when applied for by the devisee against the heir. I own I cannot see a very good reason why the Court, which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise. But, as a condition of such interference, the Court would certainly expect it to be shewn, that the party applying was proceeding with all due expedition to bring the question to a decision; whereas here, the Plaintiff, filing the bill about two years and a half after the Testator's death, does not state that, even then, any action had been [174] brought; whilst the acts of waste and destruction complained of are stated to have been committed soon after the death of the Testator. If the Court will not interpose to stay waste, *a fortiori* will it refuse to appoint a receiver, or to restrain the devisee from exercising other acts of ownership over the property.

Then there is a prayer, that the Plaintiff may be let into immediate possession of all such parts of the copyhold estate as were not surrendered to the use of the will. That is mere legal relief. Whether, in fact, there were any unsurrendered copyholds, might be matter of discovery—but the remedy is at law.

There is a statement that the testator had contracted for the purchase of certain estates, of which no conveyance had been made to him, without saying whether before or after the will, or at all pointing to any relief to be grounded on that statement; nor can I guess at any that could be administered in this suit.

The only remaining part of the prayer is, "that the executors may be restrained from interfering with the personal estate, and that the receiver of the real estate may also be the receiver of the personal estate." It is observable, that this prayer is wholly indefinite. It is not for any particular period, or during the dependance of any particular suit, that the injunction and the receivership are prayed for. The Court has, in several instances, appointed a receiver of personal estate pending a suit in the Ecclesiastical Court—but, in every case in which it has done so, it has appeared that such a suit was depending, whereas there is no such statement in any part of this bill. All that is stated is, "that the executors have not yet proved the will, though they have attempted to do so." What [175] the obstacle was, does not appear. It may now be removed. It is not stated that the next of kin have entered a *caveat*, or taken any step that would produce a suit. The ground of this Court's interference is, that, when a suit is depending, the property must remain to a degree unprotected, till its determination. If the will stands, the Plaintiff is a perfect stranger to the personal estate; for he is neither a creditor, nor a legatee. Why, therefore, is the Court to take care of the personal estate at his instance? The ground can only be, that there is a question somewhere depending, in the result of which it may appear that he is interested in the personal estate, inasmuch as the will may be set aside. But this Plaintiff does not state that there is any such question, either depending, or about to be raised. He, therefore, can have no right to have a receiver of the personal estate appointed. The result then is, that there is no part of the bill, as to which the Plaintiff has shewn himself entitled to any relief. And, although (as I have already said) he might have had a right to some of the discovery that is sought, if he had sought nothing more, yet it is now settled that, to support a general demurrer to a bill seeking both discovery and relief, it is sufficient to shew that the Plaintiff is not entitled to the relief which he prays.

The demurrer in this case must, therefore, be allowed.

(1) *Armitage v. Wadsworth*, 1 Madd. 189. And see the cases referred to, of *Jones v. Davis*, 16 Ves. 265. *Drew v. Drew*, 2 Ves. & B. 161. *Evans v. Harris*, 2 Ves. & B. 364, &c.

(2) 15 Ves. 138. See *Twort v. Twort*, 16 Ves. 130. *Grey v. Duke of Northumberland*, 17 Ves. 281. *Kinder v. Jones*, 17 Ves. 110. *Thomas v. Oakley*, 18 Ves. 184. *De Salis v. Crossan*, 1 Ball & Be. 188. *Acland v. Gaisford*, 2 Mad. 28.

(3) *March 2*, 1815. I have been obliged by Mr. *Simpkinson* with the following note of this case.

"Bill by co-heirs at law impeaching a will made by their ancestor in favour of the Defendant, and praying either an issue, or liberty to bring an ejectment, with the consequential directions. The estates were subject to out-standing terms, as was

admitted by the Defendant. He also admitted that the Plaintiffs were co-heirs, but insisted on the validity of the will.

"The Plaintiffs went into evidence to shew the incapacity of their ancestor; but their evidence was very slight, and was completely contradicted by the evidence brought by the Defendant.

"*Hart and Simpkinson* for the Plaintiffs contended that, the title of the Plaintiffs, and the existence of outstanding terms, being admitted, they were entitled to the relief prayed, in the first instance, without any regard whatever to the evidence; it appearing that the validity of the will was the only question in dispute between the parties, as to which the Court had no jurisdiction to decide.

"Sir *Samuel Romilly* and *Heys* contra.

"The Court was clearly of opinion with the Plaintiffs, and granted an issue; and His Honour thought that it was perfectly unnecessary for the Plaintiffs to have gone into any evidence under the circumstances, and therefore directed the Plaintiffs to pay the Defendant the costs of their depositions."

Reg. Lib. B. 1814, fo. 829, 831.

[176] BRITTON v. TWINING. *Rolls. July 1817.*

[See *Ex parte Wynch*, 1854, 5 De G. M. & G. 206.]

Testator directs £20,000 which he has in the 3 per cents. *to be firmly fixed*, there to remain during the life of his wife, for her to receive the interest; and after her death *to be in the same manner firmly fixed* on the infant *W. C.* "to be so secured that he may only receive the interest during his life; and, after his decease, to the heir male of his body, and so on in succession to the heir at law, male or female"; with a direction that the principal sum is never to be broken into, but the interest only to be received, "his intent being that there should always be the interest, to support the name of *Cobb* as a private gentleman." Though the intention be manifest to give only a life-interest to *W. C.*, yet there being nothing to shew that the word "heir male" was not used in a strict technical sense, *held* that *W. C.* took the absolute interest, the words being such as would create an estate tail of freehold property. *Secus*, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere *Designatio personæ*. *Held*, the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint of alienation, which, in the case of land, would not prevent the creation of an estate tail.

*John Cobb*, by his will, after giving several specific bequests to his wife, declared it to be his will that a full and clear account should be made out of the 22,000 which he then had in the 3 per cents., together with all his bonds, notes of hand, his houses therein mentioned, and also of his book-debts and stock in trade, so that the total might appear in one sum, and then "that the one-half of the whole amount might be put into the funds, and there fixed and secured in the firmest manner, so that it might be only payable to her own receipt." He afterwards made a codicil to his will, as follows: "My fortune being altered since my writing the first part of this paper, this is what I desire may be done in case of my death, viz. Let £20,000 out of the £22,000, which I now have in the 3 per cent. stocks, be firmly fixed and there to [177] remain during the life of my wife, for her to receive the interest for the same, and to be payable only to her own receipt, which at this time will make the amount of £600 per annum. And it is also my will and desire, that after the death of my wife, then the said £20,000 which was settled upon her, be in the same manner firmly fixed upon the now infant boy *William Cobb*. I say, I would have it so secured that he may only receive the interest of the same during his life and after his decease to heir male of his body and so on in succession to the heir at law, male or female. But let it be noticed, that the principal £20,000 stock is never to be broken into, but only the interest to be received as aforesaid; my intent being that there should always be the interest aforesaid to support the name of *Cobb* as a private gentleman."

The question was, Whether, according to the construction of this codicil, *William*

*Cobb* therein mentioned took the absolute interest in the £20,000, or only a life interest in the same.

Sir *Samuel Romilly* and *Shadwell*,  
*Wetherell*, *Rose*, and *Wilbraham*,  
*Bell* and *Preston*,

And *Held*,—for several parties interested, in support of the proposition that *William Cobb* took an absolute interest in the £20,000.

The only question is, whether the words used in this Codicil, if applied to real estate, would have made an estate tail; and this point is decided in the affirmative in the case referred to by *Coke*,<sup>(1)</sup> where he says, "of [178] all the estates taile most coercted or restrained that I find in our bookes, is the estate taile in 39 Ass. p. 20, where lands were given to a man and his wife, and to one heire of their bodys lawfully begotten, and to one heire of the body of that heire only."

Then, if the words, applied to freehold property, would create an estate tail, they give the absolute interest in personalty, according to the rule in *Lord Chatham v. Tothill* (6 Bro. P. C. 450; [7 Bro. P. C. 453, 2d ed.]).

The Testator has meant, what by the rules of law, he cannot accomplish—namely, to give a life interest to the heir at law for the time being. In attempting this, he has used words which are strictly words of limitation, and give the absolute interest. In such cases, the Court rejects the particular intention, in order to give effect to that which the law has declared to be the general intention; and that is to be presumed from the words which he has employed. *Blackburn v. Stables* (2 Ves. & B. 367. See *Marshall v. Bousfield*, 2 Madd. 166) is in point.

*Hart* and *Hall*, contra. The case of *Blackburn v. Stables* is wholly inapplicable to the present. There was nothing whatever in that case to prevent the words from being taken in any other than their strict legal acceptation—"no express estate for life given to the ancestor—no clause, that the estate should be without impeachment of waste—no limitation to trustees to preserve contingent remainders—no direction so to frame the limitation, that the first taker should not have the power of barring the entail. Every thing was wanting that had furnished matter [179] for argument in other cases." Here, on the contrary, all we are bound to shew, is, that there is no principle on which to enlarge the estate given to *William Cobb* expressly for the term of his life.

Now, a devise of freehold estates, by words similar to those employed in this case, would not create an estate tail in the first taker; because, the person designed to take upon the death of *William Cobb* being his heir male, and the person designed to take in succession after such heir male being heir both male and female, the Testator has thereby manifested his intention that the heir male of *William Cobb* is the stock from which the inheritance is to spring—the foundation, from which the line of succession, including the male and female issue, is to commence.

But, supposing these words, if applied to freeholds, would create an estate tail, still this would be a case of exception to the general rule that the same words which create an estate tail of a freehold estate will give the absolute interest if applied to personalty; because that rule is confined to cases where the words of limitation are clear and unequivocal words of inheritance, and is not to be extended by analogy to cases where an estate tail of freehold estate would be raised only by construction. Thus, a bequest to A. for life, with remainder to the heirs of his body, must be taken to pass the absolute interest, because the same words, in case of a devise, are clear and technical words of inheritance; but, under a bequest to A. for life, with remainder to his issue, it has been held that only a life interest passes to A. although the same words, in a devise of land, have been construed to give an estate tail. *Warman v. Seaman* (Finch, 279; 2 Cha. Ca. 209). [180] *Clare v. Clare*.<sup>(2)</sup> The reason is, that the former words necessarily comprise all descendants of the first taker, and, by a long established rule of law, are to be considered as strictly and essentially words of limitation. But the word "issue," or the words "heir male" in the singular number, does not of necessity include the whole line of descent, and, when held to do so, it has been by virtue of the desire to give effect to the presumed intention of the Testator; whereas, to extend that operation of the words to the case of personal property so as to vest the absolute interest in the first taker, would be to defeat the intention and so to counteract the very reason upon which the rule was founded. See also *Knight v. Ellis* (2 Bro. C. C. 570, 578), *Seaward v. Willock* (5 East, 198)

Besides, suppose this were a case of real estate, and that the effect of the words must be taken to give an estate tail, yet in the present case they would operate upon an executory trust: for the Testator has expressly directed the property to be so settled or secured that *William Cobb* shall only have the income during his life; and there can be little doubt that this Court, in directing a settlement to be made (whether it be considered as real or personal estate) would take care to confine the interest of *William Cobb* to a life estate.

*Benyon*, for some of the younger children.

Sir *S. Romilly*, in reply.

There can be no doubt as to what was the intention in this case—that all the descendants of the first taker [181] should enjoy the property in perpetual succession. But we are not, in construing wills, to ask what the Testator actually intended; but how, and by what words, has he expressed his intention?

The case of *Seaward v. Willock* is no authority to govern the present case. *Clare v. Clare*, and *Knight v. Ellis*, are upon the word “issue”; and in the latter case it was distinctly admitted, that if the word had not been “issue,” but “heir,” it must have been otherwise decided.

But they say, this, in the case of land, would be an executory devise. How, then, would the Court direct a settlement so as to meet the presumed intention of the Testator? Not by giving an estate for life only to *William Cobb*, with remainder to such person as shall be his heir male at the time of his decease; for that would be to defeat the intention, which is to include the heir female, as well as male, in the line of succession: not by carrying into effect the ulterior trusts for descendants of the first taker; for that would be contrary to the rule of law, and void for remoteness. But, by giving to the first taker the absolute interest, the general intention, which is to include the whole line of descendants, will be effected; the words of gift will have their legal operation; and nothing will be frustrated but the particular restriction, which is inconsistent with the rules of law, and therefore void.

As to the argument from the use of the word “settling,” that word means no more than effectually securing the property, by investing, or keeping it invested, in the public funds.

[182] The *Master of the Rolls* [Sir Wm. Grant]. If this had been a devise of land, the words used would have created an estate tail. I do not conceive that the Testator, in using the word “secured,” as he does in this will, had any reference to a further or future settlement to be made of the money; and, if he had, I do not see that there is any thing which would authorize the Court to make the settlement in any manner different from that which he has himself directed. He gives an estate for life to *William Cobb*; and he certainly meant that *William Cobb* should have no more than a life interest: but that is of no consequence, if he also meant that the heir male should take in the character of heir. Now there is nothing to qualify the words “heir male,” or to shew that they were not used in their strict technical sense. On the contrary, it is evident that the Testator conceived he could make a perpetual entail of the property, so as to make it pass from heir to heir in succession; with a condition, however, which he also conceived he could impose on the power of disposition. The “heir male” is to take in the first instance, in the same manner as the “heir male or female” is afterwards to take; for he says, “to the heir male of his body, and so on in succession to the heir at law, male or female”; so that he has inheritance alike in view with regard to them all.

It would have been otherwise if he had added the words “for life” to the words “heir male.” Then the case would have been the same as that of *White v. Collins* (1 Com. 289), where, after an estate for life to *F. M.* there was a limitation to the “heir male of his body lawfully begotten during the term of his natural life.” This was held to be no estate tail in *F. M.* because [183] of the superadded words. It is in this particular, also, that the case (which was cited) of *Seaward v. Willock* (5 East, 198), wholly differs from the present. There, the Testator had in express terms restricted all the takers to estates for life, and the word “heirs” was inserted only for the purpose of designating the several persons who were to take such life estates. Here there is no such qualification. It is, indeed, declared, that the principal stock is never to be broken into, but only the interest to be received. But that is not sufficient to turn the “heirs” into tenants for life. It is equivalent to a declaration that no heir shall alien the estate, but only receive the rents and profits. But we



are not to say that a Testator has not given an estate tail, because he conceived he could perpetually restrain alienation.

Assuming that, in the case of a devise of land, this would amount to an estate tail, I apprehend it to be settled ever since the case of *Lord Chatham v. Tothill* in the House of Lords (6 Bro. P. C. 450 ; [7 Bro. P. C. 453, 2d ed.]), that whatever would, *directly or constructively*, constitute an estate tail in land, will pass an absolute interest in personal estate. There, the dividends only were given for life, and it was evident that the first taker was intended to have no more than a life interest ; but there was nothing to qualify the words "heirs of the body," and therefore the interest was held to be absolute in the first taker.

In *Bradley v. Peizoto* (3 Ves. 324), the Testator had inserted a clause of forfeiture in case of any attempt at alienation, and had declared that the dividends were bequeathed [184] to the different takers for their support during their lives ; yet, as he had at first used words of limitation that were held to amount to a gift of the principal as well as the interest, the clause in restraint of alienation was considered as repugnant, and the whole fund was given to the first taker.

I conceive that in this case, *William Cobb* took an absolute interest in the fund.

(1) Co. Litt. 22 a. In a note on the passage, Mr. *Hargrave* refers to *Richards v. Lady Bergavenny*, 2 Vern. 525.

(2) Ca. Temp. Talb. 21. *Fearne's Ex. Dev.* 200, 308, and see the arguments on this subject in *Brouncker v. Bagot*, 1 Mer. 271.

HOLYLAND and OTHERS v. DE MENDEZ and OTHERS. DE MENDEZ and OTHERS v. HOLYLAND and OTHERS. *Rolls. Aug. 4, 1817.*

Agreement, on dissolution of partnership, that the continuing partner shall, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, by bond, conditioned to be void on payment of the annuity, "or in case he should at any time after the expiration of the then existing lease be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own." The continuing partner obtains a renewal of the lease, and afterwards becomes bankrupt, and the renewed lease passes under the assignment of his estate. This is not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease.

*George Hudson* died on the 30th of December 1799, intestate, leaving *Elizabeth Hudson* (after-[185]-wards *De Mendez*) his widow, *James Hudson* (his eldest son by a former marriage) and several children by his wife *Elizabeth*, and being possessed, at the time of his death, of a house, wharf, and premises, on which he carried on the business of a coal-merchant, under an agreement for a lease of twenty-one years from *Midsummer* 1786. *Elizabeth Hudson* the widow took out administration, and she, together with *James Hudson*, carried on the trade, in partnership, upon the same premises, till 1801, when the widow married *De Mendez* ; soon after which they agreed that the partnership should be dissolved, and the trade relinquished in favour of *Hudson*, to whom *De Mendez* and his wife should assign the premises, and all the goods and chattels to which she had become entitled as administratrix, and also all the partnership stock in trade, &c. ; in consideration whereof *Hudson* should pay to *De Mendez* the sum of £525, and also secure to be paid to trustees for the use of *De Mendez* and his wife, for the support of themselves and the children of both her marriages, an annuity of £250 to be payable during the life of *Hudson*, in the manner and with the condition after mentioned, to be secured by his bond and assignment of the premises as after mentioned.

In order to carry into effect this agreement, an indenture dated the 1st of January 1802 was entered into and executed between the parties, whereby it was declared that the partnership was dissolved ; and, in consideration of £525 paid by *Hudson*, and of his securing the said annuity as after mentioned, *De Mendez* and his wife assigned the premises so agreed to be assigned to *Hudson*, his executors, &c., absolutely, for his and their own use and benefit ; and *Hudson*, thereby, for himself, his heirs,

executors, &c., covenanted in manner following, *i.e.* that "he would forthwith use his greatest and utmost en-[186]-deavours to procure a lease of the premises at his own costs, &c., pursuant to the agreement under which the same were then held, and, when necessary, to obtain a renewal thereof for the further term of 21 years, at the like costs, &c.; and likewise would, at the request and costs, &c., of *De Mendez* or his wife, or of *Smith* and *Kirton* (trustees), or the survivor, &c., well and effectually assign and assure the premises to *Smith* and *Kirton*, or the survivor, &c., for the remainder which should be then to come of the then existing or any renewed term, for the better securing of the annuity of £250 thereby agreed to be paid, and secured by bond, as after mentioned." And by bond, of even date with the said indenture, *Hudson* became bound to *Smith* and *Kirton*, in the sum of £2000, with a condition to be void, if the said *Hudson* should well and truly pay the said annuity of £250 as therein mentioned, "or in case he should use his greatest and utmost exertions and endeavours to procure a renewal and fresh grant or lease for 21 years in the premises, and should, at any time after the expiration of the then unexpired term, be dispossessed of and be compelled and obliged to leave and quit the premises, without any collusion, contrivance, consent, act, or default, of him the said *James Hudson*."

This annuity was further secured by a warrant of attorney to confess judgment, which was entered up on the bond, *Hudson* at the same time executing to *De Mendez* another bond of indemnity against the debts and engagements of his father *George Hudson* and of the partnership. And by another indenture, of the same date with the preceding, the trusts of the annuity were declared according to the agreement, and the same was directed to be paid *De Mendez*, during his life, or so long as he should continue solvent, and, upon his death, [187] or insolvency, to *Elizabeth* (his wife) for her life, for the support and maintenance of herself and children, free from the control or engagements of her said husband.

Upon the execution of these several instruments, the agreement for a lease was deposited with the trustees (*Smith* and *Kirton*); and afterwards, on the 6th of October 1802, *Hudson*, in consideration of £200, obtained a lease for 21 years from Midsummer 1807. On the 20th of February 1813, he became a bankrupt, having regularly paid the annuity up to that time; and the Plaintiffs, *Holyland* and others, having been appointed assignees, became possessed of the premises, and of the said lease thereof, by virtue of their assignment.

The bill filed by the assignees, alleging that the several securities for payment of the annuity had become void by *Hudson's* bankruptcy and the assignment of his estate, under the clause by which the same was made no longer payable after he should become dispossessed of, or compelled to give up, the premises, prayed a declaration accordingly, and that the said securities might be delivered up to be cancelled, and the judgment on the said bond and warrant of attorney vacated, and an injunction to restrain the defendants, *De Mendez* and his wife, and their trustees, from proceeding at law in respect thereof.

*De Mendez* the husband, having become bankrupt, and residing abroad out of the jurisdiction, a cross bill was filed by the wife and children against *Hudson's* assignees, and against the trustees of the deeds of 1802, and the assignees of *De Mendez*, alleging that *Hudson's* act of bankruptcy was fraudulent, and the commission against him a concerted commission, and that his as-[188]-signees were bound by his covenant to execute an assignment of the new lease for securing the annuity, claiming therefore to have a lien on the premises in equity for the annuity, and praying a declaration accordingly, an account and payment of the arrears, and an assignment.

*Hart*, *Cooke*, and *Pugh*, for the Plaintiffs in the first cause (the assignees of *Hudson*), insisted that the bankrupt having been dispossessed by his bankruptcy, the only question that could remain was, whether that bankruptcy was fraudulent. *Shee v. Hale* (13 Ves. 404), was upon the distinction between an assignment under an act of bankruptcy, and under the insolvent act; the latter being voluntary.

Sir *S. Romilly* and *Roupell*, for the Plaintiffs in the cross cause (*Mrs. Mendez* and her children). The only question is as to the effect and construction of the bond. It was never contemplated that, because an act of bankruptcy might be committed, by reason of which *Hudson* would cease to be personally liable for the payment of the annuity, his assignees should not continue liable. In the condition

of this bond, the word "default" is introduced, which did not occur in *Shee v. Hale*, and this answers the distinction made between the cases of assignment by bankruptcy, and by virtue of the insolvent act. The "default" has been incurred by the act of bankruptcy. The assignees are not entitled to retain the annuity and also keep possession of the premises.

*Matthews*, for the Trustees.

[189] The *Master of the Rolls* [Sir Wm. Grant]. The condition is very unskillfully worded; but not so much so as to render it difficult to guess at the intention. It was in the contemplation of the parties that the premises might, or might not, continue to be of value to *Hudson*, to whom they were assigned; and that the event of their so continuing, or not, might depend either on *Hudson* himself, or on another person. If then *Hudson* chose to take the premises, he was, in so doing, to contract the obligation of paying the annuity; but in case of his being turned out of possession, the annuity was to cease, because it was granted by him in consideration, only, of his enjoyment of the premises. It is hardly supposable that the parties to the transaction could have meant to provide, by the condition entered into, for the event of bankruptcy. It is at least extraordinary, if it were so, that such event was not expressly mentioned or referred to. On the contrary, it seems that the species of dispossession in contemplation was a compulsory eviction; and they meant to provide that, if *Hudson* should be evicted, not through any fault of his own, he should no longer be burthened with payment of the annuity. The assignees of a bankrupt do not take by a title superior to the bankrupt's own; and the property is vested in them only for the benefit of the creditors. After the discharge of the debts, it reverts to the bankrupt himself, or to his representatives. The expulsion intended to be provided for, was such an expulsion as would leave *Hudson* no benefit from the premises. Here he is constantly deriving a benefit from them in the payment of his creditors, and by means of them he may hereafter become perfectly solvent. It is as his property that the assignees possess them, and it is to the satisfaction of his engagements that the profits are applied. I am therefore of opinion that, according to the true construction of this bond, the event has not happened upon which the annuity was intended to cease.

[190] WILLIAM RANDALL. and GEORGE RUSSELL, SUSANNA RUSSELL and ANN RUSSELL, Infants, Plaintiffs. and SUSANNA RUSSELL Widow, and ANOTHER, Defendants. *Rolls*. Feb. 19, Aug. 11, 1817.

[See *Hardman v. Johnson*, 1815, 3 Mer. 347; *Cockayne v. Harrison*, 1872, L. R. 13 Eq. 434; *Trumper v. Trumper*, 1872, L. R. 14 Eq. 310. Considered, *Phillips v. Phillips*, 1884, 29 Ch. D. 673.]

Testator gives "all his stock of cattle, horses and carriages," to his wife absolutely; and gives his farm "and stock and crop thereon," to his said wife during widowhood. *Held*, the live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause. Testator, seized in fee of a moiety of an estate at *L.*, and in possession of the other moiety as tenant from year to year to *St. J. College* (his lease from the College having expired), gives to his wife, *durante viduitate*, "all that his messuage or tenement, with the farm and lands at *L.* and all his estate and interest therein, she paying the rent reserved to *St. J. College*," &c. The widow, after his death, obtains a new lease, and subsequently purchases the reversion of one to whom it had been conveyed by the College under an Act of Parliament. *Held*, that the renewed lease was taken subject to the trusts of the will, and those in remainder to contribute to the fine paid by the widow in proportions to be settled by the Master. *Held*, that the purchase of the reversion, not from the College, but from the person to whom it had been conveyed by the College, was not, under the circumstances, to be taken subject to the trusts of the will. *Quære*, If the purchase had been from the College itself.

This case arose on the following clauses in the will of *George Russell*, which was duly executed to pass real estates.

"I give and bequeath all my household furniture, goods, plate, linen, china,  
O. XVI.—3\*

books, pictures, implements and utensils of household, and all such wines, liquors and provisions, as shall be in and about my house at my decease, and also all my stock of cattle, horses and carriages, and also the harness, furniture and trappings, thereto belonging, unto my wife *Susanna Russell*, her [191] executors, administrators, and assigns, absolutely, to and for her and their own use and benefit. Also I give and bequeath all that my messuage or tenement, with the farm and lands (and stock and crop thereon) called *Longlands*, situate and being at *Foot's Cray*, with the appurtenances, and all my estate and interest therein, unto my said wife *Susanna Russell*, and her assigns, for and during her natural life, if she shall so long continue sole and unmarried, she paying and discharging the rent payable to *Saint John's College, Oxford*, and all other outgoings for the same, and keeping the dwelling-house insured and in good and tenantable repair." And, after the death or second marriage of his said wife, the Testator gave the said messuage or tenement, lands and premises, to the persons thereafter mentioned, as Trustees of his freehold and copyhold estates, "to the same uses, trusts, intents and purposes, as hereinafter mentioned concerning my other freehold and copyhold lands, tenements and hereditaments." And, after giving other benefits to his said wife, he gave, devised, and bequeathed all his freehold and copyhold messuages, lands, &c., with their appurtenances, to the Plaintiff *Randall*, and the Defendant *Handyside*, their heirs, &c., upon trust that they (his said Trustees) should receive the rents and profits, and after payment of a certain annuity thereout, and subject thereto, to lay out and invest in real or Government securities, the interest thereof, to accumulate so long as his children (the infant Plaintiffs) should continue under 21, and to be considered as part of his residue; and in case his son, the Plaintiff *George Russell*, should live to attain 21, then to stand seised, &c., of his said freehold and copyhold messuages upon trust for the said *George Russell*, his heirs and assigns for ever; in case of his death under 21, for such other son as the Testator might have who should first attain 21; and in case he should have no [192] son who should live to attain 21, for his daughters, as tenants in common in tail, with an ultimate remainder for the Testator's own right heirs.

The Testator was, at the time of making this will, and of his death, seised in fee of one moiety of the estate called *Longlands*, and in possession of the other moiety of the same estate, as tenant from year to year to *St. John's College, Oxford*: the original lease, under which he held the same at a certain reserved rent, having expired. After his death, the Defendant (his widow) entered on the whole estate, and procured a new lease to be granted to her for fourteen years, at a rent of £40, in consideration of a premium of £400.

Afterwards, by an act of parliament "for effectuating an exchange" between the said College and *Christopher Hull, Esq.*, this undivided moiety (among other lands belonging to the College) was vested in the said *Christopher Hull*; who agreed to sell to the Defendant the reversion expectant on the determination of her lease from the College; and the same was duly conveyed to her accordingly, by indentures dated the 20th and 21st of *July 1809*.

The bill prayed an account of the stock and crops on the estate at the time of the Testator's death, and a declaration "that the Defendant (the widow) having had an opportunity of purchasing the said undivided moiety by reason and in consequence of the interest she acquired in the property in question under and by virtue of the will, the Testator's estate was entitled to the benefit of such purchase; that, accordingly, upon being repaid the consideration money, the Defendant might be declared a Trustee of the premises for the benefit of the persons interested, and be decreed to do all [193] necessary acts for conveying the same; but, in case the Court should be of opinion that the Defendant was at liberty to purchase, and did purchase, the inheritance of the said undivided moiety for her own benefit, then that the lease previously taken by her might be declared to be subject to the trusts of the will, and, as the term thereby granted had merged in the freehold and inheritance, that she might be decreed to grant a new lease to the trustees upon the trusts of the will, for so much of the term as would have been expired if she had not purchased the inheritance.

*Hart, Cooke, and Seton*, for the Plaintiffs.

*Fonblanque and Wingfield*, for the Defendants.

[The questions raised were so fully discussed in the judgment which was after-

wards pronounced, that it seems unnecessary to make any other statement of the arguments.]

August 11. The *Master of the Rolls* [Sir Wm. Grant]. The first question in this case is, under which of two clauses in the will the live stock on the Testator's farm is comprehended—whether under that which gives an absolute interest to the widow, or that which gives her only an interest for life in the articles bequeathed to her.

[His Honour here read the clauses in question.]

The Plaintiffs say, that the live stock used upon the farm does not pass to the widow absolutely, under the words "stock of cattle and horses," but only for life, under the word "stock," in the second of these clauses. That, to be sure, is a strong proposition; for it is saying, that, by the words "stock on the farm," cattle and horses are more properly designated, than by the [194] very words, "cattle and horses." If the Testator had spoken of horses, only in conjunction with carriages, he might be supposed to mean carriage horses, and not farm horses—but he gives, not merely his cattle and horses, but "all his stock of cattle and horses." Unless, therefore, it can be contended, that his farm stock is not his stock, or that all his stock means something less than his whole stock, I do not see how the Plaintiffs can succeed in this part of their claim.

On the second clause, a question arises, as to the nature of the interest, which the widow, as tenant for life, takes in articles (such as corn and hay), of which the use consists in the consumption. I doubt whether the testator really intended to confine her to a life interest in such articles; but the words, "during her natural life," are thrown in at the end of the clause; and I do not know how to restrain their application to any particular part of it.

In *Porter v. Tournay* (3 Ves. 311), Lord *Alvanley* says, "There has been a great doubt among Judges, what a person, having a limited use of such articles, must do. Some learned Judges have thought, that they must be sold, and that a person so entitled is to have only the interest of the money. That," he adds, "is a very rigid construction." It is, however, what is contended for by the Plaintiffs in the case now before me. My conception is, that a gift for life, if specific, of things "*quæ ipso usu consumuntur*," is a gift of the property; and that there cannot be a limitation over after a life [195] interest in such articles. If included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life. Originally we know that, by our law, there could be no limitation over of a chattel, but that a gift for life carried the absolute interest. Then a distinction was taken between the use and the property. The use might be given to one for life, and the property afterwards, to another.

A gift for life of a chattel is now construed to be a gift of the usufruct only. But, when the use and the property can have no separate existence, it should seem that the old rule must still prevail, and that a limitation over, after a life interest, must be held to be ineffectual. But I do not see how any definite declaration can be made on this subject, until it shall be ascertained of what the crop and stock on the farm consisted at the time of the Testator's death. On that point some inquiries must be directed.

It has been seen, by the clauses I before read, that the Testator gave his farm at *Longlands* to his wife, during her widowhood. Out of this bequest two questions arise.

I. The Testator was seised in fee of an undivided moiety of this estate of *Longlands*. The other moiety belonged to *St. John's College, Oxford*; but the Testator was lessee, under the College, of that moiety also. The lease, it seems, had expired before the Testator's death; but he continued to occupy, as tenant from year to year; and, in the year 1807, the widow (the tenant for life) obtained a lease from the College, in her own name, for a term of fourteen years.

[196] It is made a question, whether this renewed lease is subject to the trusts of the will, or the absolute property of the widow. On that point, however, I do not see how any doubt can be entertained.—According to the case of *James v. Dean* (11 Ves. 383; 15 Ves. 236), the Testator had a devisable interest in the premises, and the new lease became subject to the same trusts on which that interest was devised. It was attempted to take a distinction, in this respect, between a renewal by a tenant for life, and a renewal by a trustee or executor. But that the principal of what is commonly called the *Rumford Market* case (Sel. Ca. Ch. 61, *Reech v. Sandford*,

so called. See *Ambler*, 719) applies to a tenant for life, as well as a trustee or executor. was determined in *Foster v. Marriott* (*Ambler*, 668), and *Roue v. Chichester* (*Amb.* 715; 1 Bro. C. C. 198, note. And *Owen v. Williams*, *Amb.* 734; 1 Bro. 199, note). It is true that, in the latter case, Mrs. *Roue* was executrix, as well as tenant for life; but it was not her character of executrix, but of tenant for life, that gave her the opportunity of renewing. In *Pickering v. Vowles* (1 Bro. C. C. 197), Lord *Thurlow* takes the point to be settled. In the present case, the greatest part of the renewal term is already expired; and the widow may herself exhaust the whole interest. The Plaintiffs will not, therefore, in all probability, derive much advantage from the decision of this point in their favour. They have, however, a right to a declaration, that the renewed lease is subject to the trusts of the will; and it must be settled by the Master, what proportion of the fine paid on renewal is to be borne by them.

II. It appears that, after the lease was granted, the College, under the authority of an act of parliament, conveyed this estate to a Mr. *Hull* in exchange for some property of his, and he sold the reversion in fee to Mrs. *Russell*.

On the part of the Plaintiffs, it is contended, that the reversion so purchased is also subject to the trusts of the Testator's will. But the bill does not state to which of those trusts it is conceived to be subject, or for whom this estate is claimed. The Testator has given his freehold and his leasehold property in different ways. The eldest son is sole devisee of the freehold estates; all the children are entitled to the leasehold and personal property. To the eldest son, separately, no interest whatever is given in this moiety of the estate. Such interest as the Testator had in it, he divided between the wife and all the children. The eldest son, surely, cannot say, that any further interest acquired in that estate is to belong exclusively to him. The widow has purchased no interest in any estate that was limited to him by the will, and therefore cannot be a trustee for him. I presume, then, it is for all the children that the fee is claimed, as coming in the place of the leasehold interest, of which they had the remainder.

No case was mentioned, in which this sort of equity had been carried to such a length. The ground commonly stated, on which the renewed lease becomes subject to the trusts of a will disposing of the original lease, is, that the one is merely an extension or continuation of the other. But the fee is a totally different subject, which the Testator had it not in his contemplation to acquire or dispose of. Yet, if Mrs. *Russell* had purchased from the College, it might be said, that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; [198] and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although, as I have already said, I am not aware of any decision to that effect. But, here, the situation of the parties was altered by the act of the landlord, without any intervention of the tenant for life. The College had aliened the property to an individual. The benefit attending the tenant-right of renewal with a public body was gone. A lease at a rack rent was all that was to be expected from the private proprietor. Mrs. *Russell's* purchase from the first vendee wrought no change whatever in the situation of those who had had interests in the lease as a College lease. Before she bought, it had become a lease that must expire at the end of fourteen years. Whether Mr. *Hull* sold or kept the reversion, was a matter of indifference to them. It is not enough to say that Mrs. *Russell's* situation, as tenant for life, gave her the opportunity of making the purchase. They must go on, and shew, what right or interest of theirs, she acquired or defeated, by making the purchase. There never was a stronger case for turning the purchaser of a reversion into a trustee for those who had the antecedent interests in the estate than that of *Norris v. Le Neve* (3 Atk. 26). *Norris* was the executor of the testator's will: he was also trustee of a term for payment of deeds. He had had the management of the testator's affairs, and was in possession of all his deeds. The testator had made different limitations of his estate, for life, and in tail, with an ultimate remainder to his own right heirs. *Norris* found out the right heir, and obtained from him the reversion, for a small sum of money. The persons who had the limited interests in the property contended, that this purchase by *Norris*, under such circumstances, ought to be considered as a trust for them or some of them—and they likened it to [199] the case of a trustee obtaining the renewal of a lease for his own benefit. Lord *Hardwicke*, though highly disapproving of *Norris's* conduct, and

expressing a strong desire to turn him into a trustee, yet could not find a ground for declaring the purchase to be a trust for those who had nothing at all to do with the reversion (3 Atk. 37. and 38). In the present case, the Plaintiffs stood wholly unconnected with *Hull's* reversionary interest. Whether he sold it to Mrs. *Russell*, or to any other person, was a matter of indifference to them. All they allege is, that, inasmuch as her situation gave her an opportunity to make the purchase, she ought to be turned into a trustee for them. But the case to which I have referred, furnishes a sufficient answer to that argument. I think there is even less ground for turning her into a trustee for them, than there would have been for considering *Norris* as a trustee for the parties interested in the estate.

This part of the bill must, therefore, be dismissed.(1)

(1) See *Nisbett v. Tredennick*, 1 Ball & Beatty, 29. *Mulvany v. Dillon*, *Ib.* 409. *Winslow v. Tighe*, 2 Ball & B. 195. *Eyre v. Dolphin*, *Ib.* 290. See also *Hardman v. Johnson*, 3 Mer. 347.

[200] LYDIA ANN DOWNES, Plaintiff, against GRAZEBROOK and CHAMBERLAYNE, Defendants. Rolls. July, Aug. 16, 1817.

[See *In re Bloye's Trust*, 1849, 2 H. & Tw. 147; 1 Mac. & G. 495; *Robertson v. Norris*, 1858, 1 Giff. 424; *Warner v. Jacob*, 1882, 20 Ch. D. 220; *Farrar v. Farrar's Ltd.*, 1888, 40 Ch. D. 409; *Hodson v. Deans*, [1903] 2 Ch. 653.]

Conveyance of an estate to *D.* by way of security for the reinvestment of a specific sum of stock, and for payment of the dividends in the mean time, with a power of sale in case of default. Under this deed, *D.* is a trustee for the party making the conveyance, and, as such, disabled from purchasing for himself so long as he continues to be a trustee without the consent of his *cestuy que trust*. Therefore, the estate being put up to sale by auction, at which *C.* as agent for *D.* was the only bidder, and it was knocked down to him accordingly, the sale was decreed not to stand, although no evidence of fraud or undervalue; and not to be supported by evidence of the Plaintiff's having known and approved of the sale taking place, and afterwards attempting to damp it, nor of a previous conversation with her attorney in which the latter exhorted the purchaser to bid a good price for the estate to keep up the sale. *Quere*, If *C.* had purchased for himself, and not for *D.*, whether the sale could have been supported; he being present in the character of Solicitor for *D.* the vendor.

In the month of August 1815, the Plaintiff being in want of money to pay off a debt, for which an estate of which she was seised in fee, subject (as was stated in the Bill) to a mortgage to the Defendant *Chamberlayne*, was also liable under a power of sale to one *Glazier*, applied to the Defendant *Grazebrook*, who agreed to lend her the sum of £7200 3 *per cents.* upon the Plaintiff's undertaking to replace the same on the 15th of March following; and in order to secure such re-investment, together with the amount of the dividends in the mean time, to make a conveyance of her estate to the Defendant by way of mortgage, with a power of sale in case of default. Accordingly the Defendant, at the Plaintiff's request, sold the stock, and paid the whole produce (£4068) into the hands of the Plaintiff or her attorney; and by indenture dated the 16th of September 1815 (which was prepared by the Plaintiff's attorney, and under her direction), reciting that the Defendant had [201] advanced to the Plaintiff the above sum of stock, and had at the request of the Plaintiff sold the same, and paid to the Plaintiff the net produce thereof to the amount above mentioned, and that it was agreed on the treaty, or and at the time of the said loan, that the Plaintiff should secure the said stock to the Defendant, together with the dividends thereof as after mentioned, it was witnessed that, in pursuance of the agreement, the Plaintiff bargained and sold to the Defendant and his heirs the said estate, upon trust for the Plaintiff, till default made in the re-investment at the time agreed upon, or in payment to the Defendant of all dividends and interest which in the mean time the Defendant would have received or been entitled to in case the stock had remained standing; and, after any such default, upon trust to sell by public auction or private contract, and out of the produce in the first place to reimburse himself all expenses, and next to re-purchase the same amount of stock

in his own name, and retain to himself all dividends and interest which he would in the mean time have been entitled to if the stock had remained unsold ; with a covenant by the Plaintiff to re-transfer and pay the dividends accordingly.

In April 1816, the Defendant demanded payment of two dividends then due, together with a further sum of £18, which he had since advanced by way of loan to the Plaintiff, amounting in all to £234 ; and, the Plaintiff being unable to pay, he took her promissory note for the amount. The Plaintiff having also made default in the re-investment of the stock at the stipulated period, prevailed on the Defendant to grant her an extension of the time on the further security of a bond for £200 conditioned for the re-investment on the 1st of August following ; which bond (dated the 15th of June 1816) contained a recital " that the Plaintiff then " was and stood [202] indebted to the Defendant in a sum amounting to £7200 " 3 per cents. which the Defendant had some time before sold out and advanced to the " Plaintiff under an express stipulation for the re-investment at a certain day then " fixed, which the Plaintiff had neglected to do, and the same together with all " dividends thereon then remained due, and that the Plaintiff had requested of the " Defendant to give her till the said 1st of August for the re-payment, and, in order to " indemnify its re-purchase at that time had proposed to enter into the said bond." This bond was prepared by the Defendant's Solicitor, in lieu of one before prepared by the Plaintiff's Solicitor, which the Defendant delivered up to be cancelled as being informal.

At the time stipulated by this bond for the re-investment and payment of dividends, default was again made in both, and the Plaintiff then agreed to make to the Defendant an absolute conveyance of the estate, for which purpose the draft of a deed was accordingly prepared ; but the Plaintiff afterwards refused to perform her agreement ; and thereupon the Defendant brought an ejectment, and caused an affidavit of debt to be prepared, with a design of proceeding to an arrest ; to prevent which the Plaintiff executed a letter of attorney to enable the Defendant to sell the premises, and also signed a warrant of attorney, the condition whereof was, " that no action or other proceedings should be commenced or prosecuted " against the Plaintiff, her lands and tenements, goods and chattels, upon the judgment to be entered up in pursuance thereof, unless default should be made in transferring and replacing the stock, and in payment of the sum of £324 for dividends " already due on the same, and of all future dividends, together with lawful interest " on the dividends already due, from the day on which the last of such dividends [203] " would have been received if the stock had remained unsold, and interest " on the accruing dividends, from the time they should respectively become due, " to the day of payment ; and also in payment of the costs of all actions and processes occasioned by the default of re-investment, and other expenses incident thereto, " to be taxed if necessary : and in case default should be made in replacing and " performing the matters aforesaid on or before the 1st of June then next, and the estate should be previously sold, and the proceeds of sale prove insufficient for the " replacing and performing thereof, then it was agreed that execution should issue " for the sum of £6000, or so much thereof as would enable the Defendant to replace " the stock on the 1st of June, and pay himself the interest, dividends, and costs, " or so much thereof as should remain unsatisfied out of the proceeds of the estate ; " and that the Sheriff might levy the same, and also the costs of entering up judgment, " and all other incidental expenses. And it was thereby agreed that, in the event " of the Defendant's being obliged to resort to his remedies under the warrant, " no execution should be issued, or action, suit, or other process prosecuted against " the Plaintiff personally under the judgment, and that, if the proceeds of the levy " should turn out more than sufficient for the purposes aforesaid, then the distress " so to be taken should not be deemed excessive, but all overplus should be returned " to the Plaintiff, her executors, &c., or to whosoever else should be entitled thereto."

On the 1st of June (the time limited by this warrant of attorney), default was again made ; and thereupon the Defendant proceeded to a sale of the estate by public auction, with the knowledge of the Plaintiff, and after a previous consultation with her attorney, who recommended [204] the auctioneer by whom the sale was to be had, and who was a friend of the Plaintiff's. At this sale, the Defendant, and a Mr. Clarke (as his attorney and agent, were present, and Clarke, as such attorney or agent, bid for the estate 4000 guineas, at which sum it was knocked



down to him ; the Bill stating that, by such bidding on behalf of the Defendant, others were deterred, who would else have offered to become purchasers at the sale ; the answer, on the contrary, denying such statement, and alleging that, previous to the sale taking place, the Defendant was taken by the Plaintiff's Solicitor into a private room, where, in the presence of the auctioneer, the latter urged him " to bid a good price for keeping up the sale " ; to which the Defendant answered that it was not his intention to bid, but that, if he did, it would be in the exercise of his own discretion, and that the estate must be sold. The answer went on to state circumstances, from which it was inferred that the Plaintiff had herself so acted as to prevent a sale to any other person ; namely, that, on the estate being put up, a person stood forward, and declared that the Plaintiff (whom he had seen that morning), had declared to him that she would not consent to the sale ; that, though the Plaintiff's own attorney was present when this declaration was made, and was called upon by the Defendant to state that the sale was made with the Plaintiff's concurrence, he preserved an obstinate silence ; and the same person who made the declaration was afterwards seen in close conversation with the Plaintiff's Solicitor. The Defendant stated his belief that the person in question was sent by the Plaintiff or her Solicitor to prevent a sale, and proceeded to state that, at the time of *Clarke's* bidding, no other person had bid, although the estate had been then put up for a considerable time, and no other bidding was afterwards made, although the [205] auctioneer purposely kept it open more than the usual time.

No notice was given by *Clarke* at the time of the sale, or afterwards, of his attending and bidding on behalf of the Defendant.

The Bill, charging gross fraud and collusion, prayed a declaration that the deed of *September* 1815 was fraudulent, inasmuch as it purported to secure the retransfer to the Defendant *Grazebrook* of the £7200 stock, and the payment of such sums as he would have received for dividends thereupon if standing in his name, and that the same may stand and be a security for such sums only as had been actually advanced and paid by the Defendant to or for the use of the Plaintiff, with interest ;—an account ;—the delivery up of the promissory note, bonds, and warrant of attorney, to be cancelled ;—an injunction to restrain the Defendant from commencing or prosecuting any action on the note or bonds and from causing the Sheriff to make a return to the writ of execution, or further prosecuting the same, or proceeding in the said action, or prosecuting any other action on the covenant in the deed. The Bill also prayed an account against *Chamberlayne* (who was stated to be a prior mortgagee) ;—that the contract entered into by *Clarke* on behalf of *Grazebrooke* might be declared void ;—an injunction to restrain both the Defendants from selling or conveying any of the lands except under the direction of the Court ;—and a sale under such direction, with other matters incident thereto.

The answer of the Defendant *Grazebrook* denied all the charges of fraud and collusion made by the Bill, and all notice of prior incumbrances, insisting on the validity of the several instruments and proceedings so made and [206] entered into, and instituted ; submitting to the Court the question, whether either *Clarke*, or the Defendant, could become the purchaser of the estate, and whether the contract so entered into by the former could, under the circumstances of the case, be supported ; and claiming the benefit of the statute 4 & 5 W. and M. c. 16, " for preventing " frauds by clandestine mortgages," on the ground that this was a mortgage to *Grazebrook* without notice of a prior mortgage, if, as the Bill alleged, the mortgage to *Chamberlayne* was in fact prior to *Grazebrooke's*.

The Plaintiff now moved for an injunction to restrain the Defendant *Grazebrook* from commencing or prosecuting any actions on the promissory note and bonds, and from receiving any monies levied in execution of the writ issued as aforesaid and in like manner to restrain the Sheriff of *Northamptonshire* from paying over to the Defendant the monies so levied, until answer or further order ; and for an injunction also to restrain the Defendant from selling or conveying, or in any manner disposing of, the lands, &c., comprised in the indenture of the 16th of *September* 1815, which were put up to sale by his order or under his authority.

*Bell* and *Haslewood*, in support of the motion, insisted on various objections to the securities taken and proceedings adopted by the Defendant, as harsh and oppressive, and taking advantage of the situation and distresses of the Plaintiff ; principally contending that the Defendant, as standing in the situation of a trustee

could not be a purchaser—that the sale to a person attending in the character of his agent was therefore void—and that the proceedings which had subsequently taken place, could not be supported, as being contrary to the agreement between the parties, which was that [207] the estate should first be sold, and the other securities resorted to only in case of a deficiency.

Sir *S. Romilly* and *Beames*, for the Defendant, resisted the charges of improper conduct, insisting that it was owing to the Defendant's forbearance that the estate had not been sold long before, and the former securities made available to their full extent; that the sale was strictly regular, and the purchase actually thrown upon *Clarke* in consequence of the Plaintiff's own fraudulent attempts to damp the sale; and, lastly, that the Defendant could not be considered, under the circumstances, as a trustee, in the light in which the Court holds a purchase by a person in the situation of a trustee as fraudulent and void.

The *Lord Chancellor* [Eldon]. If the question is to turn on Whether *Clarke* was a purchaser for *Grazebrook*, or for himself, and it appears that he has a good contract, the case is of so much importance in point of principle that I shall read the answer before I determine it. With regard to the previous transactions, *Grazebrook* might bargain for the retransfer of the stock, and the payment of dividends; but he could not bargain *ab ante* for interest on the dividends remaining unpaid. The warrant of attorney, however, goes that length, and so far it cannot be enforced in a court of equity.

But the great question is on the sale itself, and, as to that, I am of opinion that *Grazebrook* cannot be considered otherwise than as a trustee under the conveyance to him of the estate by the deed of the 16th of *September* 1815. Now a trustee cannot (generally speaking) become a purchaser, either by private contract or publicly; and there is a case in *Vesey*, where it was laid [208] down by Lord *Hardwicke*, that such a purchase should not be allowed to stand, although not the trustee himself, but another on his behalf, had bought the estate at a public auction.(1) I take it, however, that the doctrine is not accurately stated in saying that under no circumstances whatever a trustee can purchase.(2) A trustee for sale is bound to bring the estate to the hammer under every possible advantage to his *cestuy que trust*. He may, if he pleases, retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser; and so he may purchase, not indeed from himself as trustee, but under a specific contract with his *cestuy que trust*. But, while he continues to be a trustee, he cannot, without the express authority of his *cestuy que trust*, have any thing to do with the trust property as a purchaser. In order to make the sale in the present case a valid transaction, it is therefore incumbent on Mr. *Grazebrook* to shew that he had such an authority to enable him to become a purchaser at that sale. Now, his answer states the conversation between himself and the Plaintiff's Solicitor, as amounting to such an authority: [209] but it is at all times a transaction to which the Court will look with the utmost jealousy, and it would be too dangerous to allow the Solicitor for the *cestuy que trust*, without one word of authority, to bind his employer.

The next question is one of great importance, *viz.* supposing *Clarke* to be the purchaser, whether, under these circumstances, the sale can be enforced. I recollect that Lord *Kenyon* (3) would not allow the agent for the vendor to bid at a public auction, upon the ground that such a bidding would have a direct tendency to damp the sale.

The *Lord Chancellor* afterwards stated that he had read the answer, and although there was not the slightest ground for imputing to the Defendant either fraud, oppression, or harshness of conduct towards the Plaintiff, he thought that, consistently with the general rule, the sale to *Clarke* could not stand.

*August* 23. The parties then consented to a sale before the Master, and the following order was drawn up: "That the Sheriff of *Northamptonshire* do, out of the monies levied by him in the action in the pleadings mentioned, now in his hands, pay the sum of £200 to the Defendant *Grazebrook* on account of his costs, without prejudice to the taxation of his bill of costs, or to any other question in the cause, and do pay the residue into [210] Court. And, *by consent*, that the estates in question be sold with the approbation of the Master—all parties to join in the sale—to produce deeds, &c.: and the monies arising from such sale to be paid into Court, subject to further order." Reg. Lib. A. 1816, fo. 1609.

(1) *Whelpdale v. Cookson*, 1 Ves. Sen. 9, and see Belt's Supplement to Vesey for the facts of that case, and for a reference to the later authorities. See also *Webb v. Rorke*, 2 Scho. & Lef. 661.

(2) See *Ex p. Lacey*, 6 Ves. 625. "The rule is, not that a Trustee shall not purchase from the *cestuy que trust*, but that he shall not purchase from himself.

"If a Trustee will so deal with his *cestuy que trust*, that the amount of the transaction shakes off the obligation that attaches upon him as a Trustee, then he may buy.

"A Trustee is not precluded from bargaining that he will no longer act as Trustee. The *cestuy que trust* may by a new contract dismiss him from that character; but even then the transaction must be watched with infinite and the most guarded jealousy," &c.

(3) In the case of *Twining v. Morrice*, 2 Bro. C. C. 326. And in *Nelthorpe v. Pennyman*, 14 Ves. 517, the Lord Chancellor said, "It would be a very wholesome rule to lay down, that the Solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the Solicitor is, that the sale is immediately chilled."

TOULMIN v. STEERE.(1) *Rolls. June 1, 1816, August 24, 1817.*

[See *Squire v. Ford*, 1851, 9 Hare, 60; *Otter v. Lord Vaux*, 1856, 2 K. & J. 650; 6 De G. M. & G. 643; *Whalley v. Whalley*, 1860, 2 De G. F. & J. 322; *Vane v. Vane*, 1872-73, L. R. 8 Ch. 392, n. Considered, *Anderson v. Pignet*, 1872, L. R. 8 Ch. 180. Observed upon, *Stevens v. Mid-Hants Railway Co.*, 1873, L. R. 8 Ch. 1064. Limited, *Adams v. Angell*, 1876-77, 5 Ch. D. 634. Not applicable to Indian transactions, *Gokuldoss Gopaldoss v. Rambux Seochand*, 1884, L. R. 11 Ind. App. 126. Distinguished and reflected on, *Thorne v. Cann*, [1895] A. C. 11. Questioned, *Liquidation, Estates Purchase Co. v. Willoughby*, [1896] 1 Ch. 726; but see S. C. on appeal, [1898] A. C. 321.]

Purchaser having employed the Vendor's agent who had notice of an incumbrance, charged with notice, notwithstanding the purchase was made under the sanction of the Court, and an infant was interested in it. Purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in, against subsequent incumbrances of which he had notice..

In May 1805, *Ann Simpson*, spinster, purchased of *Richard Witts*, an annuity of £180 for three lives in consideration of £2000. The annuity was granted and secured in the usual form, by way of rent charge upon certain lands of which *Witts* was the owner, subject to a mortgage in fee to *Robert Harrison* for securing £5000 and interest, which mortgage was accepted in the annuity deed: The deed contained a covenant (amongst others) on the part of *Witts* for further assurance; and also a power for *Witts* to repurchase the annuity on payment of £2045 and all arrears.

*Mark Noble Daniel* acted as solicitor for both parties, prepared the deed, and was one of the subscribing witnesses to it; and so long as the annuity continued to be paid, the payments were made through his hands.

In August 1807, *Ann Simpson* intermarried with *Bryan Holme*; on which occasion the annuity in ques[211]-tion was assigned to *Toulmin* and *Thomas Butterfield Simpson*, upon certain trusts.

*Daniel* having become much embarrassed, quitted the country in 1812; up to which time the annuity was regularly paid. But before that time, viz. in 1806, *Witts* borrowed of one *Wilby* £3000 on a second mortgage of these premises, and *Wilby* afterwards got in the first mortgage by a transfer from *Harrison*. It did not appear whether *Wilby* had, at the time of his loan, any notice of Mrs. *Holme's* annuity. In March 1810, *Witts* sold the estate to the Trustees of the Will of *Lee Steere*, who purchased it under the authority of the Court of Chancery, and it was conveyed to the uses of the will; under which uses *Lee Steere Steere* (the son of *Witts*) was tenant for life in possession, and *Lee Steere*, an infant, his son, was tenant in tail in remainder. The mortgages for £5000 and £3000 were paid off out of the purchase money, and *Wilby* the mortgagee joined in the purchase deed and conveyed the legal estate to the uses of the will. *William Haydon* and *Mark Noble Daniel* were the Trustees of the will.

The bill was originally filed by *Toulmin* and *Simpson*, the Trustees of Mr. and Mrs. *Holme's* settlement, and their *cestui que trusts*, against *Lee Steere Steere*, *Lee Steere* (the infant), and *Daniel* and *Haydon* (the Trustees); but, subsequently, by an amendment, the name of *Toulmin* was struck out as a Plaintiff, and he was made a Defendant. The bill charged notice of the annuity, and prayed a declaration that it was a charge on the lands purchased by the Defendants, in preference to the mortgages, and also an account and payment of the arrears: and in case the Court should think the Defendants had a right to set up the mortgages, or either of them, in bar of the annuity, it [212] prayed that the Plaintiffs might be at liberty to redeem the mortgages; that, upon such redemption taking place, the Defendants might be decreed to convey the legal estate to the Plaintiffs discharged of all equity of redemption, or so that the Defendants might not be permitted afterwards to redeem, except on condition of conveying the legal estate to the Plaintiffs, and of making such further assurances as might be necessary to enable the Plaintiffs to recover their annuity as the first charge on the premises. The bill prayed also an injunction against assigning the mortgages, and a receiver.

It was admitted by the answers of the Defendants to the amended bill, and proved by evidence taken in the cause, that *Daniel* acted, in the sale and purchase of the estate, as agent and solicitor for *Witts* the seller, and also for the purchasers.

It was understood that the Defendants had no actual notice of the annuity; and it was stated that *Witts* the vendor had concealed its existence, but had actually left £2045 in *Daniel's* hands to redeem it, which *Daniel* converted to his own use.

*Bell*, *Heald*, and *Hodgson*, for the Plaintiffs. This cause involves two questions. 1. Whether the Defendants are entitled to set up the mortgages at all. 2. If they can, then upon what terms the Plaintiffs are entitled to redeem.

1. If after executing the annuity deed, *Witts*, the grantor, had paid off the prior mortgage, he would have been bound to convey, or charge, the legal estate for securing the annuity. This would have been not only the general equity between the parties, but [213] results immediately from the covenant for further assurance in the annuity deed. Then any person claiming through *Witts*, with notice of the annuity and covenant, must stand in the same situation with him. That brings the question to this, whether the Defendants had notice of the annuity, and whether they claim the legal estate through *Witts*. As to notice, it is clear they employed *Daniel* as their agent in the purchase, and *Daniel* had complete notice; and actual notice to the agent is constructive notice to the principal: indeed *Daniel* was not only agent, but actually one of the Trustees by whom the purchase was made. With respect to the situation of the Defendants it is just the same as if *Witts* had paid off the mortgages first and then sold the estate; because the contract is with him for an estate clear of incumbrances (upon which terms only the estate could be purchased consistently with the trust under which the Trustees acted), and the mortgagee only joined in the conveyance by his direction. There clearly was not, and could not be, any intention to keep the mortgages alive as distinct interests in the estate. It might have been different if the Defendants had first taken a *bona fide* transfer for the mortgage, and afterwards purchased the equitable estate; but by the mode adopted, the Plaintiffs were shut out from their proper situation as incumbrancers; they were prevented from ever obtaining a conveyance of the legal estate from the grantor of their annuity, and all this by the act of persons having notice of their incumbrance. This is a clear ground for equitable relief, and there is no mode of relief so proper as that of considering them as the only remaining incumbrancers. The cases of *Greswold v. Marsham* (2 Chan. Cas. 170), *Brotherton v. Hatt* (2 Vern. 574), *Le Neve v. Le Neve* (3 Atk. 265), [214] *Mocatta v. Murgatroyd* (1 P. Wms. 393), *Taylor v. Stibbert* (2 Ves. Jun. 437), *Crofton v. Ormsby* (2 Scho. & Lef. 583), *Compton v. Ozenden* (2 Ves. Jun. 261), *St. Paul v. Dudley* (15 Ves. 172), are in point. But it will be said this is not the case of a purchase in fee, because here the estate is bought under a trust, and an infant is interested as tenant in tail; and it may be made a question whether an infant can be bound by such a case of notice. Upon principle it seems clear that no advantage could be taken of that circumstance, for it would give the greatest possible opportunity for fraud; and the case of *Huguenin v. Baseley* (14 Ves. 273) is a strong authority against the argument. There the circumstance of an infant being interested under the conveyance, which had been obtained by fraud, was pressed on the Court, but it had no weight. That was, indeed, a case of actual

fraud ; but there can be no difference in principle between such a case and the present, where the imputation of fraud results directly from the act of the Defendants done with notice of the Plaintiff's rights.

2. But if the Defendants should be thought to be entitled to set up the first mortgage against the Plaintiffs ; then we contend that they can go no further than that. That the mortgage to *Wilby* cannot be tacked, for as to that there is no averment that the money was lent without notice of the Plaintiffs' security : and it is the acknowledged law of the Court that a party cannot avail himself of his want of notice unless he pleads it. The mode of redemption we contend for, is, that on payment of the £5000 the Plaintiffs are entitled to an absolute conveyance of the legal estate, not again redeemable unless on repurchase of the annuity as well as payment of the mortgage money. To decree [215] two redemptions would be merely to introduce confusion, for the purpose of creating expence.

Sir *Samuel Romilly* and *Roupell*, for the Defendant *Lee Steere Steere*. It must be admitted that if *Witts* had paid off the mortgage and taken a conveyance of the legal estate, he could not have set it up : but the ground of that is, that he was himself the Plaintiffs' debtor, and that ground fails as between the Plaintiffs and the present Defendants. Their purchase was made under peculiar circumstances—sanctioned by the decree of this Court ; and therefore *Daniel* was rather the agent of the Court than of the parties. At all events that doctrine must apply so far as the infant is concerned, even supposing *Steere* the tenant for life to be bound.

The only question is, to what extent he is bound. The Defendants are entitled to set up the £5000 mortgage, which is actually excepted in the grant of annuity. As to that the Plaintiffs are not to be in a better situation than if no sale had taken place. It may be a question whether they can avail themselves of the mortgage for £3000 also. But they would clearly have a right to do so, if that mortgage was originally taken without notice of the annuity ; and it is to be remarked, that the Plaintiffs do not charge that any such notice existed. The utmost, therefore, which can now be decreed is, that the Plaintiffs may be allowed to redeem the first mortgage ; and the question will then arise, whether they are not to be redeemed by the Defendants in respect of the second mortgage. It is true, by the mode of conveyance adopted on the purchase there has been a confusion of the legal and equitable estates. But it is settled [216] there can be no merger in equity, which always keeps incumbrances alive, or considers them extinguished, as will best serve the purposes of justice. *Greswold v. Marsham* is not in point—no such question arose in that case ; and the other cases cited by the Plaintiffs' counsel are quoted for doctrines which we do not dispute, but which we contend are inapplicable to the question before the Court. And as to the supposed difficulty of decreasing successive redemptions, the case of *Arcedechnie v. Bowes* (2) in the Exchequer is one in which the difficulty was greater than in the present case.

*Sugden*, for the Defendant *Lee Steere*, the infant. This is a very important case, as it affects the doctrine of notice. The Plaintiffs contend that we had constructive notice of their security ; but it was owing to their own neglect, in not giving notice to the first mortgagee, and requiring a memorandum of their charge to be indorsed on his deed, that we had not express notice. I contend therefore that they have exposed themselves to the loss by their own neglect. But they contend, not only that we are to be charged with their annuity, but that it is to be the first, or only charge, on the estate. In support of this, one principal part of their argument turned on the covenant for further assurance ; but it is remarkable that the first mortgage was expressly excepted in the [217] annuity deed : therefore the covenant amounted to a declaration that they were to take an estate then incumbered, and which was to remain incumbered. It is not contended that *Witts* might not have transferred the £5000 mortgage as often as he pleased : therefore the Plaintiffs can never be injured by that mortgage remaining a prior charge to theirs. As to the mortgage for £3000, the question depends upon the notice that *Wilby* had when he lent that sum. It must be taken that he had not notice, because they do not charge that he had. *Hardy v. Reeves* (5 Ves. Jun. 426).

I admit that notice to an agent is notice to the principal ; but I contend, 1. That it must be notice in the same transaction ; 2. That the effect of a purchase by the Defendants with notice cannot be to improve the situation of the Plaintiff ; and 3. That *Daniel* cannot be considered as agent in this case.

1. The notice must be in the same transaction. *Lowther v. Carleton* (2 Atk. 242), *Warwick v. Warwick* (3 Atk. 291). Then how can it be made out that the purchase in 1810 was the same transaction as the grant of the annuity in 1805? It will be said that the notice to *Daniel* continued so long as the payments of the annuity were made through his hands; but that is not conclusive: he might have paid the annuity without having notice of the nature of the security. *Steed v. Whitaker* (Barnard, 220).

2. Assuming that the purchase was with notice, that circumstance, though affecting the Defendants, ought not to alter the situation of the Plaintiffs. This is not a case where fraud can be imputed. The purchase [218] was not clandestine, but openly transacted in this Court, and the Defendants in point of fact knew nothing of the annuity till two years after the purchase was completed. It will be remembered that *Daniel* was the Plaintiffs' own agent; and it is surely a novel equity that because we have employed their own agent, they are not only to be relieved, but to be placed in a better situation than if we had not purchased at all. The whole argument on this part of the case resolves itself into a matter of form—that we took our conveyance by one deed, instead of employing several deeds; for it is not denied that the mortgages might have been kept distinct. But although that might be important in a question of merger at law, it can be of no consequence in equity. Here all the cases prove that the merger of an incumbrance is merely a question of intention: and there is therefore no difficulty in the Court's separating the interests, although by the form of conveyance adopted they have been thrown together.

3. I contend that *Daniel* is not to be considered as an agent so as to affect the infant. It is the general principle that an infant cannot act by an agent even where he may be competent to act in person. He cannot suffer a recovery, or levy a fine by attorney. There are certainly some old cases of frauds by infants; but they are cases where the infant has been active in the fraud. *Huguenin v. Baseley* (14 Ves. Jun. 273), was a case of actual fraud by the father, and the infant was a mere volunteer under the father. But here the question is very different, namely, whether the infant is to be bound by the notice which the agent had. It is said *Daniel* was the agent of the tenant for life, and that the infant must be bound by his father's act in employing him. But sup-[219]pose a case where there is no tenant for life. Some agent must be employed,—not by the infant, but by the Court. The doctrine now contended for could not apply to such a case, nor to the case of *unborn* children; and how does the present case differ in principle? The Plaintiffs, therefore, can at most be entitled to relief only as against the tenant for life; and, as against him, only in respect of the equitable interest ulterior to the mortgages.

As to the mode in which the relief is to be given, there is considerable difficulty; but I submit that it may be as follows:

1st. The interest of the mortgage monies to be paid.

2d. The annuity.

3d. The tenant for life to take the surplus rents.

But this only during the life of the tenant for life.

*Bell*, in reply. There is no rule that the notice to an agent must be notice in the same transaction, though there are some dicta to that effect; but this was the same transaction. In fact *Daniel's* agency never ceased; he acted in the purchase of the annuity—he was employed to pay it—and while he was so paying it, he acted as agent in the transaction of the sale. Neither was there any neglect on the part of the Plaintiffs. They could not be expected to take any steps with reference to their security, while they were regularly receiving the annuity from *Daniel*, and knew nothing of the sale—a mere family transaction. As to their causing a memorandum to be indorsed on the first mortgage, they had no right to require any such step, and no mortgagee in his senses could be expected to permit it.

[220] If an infant may have an agent to do things for his benefit, he must be bound by the acts and neglects of that agent to the same extent as if he were adult. If not, it would only be to get an infant interested, to avoid all the consequences of a fraud. But *Daniel* was not only agent but also trustee, and therefore the notice to him must bind the infant, because he has his remedy against *Daniel*,

whereas the Plaintiffs have none. And the case would be exactly the same against an unborn tenant in tail.

In the case of *Le Neve v. Le Neve*, unborn children were interested under the second settlement, and interested as purchasers; yet the Court decreed against that settlement. That case, therefore, is a direct authority against the argument for protecting the infant in this case.

The only difficulty of the case is to the Plaintiffs' right to be let in before the mortgagees. But our argument proceeds on the ground not of any technical consequence of merger, but on broad principles of equity, that the mortgages have ceased to exist by the Defendant's own act;—that by the mode in which he has taken the conveyance (making the legal estate subject to the uses of the settlement) he has rendered it impossible for the Plaintiffs to obtain a conveyance of the legal fee, if they were to exert their right of redemption;—and that having purchased with notice of the charge, he must be considered as bound by it to the same extent as *Witts* was bound, and then having paid off the mortgage, cannot revive it as against his own incumbrancer.

However, if any prior charge is to be set up, it can only be the mortgage for £5000—for, in the state of the pleadings, it must be taken that *Wilby* the mortgagee for £3000 had notice of the annuity. Purchase for [221] valuable consideration without notice is a good plea in equity; but it must be pleaded, and cannot otherwise be taken advantage of.

The *Master of the Rolls* [Sir Wm. Grant]. The object of this bill is to have an annuity of £180 paid out of the estate of the Defendant, as being the sole, or at least the preferable charge on that estate; or, if the Plaintiff is not entitled to that relief, then, that she may be at liberty to redeem such incumbrances as may be considered to stand prior to the annuity.

The estate in question formerly belonged to a Mr. *Richard Witts*. The Plaintiff Mrs. *Holme*, in 1805, purchased from him an annuity of £180, to be secured on this estate. It was already subject to a mortgage in fee to a Mr. *Richard Harrison* for £5000, and Mrs. *Holme* took with notice of, and subject to, that mortgage.

In 1806, Mr. *Witts* made a mortgage for £3000 to a Mr. *Wilby*. Whether *Wilby* had, or had not, notice of the annuity, does not appear. There is no assertion of his having had notice, in the bill, nor any averment of want of it, in the answer. But, in my view of the case, it is not very material whether he had or had not notice of it.

In 1810, there being a sum of money in the Court of Chancery to be laid out in land on the trusts of the will of a Mr. *Lee Steere*, this estate was (under the direction of the Court) purchased from Mr. *Witts*, and conveyed to trustees on those trusts. Under that conveyance, the Defendant *Lee Steere Steere* is tenant for life, and his son, the Defendant *Lee Steere*, an infant, is tenant in tail in remainder.

[222] Mr. *Wilby* had paid off the mortgage to *Harrison*, and taken as assignment of it to himself. He joined in the conveyance to the trustees, and the legal estate thereby became vested in them. Under these circumstances, the first question is, whether the annuity be at all an incumbrance on the estate in the hands of the present owners. If it be, then in what order and priority is it to be paid? The Plaintiff contends, that this estate was purchased with notice of the annuity, and consequently, remains subject to the payment of it.

The facts, as to this part of the case, are,—That *Mark Noble Daniel*, as agent for *Witts*, negotiated the sale of this annuity; that by him it was paid, not only down to the time of the sale, but continued to be paid down to November 1812; that he was also the agent employed in the purchase of this estate for the present Defendants, and one of the two trustees to whom it was conveyed. It is impossible, therefore, to deny that he had complete and continued notice of the existence of the annuity. And actual notice to him, was constructive notice to those on whose account the purchase was made.

It is attempted to be made a question, whether, as infants were interested in this purchase, they could be affected with notice: but I do not see how any doubt can be entertained on the subject. It would be a strange thing to say, that by a sale to infants a man's equitable interest may be defeated, in spite of any notice he could give of the existence of his equity. There seems to be no foundation for such a doctrine.

In the case of *Le Neve v. Le Neve* (3 Atk. 646), the interest of the unborn children was not attempted to be distin-[223]-guished from that of the mother. The only question was, whether she had notice or not of the prior articles; and, it being held that she was affected by her agent's knowledge of those articles, all the trusts of the second settlement, one of which was for the issue of the marriage, were postponed to those of the articles on the first marriage. Were it otherwise, a man would only have to purchase on behalf of infants, to free an estate from all equitable incumbrances to which it might be subject.

That this estate was purchased under the directions of the Court of Chancery, is a circumstance that cannot affect or prejudice the rights and interests of third persons. The Court of Chancery employs its officer to investigate the titles of estates, but does not warrant them.

If the annuity is to be considered as an intumbrance on this estate in the hands of the present owners, the next consideration is, in what order it is to be paid. The charges that preceded it have ceased to exist. They are all paid off and extinguished. The Plaintiff contends, that the annuity is now to be considered as the sole charge affecting the estate. The Defendants say, it is only to be paid in the order in which it originally stood, and that the purchasers must be considered as the owners of the antecedent charges, and entitled to retain, in the first place, so much as would be sufficient to keep down the interest of them. Supposing Mr. *Witts* himself had paid off all the other incumbrances, the annuitant would have stood in the same situation as if she had been from the beginning the sole incumbrancer. He could not have said, "I will retain for myself so much of the rents and profits as would have been required to keep down the interest of the other charges, and you must take your chance of there being enough left to pay [224] you your annuity." In effect *Witts* has paid off the other incumbrances; for they have been paid out of the purchase money, and he has received so much less for his estate than he otherwise would have done. Then, what equity can the purchasers have, to consider them as still subsisting as against any person claiming under *Witts*? They are in no worse situation than they would have been if they had bought an estate on which there was no mortgage, but which turned out to be encumbered with an annuity, not known to them in fact, but constructively known to them by means of notice to their agent. In that case, would they be permitted to say, there was a time when there was a charge upon the estate prior to the annuity, and therefore, as between the annuitant and us, that charge shall be considered as still existing? The cases of *Greswold v. Marsham* (2 Cha. Ca. 170), and *Mocatta v. Murgatroyd* (1 P. Wms. 393), are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice. I do not see how I can make any distinction, in point of legal effect, between personal notice to the party, and notice affecting him through the medium of his agent.

I think the Plaintiff is entitled to the first relief prayed by the bill, and ought not to be put to the necessity of redeeming the incumbrances, which may at one time have been prior to the annuity.

(1) For the statement of this case, and of the arguments, I am indebted to Mr. *Hodgson*.

(2) The question in this case, which (it is believed) is no where reported as to that point, was as to the mode of decreeing a redemption where there are several mortgages one behind another; and the Court decreed, in detail, that the second should redeem the first, the third the second, and so on. The case is reported as to another point, 3 Anstr. 752.

[225] FRANKLYN and SQUIRE, *Plaintiffs*, and THOMAS and DANSEY, *Defendants*.  
July ———, August 2, 1817.

Motion for special injunction to restrain Defendant (Plaintiff at law) from suing out execution upon a judgment obtained by him in his action previous to the common injunction being obtained, refused, as contrary to practice, the Court only granting such special injunction in cases where the Plaintiff has had no opportunity of obtaining the common injunction. The Defendant (Plaintiff at



law) subsequently, on the day when the common injunction might otherwise have been obtained, puts in a demurrer, which is over-ruled; and in the mean time, pending the demurrer, the Plaintiff is taken in execution; after which, and immediately on the over-ruling of the demurrer, the common injunction is obtained. Upon an application to discharge the Plaintiff out of custody, on the ground that, the demurrer being over-ruled, the parties are entitled to be replaced in the situation they would have been in if no demurrer had been filed, and by analogy to the case of goods taken in execution; the application being opposed on the ground that the parties would not, by granting it, be placed in the situation in which they would otherwise have stood, since the judgment had been satisfied by the taking in execution, and, if now discharged, the debt would be gone: *Ordered*, that the Plaintiff be discharged on undertaking again to confess judgment, so that he might not afterwards say, the existing judgment and debt had been satisfied by the execution from which he was so discharged.

The Bill, filed on the 9th of *May* 1817, prayed (among other things) an injunction to restrain the Defendant *Dansey* from further proceeding in an action brought by him against the Plaintiff *Franklyn*. *Dansey* having obtained judgment in this action before any injunction had issued, a motion was made for a special injunction, upon the ground that *Dansey* would be entitled to sue out execution before the Plaintiff could obtain the common injunction. This motion was refused by the *Lord Chancellor*, as against the practice of the Court; according to which, special injunctions to restrain proceedings at law are granted in those circumstances only, where the party has not had any opportunity of obtaining the common injunction; as upon judgments entered up upon warrants of attorney, &c.; (1) although the reason why the bill was not sooner filed was stated to be, that, until the trial at law, it was apprehended there would be a good defence to the action, in which case it would have been unnecessary to resort to equity. On the 20th of *May* (being the day on which the Plaintiff would have been entitled to the common injunction), the Defendants filed demurrers to the bill, on the grounds of multifariousness, and want of parties. These demurrers were immediately set down for argument by the Plaintiff; and an application was made to the *Vice Chancellor*, on their behalf, that they might be advanced in his Honour's paper, or if that could not be granted, for an injunction in the mean time, until they could be disposed of. This application for an injunction was refused, but the Court appointed the earliest day for the hearing of the demurrers, that, in the then state of the business of the Court, was practicable; notwithstanding which they could not be heard before the 23d of *June*; and, on the 19th of *July*, the *Vice Chancellor* pronounced judgment, over-ruling the demurrers.

[227] The affidavit made by the Solicitor for the Plaintiffs, stating these facts, went on to allege that the filing of the demurrers, and the time which elapsed before they could be heard, and judgment obtained, had been exceedingly prejudicial to the Plaintiffs, and particularly to the Plaintiff *Franklyn*, who had been thereby deprived of the aid and assistance of the Court, which relief he believed he might have obtained, but for the demurrers, by way of injunction, either on the Defendant's default in not appearing or answering, or on the merits confessed in his answer, supposing him to have been prepared to put in an answer to the Plaintiff's bill in due time to prevent the common injunction.

The affidavit further stated, that the Plaintiff *Franklyn* had been, subsequent to the time of filing the demurrer, and when (if no demurrer had been pending) the Defendant *Dansey* would have been in contempt, taken in execution by the Sheriff of *Devon*, at the suit of the Defendant *Dansey*, in the action before mentioned, and had ever since remained in custody, but towards the latter end of *June* was removed by *Habeas Corpus* to the *King's Bench*, where he then was. That immediately on the *Vice Chancellor's* over-ruling the demurrer, he (the Deponent) applied for and obtained the common injunction on behalf of the Plaintiff; but that such proceeding, without the special interference of the Court, would not now afford any relief to the Plaintiff.

It was therefore moved, on the part of the Plaintiff, that he might be discharged out of the custody of the Marshal of the K. B. prison in the said action, the *Vice Chancellor* having over-ruled the demurrers of the Defendants, and having ordered the common injunction to issue.

[228] *Leach* and *Pepys*, in support of the motion, stated the principle upon which they made this application to be, that, inasmuch as the Plaintiff was entitled to the common injunction on the day when the demurrers were put on the file, the Defendant ought not to derive any advantage from having put in those demurrers, which were afterwards over-ruled. That it was obvious to what injustice such a course of proceeding would lead; for so, in all cases, a Defendant might, by putting in a demurrer (however untenable) defeat the established rule of the Court; that rule being that, unless an answer is put in within eight days after the filing of the bill, the Plaintiff is, at the end of that period, entitled, as of course, to the injunction to stay execution; whereas the result of this practice would be to enable the Defendant, at any time before the demurrer can be disposed of, to take out execution, and thus render the injunction of no avail. That all which was now asked by the Plaintiff was to be placed in the same situation as if no demurrer had been put on the file. And, though no precedent could be produced of such an interference of the Court as was now sought for in the case of a *capias ad satisfaciendum*, it was to be supported by analogy to what was the frequent practice of the Court in the case of a sheriff having taken in execution the goods of the party, which execution would not, under such circumstances, be suffered to proceed. That, if a writ of error is brought, and not allowed, it goes for nothing; although, if allowed, it has reference back to the time when it was issued; and, on the same principle, in this case, the demurrers not having been allowed, ought not to be permitted to prejudice the Plaintiff, who, if the demurrer had not been put in, would at that time have been at liberty, and protected by the injunction of the Court against the effect of the judgment. And they re-[229]ferred to a case of *Raphael v. Birdwood* (2) which had recently come before his Lordship.

[230] Sir *S. Romilly*, *Bell*, and *Rose*, contra. No instance can be produced of such an application as the present having ever been granted. All they can [231]allege in the way of authority is, that certain cases have been decided upon principles which they term analogous. But the effect of such an order as is now sought to be obtained will not be such as the Plaintiff himself requires; because it will not put the parties in the same situation, in which they would have stood, if the Plaintiff [232] had not been taken in execution: for, by that act, the judgment was satisfied; and, if the Plaintiff should now be released, he can never be taken again, and the debts are gone.

It was formerly the practice to make the Sheriff himself a party after execution executed. The question now is, whether, under all the circumstances of the case, the Plaintiff has any right to the extraordinary assistance of the Court; and, if he has, in what manner that assistance is to be granted.

It is difficult to say what experiments may not be tried in the way of interlocutory applications to the Court. In this case, the application for an injunction, which was made on the filing of the bill, was refused with costs. A demurrer was then put in, not (as has been falsely represented) for delay, but founded on principle. This demurrer was heard in *June*, but judgment not pronounced till the 19th of *July*, when it was over-ruled; and, immediately upon its being over-ruled, the common injunction was applied for and issued. But, after execution is actually issued, the common injunction cannot operate against the Sheriff so as to restrain him from proceeding under the execution; and thus, in the case of goods actually levied in execution, it is usual to make the Sheriff a party in order to extend the injunction to him.

The case of *Raphael v. Birdwood* is very distinguished from this. There the Defendant had put in a demurrer, which was over-ruled at a time when the common injunction could not have been obtained, in consequence of the argument of the demurrer standing over in indulgence to the Defendant's counsel.

[233] *Leach*, in reply. The single question in this case is, Whether the demurrer did, or did not, save the injunction, which would have been obtained if a demurrer had not been put in. In answer to this question, it is said that the demurrer did not save the injunction, because execution was taken out when the Defendants were entitled to take it out by the practice of the Court, as not being in contempt; and the common injunction, therefore, could not have operated to stay execution. But I believe the contrary to be true;—that the common injunction will stay the debt and costs in the hands of the Sheriff, even after they have been actually levied.

The *Lord Chancellor* [Eldon]. This is an application which will require some consideration.

I am not sure that the motion, supposing it to be otherwise such as ought to be granted, is regular in its terms, or whether it should not rather have been, that *Dansey* might discharge the Plaintiff; for I have certainly no authority to call upon the Sheriff so to discharge him. It is true that, when goods have been taken in execution, that may be easily set right. But here the taking in execution is a discharge of the debt. It is obvious, therefore, that the motion ought not to be granted without putting the parties on terms so that, in case of my ordering the Plaintiff to be discharged, he shall not take advantage of that discharge at law.

I will look into a case before Lord *Thurlow*, which I now recollect, thinking that it will prove to be an authority on this very point; and will mention it again to-morrow.

[234] *July 31. The Lord Chancellor.* The case which I referred to yesterday, does not, as I apprehended it would, decide the present question. That was a case in which Lord *Thurlow* held that, where an injunction is obtained, even after execution executed, it is a breach of that injunction to call upon the Sheriff to pay over the money; but he at the same time thought that if the Sheriff had voluntarily paid the money, it would have been no breach of the injunction. Now it is difficult to say how the act of the Sheriff can vary the right of the parties; and I should think that, in such a case, the person receiving the money would be ordered to pay it into Court.

The same principle must have operated (though I can find no case expressly to the purpose), where the execution is against the body. But then great care must be taken to make him as liable as if he had been kept in execution for the debt. The difficulty therefore is, to frame such an order as will obviate the effect of the discharge upon the debt.

*August 2. The Lord Chancellor.* Upon the fullest search, I cannot find that any thing is established with regard to the practice in such a case as this; and it is therefore incumbent on the Court to settle the practice in the best way it can according to principle.

Where a demurrer has been over-ruled, the injunction follows of course.

If an injunction is obtained upon the bill being filed, after execution executed, and, at the time of the injunction being obtained, the goods are not yet out of the [235] hands of the Sheriff; then, if the Sheriff proceeds to sell without process, he will be ordered to pay the money into Court.

It was formerly the practice in such a case to make the Sheriff a party by supplemental bill, if the money has come into his hands since the injunction issued, or by the original bill, if the money was in his hands at the time. But we are now got into a much looser practice.

The principle is this—While it is in contemplation whether a good case can be made or not, if it turns out that there is an equitable case in the result of the demurrer, then to deal with it as an equitable case from the first, and prevent execution.

If, where the Plaintiff is entitled to an answer, and the Defendant thinks fit to file a demurrer, the Court thinks that demurrer untenable, and the equity of the Plaintiff is therefore sustained, it is the bounden duty of the Court to interfere for the protection of the Plaintiff's body.

It must of necessity be, that the Court has the power, and, if so, it follows that it is also the duty of the Court, to place the Defendant where he would have been but for an untenable defence.

The order therefore to be made in this case should be, that he shall be discharged on undertaking again to confess judgment, so that he may not afterwards say, the existing judgment and debt has been satisfied by the execution from which he is now discharged.

The following order was made:—"That the Defendant *Dansey* do discharge the Plaintiff *Franklyn* out of the custody of the Marshal of [236] the *King's Bench* in the action at the suit of *Dansey*, upon the Plaintiff's delivering to the Defendant a warrant of attorney to confess judgment in the Court of *King's Bench* in the same sum for which he is at present in execution, together with interest subsequently accrued, Sheriff's poundage, and other incidental expenses, as of the same term as the former judgment; and also upon his undertaking not in any manner to avail himself of his having been taken in execution as a discharge of the debt, and submitting to an immediate order for payment of the money into Court, in case the injunction

should be dissolved, and, in default of such payment, surrendering himself to the Warden of the *Fleet* and consenting to waive personal service of the order, and also consenting that an attachment shall immediately go against him for his contempt, without any previous writ of execution—With liberty to *Dansey* to apply to the Court, with or without notice, in case of any breach, or non-compliance with the terms of, the order.” [Reg. Lib. A. 1816, fo. 1378.]

(1) Thus, in a case of *Annesley v. Rookes* (August 7, 1817), *Merivale* moved for an injunction to restrain the Defendant from suing out execution upon a Warrant of Attorney to confess judgment on a bond for £1200 into which the Plaintiff had entered, partly in consideration of the Defendant returning (as so much cash) a post-obit security formerly granted by the Plaintiff (who was an expectant heir) in discharge of a debt of inconsiderable amount, and upon the understanding that the principal was not to be called for till the death of the Plaintiff's father. Upon affidavit of these facts, it being the vacation, and no subpoena returnable till the next term, the *Lord Chancellor* granted the injunction; the Plaintiff undertaking to serve the Defendant with immediate notice, and with liberty to the Defendant to apply during the continuance of the sittings.

(2) *Raphael and Others v. Birdwood and Others.* July 26, 1817.

This was a bill filed by the Plaintiffs on behalf of themselves and all other joint creditors of *Hart* and *Joseph* who had entered into and executed, or had acceded to, certain deeds of composition dated the 26th of *October* 1812 and 13th of *April* 1813, respectively, or either of them. The bill stated that the first of the deeds had become impracticable, and had been abandoned; and that many of the joint creditors had not come in under the second deed, nor did either of the deeds provide for, or notice, the separate creditors of either of the parties. *Hart* and *Joseph* had since become bankrupt under separate commissions. *Hart's* assignees brought actions against the Plaintiff, and the other creditors who had received payment under the composition deeds, and on some of these actions had obtained verdicts, others being entered for trial at the then ensuing *Devon* assizes. The bill, against the assignees under both commissions, prayed either that the deeds might be established, and the joint creditors, on whose behalf the bill was filed, decreed entitled to retain the sums which they had received in payment; or else, that the deeds might be set aside, and an account taken of the joint property of *Hart* and *Joseph*, and that the same might be administered under the decree of the Court, praying also an injunction, in either case, to restrain the assignees of *Hart* from proceeding on the verdicts so obtained, and in the actions so entered for trial.

To this bill the Defendants (*Hart's* assignees) had put in a demurrer. The Plaintiffs set down this demurrer; and it stood in the paper accordingly, and was called on in *Trinity Term* 1817, when it stood over; and at length (upon argument before his Honour the *Vice-Chancellor*), was over-ruled on the 25th of *July*, the last seal after *Trinity Term* being on the 28th.

Immediately on the demurrer having been over-ruled, and before the Plaintiffs could move for the common injunction, an answer was put in by the Defendants: the commission day at *Exeter* was on the 26th of *July*, and, from the distance of the seal, the Plaintiff not being in a condition to move for the common injunction, in order to extend it to stay trial, gave special notice of motion by permission for the 26th to stay execution in the actions so commenced, and to restrain the Defendants from going to trial in the other actions. This motion was founded on the affidavits of the Plaintiff and his solicitor, representing that it was impossible to obtain an office copy of the answer in time to attend therewith at the trial of the causes, and that the Plaintiff, and the other creditors against whom these actions were brought, could not safely go to trial without the answer of the Defendants, and that he believed such answer would enable them to do so.

To this it was objected, first, that the Plaintiff could not be admitted to swear as to the other creditors—but that each of them should have put in his own separate affidavit: to which it was answered, that all the creditors were under similar circumstances, and therefore one and the same defence would do for all.

Sir *S. Romilly*, *Bell*, and *Pepys*, in support of the motion, insisted, that the demurrer being over-ruled, the Plaintiff was entitled to the common injunction, as of course;

and that it was by the delay and non-attendance of the counsel for the Defendants, that the argument of the demurrer had stood over.

The *Solicitor General*, *Wetherell*, and *Rose*, contra, insisted, that this was a mere question of practice, not at all depending on the circumstances of the particular case. That the right to the common injunction did not arise as a matter of course upon a demurrer being put in and over-ruled, but could only be obtained upon motion; and the Defendant not having moved, and there being no seal at which he could move, for the common injunction, and it being rendered impossible to be obtained by the diligence of the Defendant, and the filing of the answer, the Plaintiff was not entitled to any indulgence. This was not a demurrer merely for delay, but, if it were, there is no distinction, on a mere question of practice, between a demurrer put in for delay and any other demurrer. Then the question was, simply, whether the filing of a demurrer, by which the Plaintiff is deprived of his usual remedy, entitles him, upon its being over-ruled, to seek an advantage which he has not according to the regular practice of the Court. No instance could be produced of such an indulgence being granted; but the case cited was an authority against it. That the Defendants had a right to insist on the strict practice, unless there had been any thing in their conduct to deprive them of the benefit of it.

The *Lord Chancellor* [Eldon] said, that if the demurrer had been argued at the time when it stood in the paper, in Term, the Plaintiff, upon its being over-ruled, could have immediately put himself in possession of the common injunction, and have proceeded regularly to extend it to stay trial. The question was, then, by whose fault it was that the argument did not take place at that time—and as to this he required an affidavit.

The Plaintiff thereupon produced an affidavit, that some of the Counsel for the Defendants being then engaged in the pending state trials, the argument of the demurrer had been postponed in consequence of their absence; and upon this the *Lord Chancellor* made the order.

[237] ROBERT BLORE, Plaintiff, and Sir RICHARD SUTTON, Bart. JAMES WEST, H. C. LITCHFIELD, Dame MARY IMPEY, and CHRISTOPHER CODRINGTON, Defendants. *Rolls*. June 18, 20, 1816; August 25, 1817.

[See *Onions v. Cohen*, 1865, 2 H. & M. 361; *Landed Estates Co. Ltd. v. Weeding*, 1869, 21 L. T. 386; *Jaques v. Millar*, 1877, 6 Ch. D. 156; *Marshall v. Berridge*, 1881, 19 Ch. D. 239; *Joliffe v. Baker*, 1883, 11 Q. B. D. 268; *In re Lauder & Bagley's Contract*, [1892] 3 Ch. 47.]

1. tenant for life with a power to lease by deed duly executed under her hand and seal, reserving the best yearly rent. Plaintiff enters into possession, and expends money in building under an agreement for a lease evidenced only by the memorandum in writing entered in the book of A.'s authorised agent, signed not by the agent himself, but by his clerk, although in evidence to have been approved by him, and according to the usual course of business. A. dies; and on a bill for specific performance against the remainder-man, held, first, no sufficient agreement in writing—not being signed by an agent properly authorised, and, if it had, yet the memorandum not containing some of the material terms of a lease, which were left to be made out by parol evidence; secondly, not to be established as a parol agreement in part performed—both as it was not the agreement of the principal, nor of the authorised agent, and also because the remainder-man has been guilty of no fraud upon which to charge him with the conveyances of the contract. Also, the Plaintiff not entitled to compensation from A.'s representatives for money laid out by him on the faith of the alleged agreement—such compensation being in the nature of damages, and the fault lying in the Plaintiff's own negligence.

The Bill stated that *Henrietta Laura*, late Countess of *Bath*, was tenant for life, under the will of her mother, of certain messuages, &c., in the parishes of *St. James, Westminster*, and elsewhere, with a power (contained in the will) "from time to time, and at all times after she should have attained twenty-one, during her life, whether covert or sole, by deed duly executed under her hand and seal, to demise

"or lease unto any person or persons, &c., for any term of years not exceeding ninety-nine years from the time of executing such lease, so as to take effect, either in possession, or immediately after the determination of the leases then subsisting, and so [238] as upon every such lease there should be reserved, to be due and payable during the continuance of the estates to be thereby granted, the best and most beneficial yearly rent or rents, to be incident to the immediate reversion, that, considering the nature of the case, could be reasonably had or gotten for the same at the time of making such lease, without fine, premium, or foregift, and half yearly payable, and so as in all such leases there should be contained a covenant obliging the respective lessees to insure the premises, and conditions of re-entry in case the rent should be in arrear, and so as the respective lessees should severally seal and deliver counterparts of their respective leases, and enter into covenants to repair, and other usual covenants."

On the 26th of *October* 1807, the Plaintiff entered into a contract with *S. P. Cockerell*, "as the agent for and on behalf of the said *Lady Bath*," whereby, in consideration of the money to be expended by the Plaintiff in building, *Cockerell*, "as such agent as aforesaid," agreed to let to him certain premises in *Piccadilly* (part of the estate comprised in the will); and a memorandum of such contract, and of the terms thereof, was then made in writing, and entered in a book kept by *Cockerell*, as follows:—"Plans of the ground and buildings agreed to be built by Mr. *Robert Blore* in *Piccadilly*, where Mr. *Arnold's* house now stands—the term to be ninety-nine years, and the rent for the first two years £60 per annum: and for the remainder of the term £120 per annum:—Covenants as usual in the *Bath* estate." The memorandum so made and entered was signed by the Plaintiff.

*Lady Bath* died in *July* 1808, having by her will appointed the Defendant *Codrington* (together with [239] others, of whom *Codrington* survived), her executor. The Defendant *Sir Richard Sutton* (an infant) was, at the death of *Lady Bath*, become entitled to the estates of which *Lady Bath* had been tenant for life, as tenant in tail by virtue of the will of his grandfather *Sir Richard Sutton*, the remainderman; (1) and the other Defendants were the representatives of *Sir Elijah Impey*, the surviving trustee under that will.

The Bill stating further that, in part performance of the agreement with *Lady Bath's* agent, the Plaintiff had taken possession of the premises, and laid out £6000 in buildings upon the same, prayed a declaration that *Sir Richard Sutton* was bound by the agreement, and that he, and all other necessary parties, might be directed to grant to the Plaintiff a lease of the premises upon the terms and conditions of the agreement; the Plaintiff offering to execute a counterpart of such lease; or, if the Court should be of opinion that *Sir Richard Sutton* was not bound by the agreement, then an account of monies expended in repairs or otherwise, and that the Plaintiff might be declared entitled to be reimbursed the amount thereof out of the personal estate of *Lady Bath*.

The evidence of *Cockerell*, the agent employed by *Lady Bath* for receiving the rents and for the management and letting of her estates in *London*, stated that the business of so managing and letting the estates [240] in question was conducted in his office, and either personally by himself, or by the occasional assistance of *Noble* (his chief clerk), or some other clerk, under his immediate direction. That, about the time stated in the bill, *Noble*, with the privity and under the immediate direction of the witness, as such agent, for and on behalf of *Lady Bath*, verbally agreed with the Plaintiff to make to him a building lease of the premises in question for ninety-nine years on the terms above specified. That the particulars of the agreement were not reduced into writing, otherwise than by a memorandum (the same as that stated in the bill) being made thereof by *Noble*, by the witness's order, and a plan drawn and signed and affixed by the Plaintiff as a description of the premises, which the Plaintiff proposed to erect upon the site of the premises. That the witness affixed his initials to such entry or memorandum; and that the lease to be granted was to commence at the expiration of a then existing lease which expired at *Christmas* following the date of the memorandum. He deposed that, at the time of the agreement being entered into, the premises in question were in need of very heavy and substantial repairs, and that it appeared to him that it was better they should be pulled down and other buildings erected on the same site than that any repairs should be attempted. That the Plaintiff

the date of the agreement, laid out very considerable sums in rebuilding the same pursuant to the agreement; but that the same were only in part rebuilt at Lady *Bath's* death, and only one fourth part of the whole cost at that time expended therein; and witness believed that, if the Plaintiff had then stopped proceeding with the buildings, the same could not, in their then unfinished state, have been let for much more than the yearly rents of £60 and £120 reserved by the agree-[241]-ment, and that all the benefit of the improvements had accrued since Sir *Richard Sutton* succeeded to the inheritance.

The evidence of *Noble* was principally to the same effect. That of other witnesses, examined on the part of the Plaintiff went to the condition and value of the premises, and the money expended by him under the agreement.

*Hart* and *Courtenay*, for the Plaintiff. *First*, this is a sufficient contract in writing, signed by an agent duly authorised—although not by *Cockerell* himself, yet by his chief clerk, under his immediate direction, and according to the usual course of business in his office. If so, it is equally binding on the remainder-man as a lease actually executed in conformity to the power. *Shannon v. Bradstreet* (1 Scho. & Lef. 52). There is no general rule by which it can be determined what constitutes agency; but in this case it is sufficiently to be inferred from the circumstances—the magnitude of the property—the course of management—and the habit of the office.

*Secondly*, if this is not a sufficient agreement in writing, then it is a parol agreement, which has been part performed, and would therefore be binding on the party and those deriving under him. The principle upon which *Shannon v. Bradstreet* was decided will apply to this case also; and, if it were to be held otherwise, it would be opening the door to fraud and great inconvenience.

There is no principle, according to which a Court of equity has been induced to supply the defective [242] execution of a power, which does not apply to a case like the present.

Sir *S. Romilly*, and *Richards*, for the Defendant Sir *Richard Sutton*. The cases in which Equity supplies the defective execution of powers, are confined to those of defects in point of form. Here the defect is in substance. The power does not authorize leases upon such terms as those of the agreement in question, by which two different rents are reserved, neither of them the best that could be obtained; and this alone disposes of the case.

In the next place, there is no agreement in writing. *Noble's* agency is not proved. He is the clerk of Mr. *Cockerell*, not the agent of Lady *Bath*; and there can be no delegation of agency.

*Lastly*, as to part performance, that is not insisted on by the bill, as a ground for the relief prayed. *Shannon v. Bradstreet* has carried the doctrine of Equity to an inconvenient length, and it seems at least doubtful whether this Court would go so far as to recognise its authority. It is not, however, necessary now to impeach it. It is enough to insist that the principle ought not to be extended further. Here is an express power, annexing to its valid execution the necessity of an instrument under seal, and a counterpart; and, in the absence of every requisite, the Court is now called upon to declare that an agreement so imperfectly made is tantamount to the execution of the power so as to bind the remainder-man. In the case cited, Lord *Redesdale* himself ex-[243]-presses a doubt whether, if it had been the case of a parol agreement in part performed, it could have been enforced against the remainder-man, observing that the party himself is held to be bound by a part performance principally on the ground of fraud, which is personal. But the remainder-man has been guilty of no fraud. Why is he to be subjected to the inconvenience of having this agreement forced upon him in direct violation of the statute?

*Bell* and *Dowdeswell*, for the Defendant *Codrington*. If this be a sufficient agreement within the statute, then it is binding on the remainder-man. But it is not such an agreement.

Supposing, however, that there were a valid agreement, and that the Court should hold that the remainder-man is not bound by it, still this is no case for compensation, but the Plaintiff must be left to his action for damages. *Denton v. Stewart* (1 Cox, 258, cited 1 Ves. J. 329, & 17 Ves. 276. *Greenway v. Adams*, 12 Ves. 395), if to be supported at all, is no authority for the present case; but there the Defendant had it in his power to perform the agreement, and, while the suit was

pending put it out of his power to do so by his own act. And in *Todd v. Gee* (17 Ves. 273. *Gwillim v. Stone*, 14 Ves. 128; Sugd. Vend. and Purch. 188, 9) Lord *Eldon* says, that the case of *Denton v. Stewart*, if not to be supported on that distinction, is not according to the principles of the Court.

*Hart*, in reply. The case is very peculiar and must be considered in all its bearings. There can be no doubt that [244] there is a contract signed by an agent properly authorised; for the act of *Noble* under *Cockerell's* immediate direction is the act of *Cockerell* himself. There is no fact in dispute—no conflict of evidence—no imputation on the *bona fides* of the transaction. The contract is a beneficial contract, and equally for the advantage of all parties.

As to the power, this is not a mere ordinary leasing power, and must be regarded with reference to the quality of the property and the nature of the case. There is nothing to exclude a lease for the purpose of building, or to prevent a variation in the rent according to the actual value; and it is in evidence that these rents were fixed by a *bona fide* estimate made by persons of competent judgment.

Admitting the principle, that *delegatus non potest delegare*, this is a case to be determined by the usual course of management—a course of management pursued for a series of years, and recognised by the owners of the property, who must be taken to have adopted the acts of those to whom the principal agent has confided a part of that management as the acts of the agent himself. *Noble* was the servant, not the delegated agent, of *Cockerell*, and *qui facit per alterum, facit per se*. As to the agent by his signature binding the principal, see *Kemeys v. Proctor* (3 Ves. & B. 57), *White v. Proctor, &c.* (4 Taunt. 209. See Sugd. Vend. and Purch. 81). Mr. *Sugden*, in his Treatise on Powers (2d ed. p. 358), mentions an opinion given by Lord *Kenyon*, that ever since the case of *Leach v. Campbell* (Ambl. 740; Appx. to Sugden on Powers, No. 13), a lease by parol from year to year by a tenant for life with a power, is binding in equity [245] upon the remainder-man. As to the doubt expressed by Lord *Redesdale* in *Shannon v. Bradstreet*, the only difference between a written and parol agreement is on the ground of the latter opening a door to fraud, and, where the agreement is evidenced by acts of part performance, it amounts in principle to the same thing.

With respect to the alternative prayed by the bill, your Honour, in *Greenway v. Adams*, thought there was nothing unreasonable in the decision of *Denton v. Stewart*. We admit that this is not a Court that can award damages: but, if we have been led by the act of *Lady Bath's* agents to expend money on the faith of an undertaking which they are unable to execute, it is reasonable that we should call upon her representatives to repay us the money we have laid out; and this Court will decree an account to be taken accordingly.

The *Master of the Rolls* [Sir Wm. Grant]. This is a bill for the specific performance of an agreement to grant a lease. The agreement is alleged to have been entered into with the agent of the late Countess of *Bath*, who was tenant for life, with a power of granting leases in the manner and on the terms specified in the power; and the question is, whether there be any such agreement in this case as is binding upon the remainder-man, the Defendant Sir *Richard Sutton*.

It appears to me that there is no sufficient agreement in writing; first, because *Charles Noble*, who signs his initials to the memorandum written on the plan, is neither alleged by the bill, nor proved by the evidence, to have been the authorised agent of *Lady Bath*; secondly, [246] because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent, and the number of years. It does not even specify the commencement of the lease. By the parol evidence, indeed, it is said, that it was to be from the expiration of a subsisting lease. But then the whole agreement is not in writing.

It was insisted, however, that there is a parol agreement, in part executed; for the Plaintiff has expended large sums in building upon the premises, partly in *Lady Bath's* lifetime, but principally since her death. The agreement, it is said, is therefore binding on the remainder-man. It is rather difficult to say, that there is even a parol agreement by an authorised agent of *Lady Bath*. For the evidence is, that *Noble*, by the direction and with the privity of Mr. *Cockerell*, who was *Lady Bath's* agent, did make a verbal agreement with the Plaintiff. This seems rather a delegation of *Cockerell's* authority, than the personal exercise of it. He does not appear to have had any communication with the Plaintiff. He does not say, I ratify the terms



agreed upon by *Noble*, but, I authorise *Noble* to make the agreement. Supposing, however, that, by the effect of *Cockerell's* direction to *Noble*, this can be construed to be the parol agreement of *Cockerell* himself, and that, subsequently to such agreement, and on the faith of it, an expenditure has been made by the Plaintiff, there is no authority for holding that the remainder-man is bound by such an agreement.

It is considered as a fraud in a party permitting an expenditure on the faith of his parol agreement, to attempt to take advantage of its not being in writing. But of what fraud is a remainder-man guilty, who has entered into no agreement, written or parol, and has done no act, on the faith of which the other party could [247] have relied? The only way in which he could be affected with fraud, would be by shewing, that an expenditure had been permitted by him, with a knowledge that the party had only a parol agreement from the tenant for life. Without that knowledge, there is nothing in the mere circumstance of expenditure. For the *prima facie* presumption is, that he who is making it has a valid lease under the power, or at least a binding agreement for a lease. That the remainder-man in this case, or those acting on his behalf, had any such knowledge, is neither alleged, nor proved. The reason, therefore, fails, on which the case of a parol agreement, in part performed, is taken out of the statute of frauds.

On the strict construction of the power, the remainder-man would only be bound by a lease executed conformably to it. But Lord *Redesdale* has, I think, in the case of *Shannon v. Bradstreet* (1 Sch. & Lef. 52), given satisfactory reasons, why a clear, explicit, written agreement ought, in equity, to be held equivalent to a lease, and as binding on the remainder-man as a formal lease conceived in the same terms would have been. But, to go farther, and say, that a man shall be bound not by his own parol agreement, but by the uncommunicated and unknown parol agreement of another person, would be to break in upon the statute of frauds, without the existence of any of the pretexts on which it has been already too much infringed.

On the supposition that the Plaintiff cannot obtain specific performance, he prays that he may be reimbursed for his expenditure out of *Lady Bath's* assets. This would be, as against her representatives, a decree merely for damages, and not a compensation for the benefit her estate has received. It is the estate of the [248] remainder-man that is benefited by the houses built upon it. The competency of a court of equity to give damages for the non-performance of an agreement, has, notwithstanding the case of *Denton v. Stewart* (1 Cox, 258, and see 3 Mer. 243), been questioned by very high authorities. In that case, however, the party was guilty of a fraud, in voluntarily disabling himself to perform his agreement, and had an immediate benefit from the breach of it. But *Lady Bath* never refused to perform the agreement. On the contrary, the Plaintiff alleges, that, if she had lived, she would have granted him a lease. Then the case is only that he himself has been so improvident as not to get from *Lady Bath* that which, he says, she would have given him; namely, a lease that would have been binding on the remainder-man. That, surely, is not a case in which a court of equity will exercise a doubtful jurisdiction, by awarding damages for a loss, which, if it shall ever be sustained, will have been occasioned, more by the Plaintiff's negligence, than by *Lady Bath's* fault. I say, if it shall be ever sustained; for it does not appear that the Plaintiff has been yet evicted; and I cannot believe that Sir *Richard Sutton*, when able to judge and act for himself, will think of taking the benefit of the Plaintiff's improvements, without making him a compensation for them. But, be that as it may, I should not be warranted in straining general principles in order to obviate the hardship of a particular case.

The bill must be dismissed, but without costs.

(1) It did not appear in the pleadings by what title Sir *Richard Sutton* claimed as remainder-man; but it appears from the report of *Lady Cavan v. Pultney*, 2 Ves. J. 544, and was therefore assumed by the Plaintiff's counsel, and not resisted on behalf of the Defendant, that the remainder was created by the will of *Lady Bath's* mother—the same instrument which contained the leasing power.

See also the next case of *Sutton v. Lord Chetwynd*.

[249] Sir RICHARD SUTTON, Baronet (an Infant, by his next Friend), *Plaintiff*, and Lord Viscount CHETWYND, OSBORN MARKHAM, the Earl of DARLINGTON, and JOHN PADDY, *Defendants*. *Rolls. Trin. Term*, 1812; Aug. 25, 1817.

[*Davenport v. Bishopp*, 1843, 2 Y. & C. C. C. 462; *Voyle v. Hughes*, 1854, 2 Sm. & G. 30.]

Covenant in marriage articles in favour of a stranger held merely voluntary, and not to be supported by the marriage consideration.

*Frances*, the wife of Sir *William Pulteney*, Baronet, by her will made in execution of a power reserved to her in her marriage settlement, devised or appointed certain estates therein mentioned, to the use of her daughter *Henrietta Laura Pulteney* (afterwards Countess of *Bath*) for life, with remainder to her first and other sons in tail male, with several remainders over, and with an ultimate remainder, in default of such issue as therein mentioned, to the use of Sir *Richard Sutton*, the grandfather of the Plaintiff; and died, leaving the said *Henrietta Laura Pulteney* (then an infant) her only child.

*Henrietta Laura Pulteney* (while still an infant) became entitled, to her and her heirs, according to the custom, to certain copyhold premises holden of the manor of *Stoke Newington*; and being so entitled, she was, on the 20th of *September* 1784, admitted tenant, and on the 8th of *August* 1789 surrendered the premises "to such use or uses, and for such estate and estates, as she should by her last will declare, limit, and appoint the same."

By articles of settlement dated the 23d of *July* 1794 previous to the marriage of the said *Henrietta Laura Pulteney* (then Countess of *Bath*) with Sir *James Pulteney*, Baronet, and made between the said Sir *James Pulteney* of the first part, the said Countess of *Bath* of the second [250] part, Sir *W. Pulteney* (father of the Countess) of the third part, and the Defendants Lord *Chetwynd* and *Markham* and another (trustees) of the fourth part; reciting that the Countess was entitled (among other things) to the said copyhold premises, and that Sir *James Pulteney* thereby consented to enter into an agreement that all the real and personal estate of Lady *Bath* (except as therein excepted) should (previous to the marriage) be conveyed to the said trustees and their heirs, executors, &c., upon the trusts therein mentioned, and so that, for the purpose of making a provision for younger children of the marriage, the several estates therein specified (including the copyholds) should be made an accumulating fund for the benefit of younger children, in the manner and upon and subject to the terms and conditions after mentioned, it was witnessed that, in pursuance of the said agreement, it was thereby declared and agreed, and the said Lady *Bath*, with the consent of the said Sir *James Pulteney*, did thereby for herself, her heirs, &c., covenant and agree to and with the said trustees, their heirs, &c., that, in case the marriage should take effect, she, and all persons claiming any interest in trust for her in the several estates to which she was entitled as therein mentioned (except as therein mentioned), should within six months after the solemnization of the marriage, do all such acts as should be necessary for granting to and vesting in the said trustees and their heirs, all the estates (including the copyholds), and that the same might (as to part, after the decease of Sir *William Pulteney* her father, and as to the remainder, after her own death) be made an accumulating fund for the benefit of such younger children as therein mentioned; and, subject thereto, in trust to make such conveyances and assurances thereof to and for the benefit of such person or persons, and for such estate and estates, and subject to such powers and conditions, as she (the [251] said Lady *Bath*) should in manner therein mentioned direct or appoint; and, in default of appointment, to stand seized thereof during the coverture for the sole and separate use of Lady *Bath*, and after her death, as to so much and such parts as were by the said will of *Frances Pulteney* (her mother) devised or appointed, or intended so to be, in trust for such person or persons, and for such estate and estates, &c., as by the said will of *Frances Pulteney* was expressed concerning the same; and as to the remainder (including the copyholds) in trust for such person or persons, and for such estate and estates, &c., as by the said will of *Frances Pulteney* expressed concerning the said former estates, or as near thereto as the deaths of parties, and other contingencies, would admit.

Sir *Richard Sutton* (the devisee of *Frances Pulteney*) died in the life time of *Lady Bath*, leaving the Plaintiff his grandson and heir at law ; and *Lady Bath* died in *July 1808* without issue, and having made her will, but not having thereby or otherwise made or executed any further appointment of the copyholds.

The Bill, alleging that, upon the death of *Lady Bath*, the Plaintiff became entitled in equity under the marriage articles to the copyhold premises, the legal estate in which had descended to the Defendants the Earl of *Darlington* and *John Paddy*, who had procured themselves to be admitted tenants thereto, prayed that the articles might be decreed to be specifically performed and carried into execution, and that the Defendants the Earl of *Darlington* and *Paddy* might be directed to surrender the copyholds, in order that the Defendants *Lord Chetwynd* and *Markham* might be admitted tenants upon the trusts of the articles, or that the same might be surrendered to the Plaintiff and his heirs, and possession [252] thereof delivered to him, and an account of rents and profits, &c.

The Defendants, the Earl of *Darlington* and *Paddy*, by their answer alleged that neither the Plaintiff nor his grandfather was a party to *Lady Bath's* marriage articles, and that the Plaintiff ought to be considered in equity as altogether a stranger to the same and not entitled in consideration of blood or otherwise to have the same specifically performed for his benefit by divesting the Defendants of their legal estate and possession.

The principal question was, Whether the consideration of marriage could be held to extend, under the covenant in the articles to all the provisions of the will of *Frances Pulteney*, or whether that covenant was merely voluntary as to Sir *Richard Sutton* and his descendants, who were strangers to the settlement.

The following cases were cited in the argument. *Jenkins v. Keymis* (1 Lev. 150, 237 ; 1 Cha. Ca. 105), *White v. Stringer* (2 Lev. 105), *Osgood v. Strobe* (2 P. W. 245), *Stephens v. Trueman* (1 Ves. Sen. 73), &c. ; and see *Sudgen's Vendors and Purchasers*, chap. 16, sect. 1 (4th ed. p. 535 et. seq.), *Clayton v. Wilton* (cited in *Sugd.* p. 537), *Fairfield v. Birch* (*Ib.* p. 539), &c.

*Leach* and *Dowdeswell*, for the Plaintiff.

Sir *S. Romilly*, *Fonblanque*, and *Horne*, for the Defendants *Lord Darlington* and *Paddy*.

[I was not present when the case was argued.]

[253] *The Master of the Rolls* [Sir Wm. Grant]. This is a bill for the specific performance of a covenant contained in the articles of agreement made on the marriage of the late Sir *James Pulteney* and the Countess of *Bath*. And the question is, whether the covenant is to be considered as merely voluntary, and therefore not to be carried into execution in a court of equity, or whether the consideration of marriage does not extend to all the limitations and agreements contained in the articles.

By the articles, in this case, it was agreed that, in events that have happened, the copyhold estate in question should go according to the limitations of the will of *Lady Bath's* mother. Under that will, Sir *Richard Sutton*, the Plaintiff's grandfather, was the ultimate remainder-man in fee. Sir *Richard* was no party to the articles, nor is he mentioned in them. Of course, no consideration whatever moved from him, nor does it appear that he was related in blood to any party from whom any consideration did move, or indeed to any of the parties to the marriage articles.

It seems, therefore, that nothing short of the establishment of the broad general proposition attributed to Lord Chief Justice *Hale* in *Jenkins v. Keymis* (1 Lev. 150, 237 ; 1 Cha. Ca. 105), could support his claim.

When this cause was heard, it was stated that there was a case depending in the Court of King's Bench, upon a reference from the Court of Chancery, in which the general question might possibly be decided. It afterwards appeared, however, that the case alluded to turned upon its own particular circumstances, and would [254] be no precedent for the decision of the question before me. In the mean time, the case of *Johnson v. Legard* had occurred here, in which the question was, whether limitations in a marriage settlement to the brothers of the settlor were good against a subsequent purchaser for a valuable consideration. That case being sent to law, my judgment was again suspended ; for, although a decision in favour of the brothers would not necessarily be an authority for the Plaintiff's claim, a decision the other way would be a direct authority against it. The case

has been lately decided, and the Court of King's Bench have certified that the limitations to the brothers were void against the purchasers. This decision expressly negatives the proposition, that every limitation in a settlement is protected and rendered valuable by the consideration of marriage. And, to that extent, I entirely concur in the opinion given. I say, to that extent; because the negative of the general proposition is sufficient for the decision of the present cause, and I do not wish to prejudice any other question that may be made when the certificate comes before the Court for confirmation.(1)

[255] There are, certainly, cases in which a Court of Equity has executed covenants in marriage settlements in favour of collateral relations (see *Pulvertoft v. Pulvertoft*, 18 Ves. 92, and cases cited); but I am not aware of any, in which it has been laid down, that a covenant in favour of a stranger is to be carried into execution, merely because it is found in a marriage settlement. For aught that appears in this cause, Sir *Richard Sutton* must be taken to be a mere stranger; and, therefore, the bill must be dismissed, with costs as to the trustees, without costs as to the heir at law.

(1) The case of *Johnson v. Legard* is not yet reported. On the 16th and 17th of July 1818 it came before the *Vice Chancellor* for further directions upon the certificate, when His Honor was pleased to confirm the same. The case of *Smith v. Garland* (2 Mer. 123), was cited in argument, but held not to govern the question in *Johnson v. Legard*, the Bill, in the latter case, being filed by creditors, and by the person claiming under the voluntary settlement, not by the settlor, as in *Smith v. Garland*. In both cases the Defendant (who was the purchaser) raised by his answer the objection to the title founded on the voluntary settlement, but submitted to perform the agreement if the Court should be of opinion that a good title could be made. [See S. C. 3 Madd. 283; 6 M. & S. 60; Turn. & R. 281.]

[256] W. H. WORRALL, and ANN WORRALL, Infants, *Plaintiffs*, and A. JACOB (Assignee of GRAHAM WILKINSON, Bankrupt), ANN WORRALL, Widow, and OTHERS, *Defendants*. *Rolls*. Nov. 18, 1816; Aug. 11, 1817.

[*Jee v. Thurlow*, 1824, 2 B. & C. 554; *Jones v. Waite*, 1839, 7 Scott, 335; *Wilson v. Wilson*, 1848, 14 Sim. 417; *Hall v. Hall*, 1872, L. R. 14 Eq. 377.]

By deed of separation the husband (a trader liable to the bankrupt laws) covenants with a trustee for the wife, in consideration of being indemnified from all debts and engagements which might be contracted by her during the separation, to release his remainder in fee in certain estates (of which he was tenant for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder to himself in fee), to such uses, &c., as the wife shall by deed or will appoint; with power to the wife to revoke the uses of such deed or will. The wife executes the power by deed, which she retains in her possession, and afterwards alters, and re-executes. Held, *first*, that the covenant, although entered into on occasion of a separation between husband and wife, was yet binding in equity, being made to a third party; *secondly*, that it might be supported against creditors, under the statute of *James*, by the consideration of indemnity against the wife's debts and engagements; *thirdly*, that, the deed of appointment containing no power of revocation, although it was contained in the instrument creating the original power, the re-execution was void, and the original appointment therefore was decreed to be carried into execution.

By settlement made after the marriage of *Graham Wilkinson* (a trader liable to the bankrupt laws) and *Mary* his wife, in consideration thereof, *Wilkinson* and his wife conveyed an estate (to which she was entitled as tenant in tail under the will of her father) in order that a recovery might be suffered (which was suffered accordingly) to the use of the husband for life, remainder to trustees to preserve, &c., remainder to the wife for life, remainder to the children of the marriage, as the husband and wife jointly, by deed, or (in default of joint appointment) as the survivor should, by deed with or without power of revocation, or by will, ap-  
[257] point, and, in default of appointment, to the use of the first and other sons

of the marriage in succession, in tail, remainder to all and every the daughters of the marriage equally as tenants in common in tail, and in default of such issue, to the use of the survivor of them (the said *G. Wilkinson* and his wife), his or her assigns for ever.

A separation afterwards took place between *Wilkinson* and his wife; and by indenture entered into on the occasion of that separation, and made between the said *Graham Wilkinson* and *Mary* his wife of the one part, and *William Worrall* (who was brother to Mrs. *Wilkinson*, and father of the infant Plaintiffs) of the other part, reciting the settlement, and that in consideration thereof *Wilkinson* had agreed to enter into covenants for payment to his said wife of an annuity of £70 for her sole and separate use during such separation, and for releasing to her, or such persons as she should appoint, the remainder or remainders in fee to which he might be entitled under the settlement in default of issue, and that *Worrall* had agreed to save harmless and indemnified the said *Wilkinson*, his executors, &c., from all debts and engagements that his wife might contract during the separation, *Wilkinson* covenanted with *Worrall*, accordingly, that, in case he should survive his wife, and there should be no issue of the marriage at her death, he would, immediately on her death, "release and assure unto trustees, or otherwise," all his remainder in fee, after his own decease, in the said estate, "to the use of such persons, and for such estate, &c., and upon such trusts, &c., with or without power of revocation and new appointment, as his said wife should, notwithstanding her coverture, by any deed under her hand and seal (executed as therein mentioned) or by will (which deed or will she was thereby fully authorized to make, alter, or revoke), notwithstanding her co-[258]verture appoint;" and, in default of appointment, to the use of her right heirs for ever.(1)

By deed poll, dated the 25th of April 1797, duly executed according to the power, *Mary Wilkinson* appointed that, in case of her death, living her husband, he (the said *G. Wilkinson*), should, immediately after her decease, convey the said remainder in fee to the use of the said *W. H. Worrall* for life, and after his decease to the use of his children as tenants in common.

Afterwards, on the 28th of the same month, the deed was re-sealed and re-delivered by *Mary Wilkinson* in the presence of the same persons who were witnesses to the first sealing and delivery thereof; an interlineation having been first introduced, after the estate for life to *W. H. Worrall*, "to the use of *Ann Worrall* his wife for her life, and after the several deceases of the said *W. H. Worrall* and *Ann* his wife," to the children as before.

*Mary Wilkinson* died in September 1799, without having had any issue, leaving her husband, and the said *W. H. Worrall*, surviving.

In February 1805, a commission of bankrupt issued against *Wilkinson*, under which the Defendant, *Jacob*, was chosen assignee.

*Graham Wilkinson* (the bankrupt) died in May 1807, without having ever made, and without having been called upon to make, a conveyance of the estate according to his covenant.

[259] *Worrall* also died, leaving the Plaintiffs his children, and the Defendant *Ann Worrall* his widow, surviving.

The bill filed by the children of Mr. and Mrs. *Worrall* insisted that the re-execution of the deed of appointment by Mrs. *Wilkinson* did not alter the legal effect of the deed, for that, after it was executed, she had no power to revoke, or appoint to any new uses; and it prayed (as against the assignee) a conveyance of the estate, pursuant to the covenant of the deed of separation and the appointment; and an account of the rents and profits.

Sir *S. Romilly* and *Heald*, for the Plaintiffs.

*Bell*, for the Defendant Mrs. *Worrall*.

*Agar* and *Pepys*, for the Assignees.

*Wetherell*, for another party in the same interest.

Three questions were raised; first, upon the deed of separation, whether a court of equity would carry into execution the covenant which it contained, being a covenant arising out of, and founded upon, that transaction; as to which were cited *Lord St. John v. Lady St. John* (11 Ves. 526), *Legard v. Johnson* (3 Ves. 352), *Lord Rodney v. Chambers* (2 East, 283). And see other cases cited in *Lord v. Lady St. John*.

The second question was, whether the covenant, if otherwise to be supported,

was not void as against creditors, being unsupported by any valuable consideration, and Mr. *Wilkinson* having been (as appeared from the evidence) a trader at the time of entering into it. And, as to this, it was said that the case came within the statute of *James* (1 Jac. 1, c. 15, § 5). But it was answered, that the covenant from the trustee to indemnify the husband against the [260] debts of the wife was in itself a sufficient valuable consideration to support the transaction; and *Stephens v. Olive* was principally relied upon in support of that proposition. (2 Bro. C. C. 38. And see the other cases referred to in his Honour's judgment.)

The third point was as to the claim of the widow Mrs. *Worrall* to an estate for life under the deed of appointment, as it had been re-executed and re-delivered by Mrs. *Wilkinson*, no power of revocation having been reserved in the instrument of appointment, although contained in the original power. *Hele v. Bond*. (2) But in answer to this it was observed that the deed was voluntary on the part of Mrs. *Wilkinson*, and, after its first execution, had been retained by her in her own custody; and it was said that, where the possession of such a deed has not been parted with, it still remains in the power of the maker of the instrument to alter or vary it at pleasure. *Clavering v. Clavering* (2 Vern. 473), *Naldred v. Gilham* (1 P. Wms. 579), *Boughton v. Boughton* (1 Atk. 625).

[My note of the arguments in this case being very imperfect, I have been induced to subjoin in a note the substance of opinions of Counsel taken upon the occasion mentioned below, and which were the foundation of most that was afterwards urged on both sides at the hearing.] (3)

[261] The *Master of the Rolls* [Sir Wm. Grant]. By a settlement executed by *Graham Wilkinson* and his wife, the estate in question in this cause, which had [262] been originally her property, stood limited, in default of issue of their bodies, to the survivor of them in fee. [263] A separation afterwards taking place between them, Mr. *Wilkinson* covenanted with a trustee to pay his wife an [264] annuity of £70 *per annum*, and to convey his contingent estate in fee to such person as she should by deed [265] or will appoint. The trustee, on his side, covenanted to indemnify the husband against the wife's debts, and [266] against any demand for alimony which she might at any time make.

[267] She executed an appointment in favour of the Plaintiffs, by a deed properly attested, in which she did not reserve to herself any power of revocation. A few days after the execution, she directed an interlineation to be made in the deed, giving to Mrs. *Worrall*, the mother of the Plaintiffs, a life estate, in priority to the limitation previously made to them, and then she re-executed the deed.

Mr. *Wilkinson* survived his wife,—he became a bankrupt, and is now dead. The bill is filed by the Plaintiffs, as appointees of Mrs. *Wilkinson*, for a conveyance of the estate, agreeably to Mr. *Wilkinson's* covenant, and for an account of the rents and profits since his death.

On the part of his assignees, two objections are made to this claim. First, it was said, the Court will not [268] execute any covenant contained in a deed of separation between husband and wife.—Secondly, That this covenant is void, as against creditors, for want of a sufficient consideration to support it; Mr. *Wilkinson* having been a trader when the deed of separation was executed.

If these objections do not prevail, and the covenant is to be executed, then, on the part of Mrs. *Worrall*, it is contended, that the limitation to her for life was well introduced into the deed of appointment.

As to the first point, I apprehend it to be now settled, that this Court will not carry into execution articles of separation between husband and wife. It recognizes no power in them to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of that contract. It should seem to follow, that the Court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange, that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit, and the policy, of the law. It has, however, been held, that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of, and relate to, that unauthorised state of separation, in which the husband and wife have endeavoured to place themselves. I am, there-

fore, only to repeat what the *Lord Chancellor* has said in the case of *Lord St. John v. Lady St. John* (11 Ves. 537)—“If this were *res integra*, untouched by dictum or decision, I would not have permitted such [269] a covenant to be the foundation of an action, or a suit in this Court. But, if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject.”

As to the second point, I think I must, upon the evidence, hold Mr. *Wilkinson* to have been a trader at the time when he executed this deed. He certainly was in trade before, and it does not distinctly appear that he had given up business at the period in question. Then, is this a covenant for a valuable consideration, within the meaning of the statute? (1 *Jac.* 1, cap. 15, s. 5.) Mr. *Wilkinson*, as I have before stated, stipulates, on the one side, to pay his wife an annuity of £70 *per annum*, and to convey according to her appointment; and the trustee, “for the considerations aforesaid,” engages to indemnify the husband against debts and alimony. It was said, that an indemnity against the wife’s debts is an indemnity against nothing, as the husband, living apart from his wife, and allowing her a separate maintenance, is not liable to pay her debts. That, however, is too largely stated—for questions frequently arise, as to the husband’s liability, notwithstanding a separate maintenance is provided for the wife. The sufficiency of the maintenance, according to the condition and fortune of the parties, is held to be a question for the consideration of the Jury. This covenant may, therefore, afford a most important protection to the husband, and throw a burthensome obligation on the trustee. In *Hyde v. Price* (3 Ves. 437), Lord *Alvanley* calls it a very material covenant, although at that time it was held that a married woman, having a separate maintenance, might herself be sued [270] for the debts she contracted. And it is not against debts alone, but against any claim of alimony, that the husband is in this case indemnified. A covenant of indemnity, even against debts, has so often been held to amount to a valuable consideration, that I do not think myself at liberty to treat it as an open question. Though Lord *Hardwicke* had no occasion expressly to decide it in *Fitzer v. Fitzer* (2 Atk. 252, 511), yet he laid great stress on the absence of such a covenant. The case affords, therefore, an argument by implication in favour of its effect. In *Stephens v. Olive* (2 Bro. C. C. 90), it was held by Lord *Kenyon* to be a covenant for a valuable consideration. The same point was ruled by Lord *Rosslyn* in the case of *The King v. Brewer* (Bro. C. C. 93, note), and Mr. Justice *Buller*, in *Compton v. Collinson* (2 Bro. C. C. 38), says, that “the deed made on the separation was clearly founded on a good and valuable consideration, the husband being indemnified from all debts which the wife may contract.” No contrary determination has been cited; and, therefore, I must hold, that this covenant, being grounded on a valuable consideration, is to be specifically performed.

As to Mrs. *Worrall*’s claim, the objection to it is, that, as Mrs. *Wilkinson* had reserved no power of revocation, she could not insert a limitation, which had, *pro tanto*, the effect of revoking the appointment she had already made. The answer attempted to be given to this objection, was, that, as this was, on the part of Mrs. *Wilkinson*, a mere voluntary deed, which had not been out of her own custody, she might cancel or revoke, and *a fortiori* alter it, at her pleasure. But there is, I conceive, no authority for the proposition so broadly stated. The case of *Clavering v. Clavering* (2 Vern. 473) is a direct authority the other way. Both deeds were, in that case, alike voluntary. Neither had ever been out of the possession of the grantor. Yet it was determined, first by the Court of Chancery, and afterwards by the House of Lords, that the first deed was not revoked by the second. The case of *Naldred v. Gilham* (1 P. Wms. 579) turned on its own particular circumstances, as is observed by Lord *Hardwicke*, in *Boughton v. Boughton* (1 Atk. 625). Sir *Joseph Jekyll* had conceived it to be so clear that a voluntary deed, once perfected, could not be revoked at pleasure, that he established the copy of the first deed, though the original had been destroyed by the maker. If Lord *Macclesfield* had meant to affirm the proposition stated on the part of Mrs. *Worrall*, he would only have had to say, in three words, that, as the first deed was voluntary, and had been cancelled by the maker, the second must necessarily prevail. Instead of this, he enters into a detailed consideration of all the circumstances of the case, and thinks himself warranted to infer from them, that Mrs. *Naldred* had been imposed upon in making the first

settlement an absolute conveyance. Here, there is not the least evidence of mistake, or misapprehension, in framing the deed, as it at first stood. The mere attempt to vary the disposition, cannot, of itself, prove, that the omission of a power of revocation was occasioned by fraud or mistake; for then the second disposition must in every case prevail. All it shews, is, that the party mistook the law, and conceived that a deed might be altered or revoked, though no power of revocation had been reserved.

I am of opinion, that it is the appointment, as it originally stood, that is to be carried into execution.

(1) This deed is not sufficiently set forth in the pleadings; but the true nature of its provisions may be collected from His Honour's judgment, founded either on inspection of the deed itself, or on the admission of parties at the hearing.

(2) Pre. Cha. 474; 1 Eq. Ab. 342, and more fully stated in Sugden on Powers, Appendix, No. 2. See also Sugd. on Powers, Sect. 7, p. 303 & seq. second edition.

(3) After the death of Mrs. *Wilkinson*, and before the bankruptcy of her husband, a case was submitted to Counsel, in which, after stating the deed of separation, as recited in the deed of appointment, and also the deed of appointment, their opinions were asked as to the following queries.

"Whether the deed of separation containing the power of appointment, and the deed of appointment made in pursuance thereof, can stand good as against a legal and *bona fide* purchaser, or against a creditor, who might prosecute a commission of bankruptcy against *Graham Wilkinson* grounded on an act committed long after the execution of the deed of separation? Or whether the deed of separation is void, and the subsequent appointment also, and Mr. *Wilkinson* has still an estate in fee in the premises (he now being in possession)?"

1. "If the deed of the 16th of March 1780 was the only deed executed on the separation of Mr. and Mrs. *Wilkinson*, and there was no contract or arrangement between them, under which Mr. *Wilkinson* was benefited, his agreement in that deed to convey the estate, in the event of his surviving Mrs. *Wilkinson*, to such uses as she should appoint, was purely voluntary, and therefore falls within 1 *Jas.* 1, c. 15, s. 5, by which the commissioners of bankrupts are authorised to convey to the assignees all the bankrupt's lands and goods previously sold or disposed of by him, unless such sale or disposition of them was made on the marriage of his children or for some valuable consideration. If therefore a commission of bankrupt should be sued out against Mr. *Wilkinson*, though grounded on an act committed long after the execution of the deed of separation, the bargain and sale of the commissioners would vest the estate in the assignees for the benefit of the creditors. Independent of a commission of bankruptcy, by the 27 *Eliz.* c. 4, a settlement without a valuable consideration is void against subsequent purchasers. And it has been held that this extends to purchasers even with notice of the settlement. (*Evelin v. Templer*, 2 Bro. C. C. 148.) It should seem, therefore, that, on the supposition I have stated, of the transaction resting solely on the deed of separation, Mr. *Wilkinson* may now make a good title to a purchaser of the estate, though that purchaser should have notice of the separation; and even without resorting to either of these statutes, as the legal estate is evidently vested in Mr. *Wilkinson*, it is very doubtful whether, if the separation deed is voluntary, a Court of Equity would decree either Mr. *Wilkinson* to execute a conveyance, or otherwise carry the agreement of that deed into execution."

2. "The appointment executed by Mrs. *Wilkinson*, under the power reserved to her by the deed of separation, is an effectual, valid, and existing appointment; not at all coming within the statute of *Elizabeth* in favour of creditors; and the same cannot be affected by any sale to be made by Mr. *Wilkinson*, or any act of bankruptcy committed by him; and no effectual means can be taken to destroy the effect thereof. Mrs. *Wilkinson* was a purchaser for a valuable consideration under the deed of separation, even if no clause is therein inserted (which I have no doubt there was) to indemnify Mr. *Wilkinson* against her debts. If any authority were necessary to be resorted to, the case of *Stephens v. Olive* (2 Bro. C. C. 90) and the note of *King v. Brewer*, at the end of that case, are decisive on the question."

The case was then sent again to the gentlemen who had given these different opinions, and who wrote upon it as follows.

1. "The personal undertaking of the Trustee to indemnify him generally against



all Mrs. *Wilkinson's* debts might, perhaps, be considered a benefit to Mr. *Wilkinson*; and, if there be such a contract, might take it from the conclusion of law upon which the whole of my opinion proceeds. But, if there be no such covenant, and Mr. *Wilkinson* did not otherwise derive a benefit from the separation, I think the settlement would be considered to fall within the statutes, and would therefore be void against a purchaser for a valuable consideration. I have only to observe further, that the statute of *Elizabeth* contains a difference with respect to creditors and purchasers, and that this distinction is preserved in all the decisions upon the statute."

2. "I think that a separation alone between man and wife would be a good consideration within the statute 27 *Eliz.*, but that a covenant from Trustees is not only a good but a valuable consideration, and would take a conveyance out of the statute of either *Elizabeth* in favour of purchasers, or *James* in favour of creditors."

In consequence of the difference still prevailing in these opinions, a case was now submitted to two other gentlemen, in which, taking it for granted that a covenant from the Trustee to indemnify Mr. W. from his wife's debts was contained in the deed of separation, and bearing it in mind that Mr. W. thereby agreed to pay, and did actually pay her an annuity of £70 from the date of such deed of separation to the time of her death, and then paid the expenses of her funeral, the following *queries* were subjoined:—"Is a separation between man and wife considered, either in law or equity, a good consideration, within the meaning of the statute of *Elizabeth*? And, if a covenant to indemnify from debts actually exists, whether that is such a valuable consideration as to take the case out of the statute of *James*?"

1. "The separation of Mr. and Mrs. *Wilkinson*, on the terms of his allowing her a separate maintenance of £70 *per annum*, guaranteed by the covenant of a third person from any debts she might contract, cannot be considered a valuable consideration within the statute 1 *Jac.* 1, c. 15, s. 5. If, therefore, the deed of separation and consequent appointment could be considered in the nature of a conveyance, I should be of opinion that, on a commission of bankruptcy being now issued against Mr. *Wilkinson*, the fee in question would pass by the commissioners' bargain and sale under the above statute, as if no such deed of separation or appointment had ever existed; and, consequently, that the assignees under such commission would be at liberty to sell the same for the benefit of the creditors seeking relief under such commission. But, inasmuch as the freehold is clearly in Mr. *Wilkinson*, he having never actually conveyed the same to the appointee, but only covenanted so to do, I am of opinion that, on this ground (independently of the statute of *James*), the commission of bankruptcy would operate upon it, the Court of Chancery having in several cases refused to carry voluntary contracts into execution against the assignees. Whether, without a commission of bankruptcy, Mr. *Wilkinson* himself could, under statute 27 *Eliz.* c. 4, make a good title in fee to a purchaser, appears to me a very doubtful point, in as much as the 4th section of that act provides that it shall not impeach any conveyance, assurance, &c., made upon a good and *bona fide* consideration. Now I strongly incline to think, that a good and *bona fide* consideration under this act will admit of a much more extensive construction than the valuable consideration required by the statute 1 *Jac.* 1, c. 15, s. 5. I therefore hold it by no means clear, that a purchaser from Mr. *Wilkinson* would hold the premises free from the contract contained in the deed of separation. At all events, I think, this point will fairly admit such difference of opinion, as to preclude all hopes of a purchaser, without the aid of a commission of bankruptcy. Upon the whole, I am of opinion, that a commission of bankrupt against Mr. *Wilkinson* would have the effect of appropriating the value of the fee in question towards the payment of his creditors, and that such measure is the only way under which that end can be obtained."

2. "If the contract of the trustees to indemnify Mr. W. against his wife's debts be a valuable consideration within the statute of the 1st of *James*, the deeds of separation and appointment are good against all the world;—if not, the fee simple of the estate may be sold by the assignee for the benefit of the creditors. And the cases of *Stephens v. Olive*, and *The King v. Brewer*, which decide in general terms that a contract of indemnity against a wife's debts is a valuable consideration, appear to me conclusive authorities in support of those two deeds. I conceive, further, that, if the consideration be such a good and valuable one, that the conveyance, if made, would not be set aside in favour of creditors, the Court would decree it to be made on an application to that effect from Mrs. W.'s appointee. See *Tyrrell v. Hope* (2 *Atk.* 562), *Walker v.*

*Burrows* (1 Atk. 94), *Brown v. James* (*ib.* 188). In the last paragraph of *Tyrrell v. Hope*, the *Master of the Rolls* is reported to have said, that, though the wife was entitled in that case to relief against the assignees, yet it should be without costs, as it was their duty (being only trustees for the creditors at large) to bring a case so circumstanced before the Court. I think the present case doubtful enough to make the same thing proper here. The deeds in question might be attacked on the 13 *Eliz.* as I am informed that Mr. *Wilkinson*, at the time of their execution, was considerably in debt, and Lord *Hardwicke's* declaration might be relied on (1 Atk. 15), that he had 'hardly known one case, where the person conveying was indebted at the time of the conveyance, that had not been deemed fraudulent.' But the strongest ground of argument would arise from the distinction between *Stephens v. Olive*, which turned upon 13 *Eliz.*, and the present case, falling within the 1st *James*. An appeal might be made to the partiality of the Court to creditors under a commission, sanctioned and enjoined by the first section of 21 *Jac.* 1, c. 19, which enacts 'that all laws against bankrupts shall be largely and beneficially construed for their aid, help, and relief.' From the use of the word 'valuable,' in 1 *Jac.* 1 (not 'good and bona fide' as in other places), an intention might be presumed in the legislature to protect no considerations against creditors but such as have produced some certain actual benefit to the estate, capable of enriching it before the bankruptcy, or afterwards of being divided among the creditors. This restricted signification would effectually exclude a personal contract, under which it is merely possible that the bankrupt might be relieved from a liability which might never occur; from which contract, in point of fact, Mr. *Wilkinson* derived no benefit. The particular circumstances may also be brought forward; as that the annual value of the estate was less than the allowance secured by the deed of separation, and actually paid to the wife; and that, whereas in *Stephens v. Olive* the conveyance was made for the provision of the debtor's wife and children, the bankrupt in this case parted with his interest for the emolument of any stranger his wife's caprice might pitch upon."

After the commission of bankrupt had issued, a third case was submitted to Counsel on behalf of the assignee, with the following queries:

"1st. Does the estate pass by the bargain and sale, and can the assignee make a marketable and sufficient title thereto?

2d. "Is it necessary that a notice should be given of the settlement and separation, &c.; and if so how would you advise it should be done?"

#### Opinion.

"If the deed of separation contained a covenant from Mrs. *Wilkinson's* brother and trustee, Mr. *Worrall*, against her husband's being sued by her in the Spiritual Court, and against his being liable for her future debts, I strongly incline to think that there would be consideration enough to support Mr. *Wilkinson's* covenant for conveying the remainder in fee, in the contingency which was described, and has happened, both at law and in equity, against his assignee. My first impression was very much to the contrary; but such impression has been overcome. It has been so partly by reading the masterly consideration of the subject of settlements on voluntary separation between husband and wife in Robert's Treatise on the statutes of 13th and 27th *Eliz.* It has been partly also overcome by a consideration of the principles which appear to have been adopted by the King's Bench in two cases since its publication; namely, the cases of *Nun v. Wilsmore* (8 Durnf. & East, 521), and *Lord Rodney v. Chambers* (2 East, 283). I say, upon the principles of those two cases, because neither of them was on the bankrupt statutes. However, in respect of matter somewhat of a contrary tendency, which appears to have come from Lord Chancellor *Rosslyn*, in *Legard v. Johnson* (3 Ves. 352), and from Lord *Eldon*, in *Beard v. Webb*, (2 Bos. & Pull. 105), relative to deeds of separation, I recommend it to the assignees not to act upon my single opinion; and, perhaps, upon consulting other counsel it may, if the assignees have agreed to sell, be found advisable to endeavour at fixing upon some short mode of trying the point with a purchaser, in case of his refusal to accept the title, on the ground that the bankrupt's covenant to convey the remainder in fee to his wife's appointees was fraudulent as against those claiming under the commission of bankrupt."

## [272] SAMUELL v. HOWARTH. August 7, 1817.

[*Reade v. Lowndes*, 1857, 23 Beav. 368; *Oriental Financial Corporation v. Overend, Gurney & Co.*, 1871, L. R. 7 Ch. 150; *Petty v. Cooke*, 1871, L. R. 6 Q. B. 794; *Robinson v. Mollett*, 1875, L. R. 7 H. L. 814; *Polak v. Everett*, 1876, 1 Q. B. D. 674; *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 763; *Clarke v. Birley*, 1889, 41 Ch. D. 434; *Mayor, &c., of Durham v. Fowler*, 1889, 22 Q. B. D. 417.]

A. guarantees the payment of any goods to be supplied by B. to C. between the 2d of April 1814 and the 2d of April 1815. Although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and C. having accepted bills for the amount of the goods delivered, which B. permits him to renew when payable without any communication to A. on the subject of such renewal; *Held*, that A. was discharged from his guarantee, by virtue of the rule that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety. And that, although it was proved that the renewal was given only in consequence of C.'s inability to pay, and that no injury could accrue to A.; the surety being himself the fit judge of what is, or is not, for his own benefit.

The Bill stated that in April 1814 the Plaintiff was applied to by a person of his acquaintance named *Henry*, a woollen draper at *Liverpool*, to guarantee the payment of the amount of certain goods which he was about to order from the Defendant, a manufacturer at *Leeds*, representing to the Plaintiff that his orders should not at any one time exceed £800, and that the Defendant also understood and expected that such proposed guarantee would not at any time render the Plaintiff liable beyond that amount. That, upon the faith of these representations, the Plaintiff consented to give the guarantee which was requested of him for one year only, and accordingly signed a memorandum to the following effect: "*Liverpool*, 2d April 1814. Messrs. *Howarths and Co.* Gentlemen,—We engage to guarantee to you the payment of any goods you may supply to Mr. *Isaac Henry* between the 2d of April 1814 and the 2d of April 1815."

The Bill went on to state that goods were afterwards supplied by the Defendant to *Henry* at various times within the succeeding twelvemonth, to an amount very far exceeding £800, and which were sent at a credit of six months as to part, and of nine months as to other part, payable at the expiration of such respective credits in bills at three months' date; and that, at the expiration of such respective credits, *Henry* accepted bills for the amount, payable at three months accordingly. That, [273] instead of enforcing payment of the bills so accepted, the Defendant in every instance permitted *Henry* to renew the same by giving or accepting other bills at extended periods, and which renewed bills were afterwards again renewed; thus giving further time for the payment at the expiration of the credit which originally had been so given; and that this was done without the knowledge, privity, or consent of the Plaintiff, who was never informed of the irregularity in the payments, or of any of the aforesaid transactions, until the month of June 1816 (previous to which *Henry* had been found bankrupt under a commission), when he received notice of an action intended to be commenced against himself and *Henry* upon the bills which had become due; and which action had since been actually commenced pursuant to such notice.

The Bill prayed that the guarantee so as aforesaid given and signed by the Plaintiff might be declared to be at an end and altogether void; or, if necessary, that an account might be taken of the amount of any liability of the Plaintiff under the same, and that, upon payment thereof the said guarantee might be delivered up to be cancelled; and an injunction to restrain proceedings at law in respect thereof.

The Defendant by his answer stated, that *Henry* having applied to the Defendant to supply him with goods upon credit, the Defendant declined so to do unless *Henry* would procure some respectable person to be his guarantee for the payment of the amount, upon which *Henry* proposed the Plaintiff as such guarantee, and thereupon the Defendant accompanied him to the Plaintiff's house, and, after some consideration, the Plaintiff agreed to guarantee to the Defendant pay-

ment for all such goods as *Henry* should have from him between the [274] 2d of April 1814 and the 2d of April 1815, in case *Henry* did not or could not pay for them, and thereupon he gave such written guarantee as in the bill stated; but he denied that, on such application, any limitation was mentioned as to the amount of goods to be furnished, or otherwise than as to the period within which they were to be delivered. The answer admitted that, at the expiration of the respective periods of credit at which the goods were delivered, *Henry* did give bills and acceptances to a certain amount in payment for such goods, and said that the dishonour of such bills and acceptances, and of others given to replace them, and the inability of the Defendant to obtain payment from *Henry*, were the cause of the Plaintiff being now called upon under his guarantee, it having been expressly understood and agreed between them that the Defendant should use all practicable means, according to his discretion, for obtaining payment from *Henry*, by the renewal of bills or otherwise, without prejudice to his right so to call upon the Plaintiff. That the Defendant verily believed the course he had taken to be the most effectual, and the best according to circumstances, for the purpose of obtaining payment, and that, if he had had recourse to legal proceedings to enforce the payment, he should not have obtained so much as he had obtained by the course actually adopted; but that if the Plaintiff had desired him to take legal proceedings, he should have complied with such request. That he believed, on every occasion of renewing such bills, *Henry* was in fact, as he represented himself to be, utterly incapable of paying the same, and that he never gave further time for payment otherwise than by such necessary renewals; admitting, however, that he did not consult the Plaintiff on the occasion of such renewals, or apprise him of the circumstances under which the same were made, and consequently that further time was, in such instances, actually [275] given without the Plaintiff's express consent, but not, as he believed, in any of such instances, without his knowledge. That the Plaintiff knew, and it was so understood and expressed at their first meeting, that the goods were to be sold at the usual credit: and that the period of credit so as aforesaid given by the Defendant to *Henry* were the usual periods. That the Defendant frequently informed the Plaintiff by letter of the irregularity of *Henry* in paying his bills and acceptances, but that the Plaintiff never took any notice of such letters, and on the contrary fraudulently denied to the Defendant's agent that he had given any guarantee, and told him that he knew nothing about it. The answer then stated various circumstances, from which the Defendant inferred that the Plaintiff acted in concert with *Henry*, and was well aware of the state of all the transactions in which he was concerned, and with every circumstance relating to the renewals of bills, to which he never stated any objections; and it admitted that the Defendant, consequently, knowing of no objections on the Plaintiff's part, and thinking it of advantage to all parties, agreed to a proposal of *Henry's* for a further renewal, which was given accordingly; submitting that, under such circumstances, the Plaintiff was not discharged by any act of him (the Defendant) from his liability under the guarantee which he had given, and that he (the Defendant) was therefore not bound to relinquish the same.

An injunction having been obtained on the filing of the bill, *Hart and Wray* now shewed cause against dissolving the same.

The guarantee given by the Plaintiff as surety for *Henry* was absolutely discharged, under the circumstances of this case, by the Defendant's giving further [276] time to the principal without communication to the Surety. *Nisbet v. Smith* (2 Bro. C. C. 579) *Rees v. Berrington*. (1)—If the credit originally given was in the regular course of trade, and the transaction can on that ground be so far supported, the renewal of the bills and acceptances cannot be so considered, and, being granted without the Plaintiff's privity, falls within the principle of these cases. The fact, as to the limitation of the amount which the guarantee was intended to cover, to £800, is denied by the answer;—but it is immaterial to the question of exoneration. The conviction alleged by the Defendant of *Henry's* inability to pay previous to his consenting to a renewal, does not alter the case. He ought to have communicated his intention to the Plaintiff; and the circumstance that the Surety did not in fact sustain any injury, but derived even an actual benefit from the time so given to his principal, was considered by Lord *Thurlow* as not invalidating his claim to be discharged upon the strict technical rule. See also *Boulbee v. Stubbs* (18 Ves. 20.

*Bowmaker v. Moore*, 3 Price, 214. *Moore v. Bowmaker*, 6 Taunt. 379; 2 Marsh. 82, 392).

*Horne*, for the Defendant. The arguments used in favour of the Plaintiff's claim to be discharged apply only to a case in which the amount of credit, the time and mode of payment, have been precisely specified. Here the Bill alleges that the amount was restricted to £800; but that has not been shewn to be the fact—it does not appear on the face of the guarantee given, and the fact that there was any [277] such agreement is denied by the answer. This is not a guarantee for the payment of a particular sum at a particular period, but of all goods to be delivered between the month of *April* 1814 and the month of *April* 1815; and it says nothing as to the time of payment. The Defendant was not bound, in order to render the Plaintiff liable under his guarantee, to use any other diligence than he actually has used in obtaining payment of the bills from *Henry*; and, with regard to the renewals being given without the consent of the Surety, the inability of *Henry* to pay was well known to the Surety;—he was informed of such inability by the Defendant himself; and he must have known of the renewals, although not expressly made acquainted with them by the Defendant, nor consulted with respect to them previous to the arrangement being made. The benefit which the Plaintiff himself has derived from the transaction, and the circumstance that his remedy against the principal is now as good as it ever could have been, are not to be passed over, or regarded as of no moment in such a transaction. The credit understood to be given was indefinite in extent, and cannot be limited by any arbitrary rule of convenience.

The *Lord Chancellor* [Eldon]. The guarantee given in this case is general in its terms, and must be construed, according to its legal effect, in favour of the Surety.

The liabilities of Sureties are governed by principles which have been long settled in equity and are now adopted in courts of law.—I say, *now*, because the Court of Common Pleas formerly held a different doctrine. But at present it is firmly established that the same principles which have been held to discharge the Surety in equity will operate to discharge him also at [278] law. However, as the same relief is to be obtained in both, a Court of Equity will not send a party who is suing here to a Court of Law for the discharge to which he is equally entitled in this place.

The rule is this—that, if a creditor, without the consent of the Surety, gives time to the principal debtor, by so doing he discharges the Surety; that is, if time is given by virtue of positive contract between the creditor and the principal—not where the creditor is merely inactive. And, in the case put, the Surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the Surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract.

Now, in the present case, the creditor has been supplying goods to the principal debtor, from time to time, upon a certain credit, the extent of which, not being expressly stipulated between the parties, I must take to be credit given according to the usual course of trade. The Surety says, I will be answerable for the amount of such goods as you shall furnish during the period from the 2d of *April* 1814 to the 2d of *April* 1815. It is impossible for me to hold that this is an engagement by which he (the Surety) has rendered himself liable for an indefinite time beyond the expiration of the period limited for the delivery of the goods. It cannot be supposed that the Plaintiff meant he should continue liable, after the 2d of *April* 1815, so long as the Defendant might choose to renew the bills of the principal debtor. You cannot contend in support of such an extravagant proposition. It has been truly stated that the renewal [279] of these bills might have been for the benefit of the Surety; but the law has said that the Surety shall be the judge of that, and that he alone has the right to determine whether it is, or is not, for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the Surety, without the consent of the Surety.

Injunction continued.

(1) 2 Ves. J. 540. See *Devaynes v. Noble*, 1 Mer. 549, and *Cooke's Bank. Laws*, 167 (5th ed.), as to the acceptor of a bill of exchange being discharged by time given to the drawer.

BRICKWOOD v. MILLER. *Rolls. August 25, 1817.*

*P.* a partner in two houses of trade originating in the *West Indies* where his partners continue to carry on the business, but being himself resident in *London*, receiving and disposing of consignments from, and shipping cargoes to, his partners abroad, becomes bankrupt. On Bill by his assignees against a creditor of the two firms, having attached in the *West Indies* property belonging to both, for an account of what he had received by means of his attachments, *Held*, that the Defendant was entitled to retain what he had received, to the extent of satisfying his joint debts, and to account only for the overplus. Different from the cases where the bankrupt was the sole debtor, and where the trade was in *England* only, and the attachments laid in *London*.

[The facts of this case are fully stated in the judgment of the *Master of the Rolls*. I was not present during the arguments of counsel.]

The *Master of the Rolls*. The Plaintiffs are assignees of *Thomas Ibbott Pierce*, a Bankrupt, who was a partner in two houses originally formed in the *West Indies*; the one under [280] the firm of *Thomas Ibbott Pierce and Co.*, which consisted of *Pierce* himself and *William Brown*; the other under the firms of *William Brown and Co.*, which consisted of *Pierce* and *Brown*, and also of *Joseph Lambott* and *George Fitzwilliam*. *Brown* is dead. *Lambott* and *Fitzwilliam* are made Defendants, but are out of the jurisdiction, and have never appeared, or answered. The material Defendant is *James Richard Miller*, who, claiming to be a creditor of the two firms, has attached in the *West Indies* property belonging to them both. And the principal question in the cause is, Whether *Miller* can be compelled by the assignees of the bankrupt partner to account for what he has received by means of his attachments.

I have already stated that the partnerships had been formed in the *West Indies*; but soon after their formation, viz. in 1802, Mr. *Pierce* came over here, and established himself in *London*, for the purpose of conducting the English branch of the business of the two houses. He received and disposed of the consignments from the *West Indies*, and shipped cargoes from hence to his partners there.

A commission of bankruptcy issued against him in *January* 1805, grounded on an act of bankruptcy alleged to have been committed in the preceding *October*. This bill, however, was not filed till seven years afterwards. The case which it brings before the Court does not appear ever to have been the subject of judicial decision. In *Sill v. Worswick* (1 H. Black. 665) and *Hunter v. Potts* (4 T. R. 182), where the English creditor was forced to refund what he had recovered under a foreign attachment, the bankrupt was a sole debtor, and not one of several [281] partners; and it was in *England* alone that he had any commercial establishment. In *Barker v. Goodair* (11 Ves. 78) and in *Dutton v. Morison* (17 Ves. 201; 1 Rose, 213), where the Lord Chancellor granted an injunction against the proceeding by attachment, the case was, indeed, that of the bankruptcy of one of several partners; but the commercial establishment was in this country alone, and it was in *London* that the attachments were laid. But here the partnerships are at least as much *West Indian* as *English* establishments, and it is in the *West Indies* that the attachments are laid. Now it is contended for the Defendant, that the bankruptcy of the partner resident in *England* could not affect the partners remaining at home, in a country not subject to the bankruptcy law, so as to divest them of the management of the partnership concerns, or the disposition of the partnership property. If they applied the partnership assets in the payment of the partnership debts, or if, in a legal course of proceeding against them, the debts were recovered according to the law of the country, there exists, it was said, no jurisdiction here to force a partnership creditor to refund what he has so received or so recovered. The case so put appeared to me to be a very strong one. Even in the less difficult case of the attachment abroad of the property of a sole debtor, residing, and becoming a bankrupt, in this country, I doubt whether all the reason-

ing of Lord Chief Justice *Eyre*, in *Hunter v. Potts* has ever received a completely satisfactory answer.

It does seem an anomalous proceeding for the Courts of one country to take from a man what has [282] been adjudged to him by the Courts of another. Assuming however, as I ought to do, that those decisions are right, do they necessarily govern the present case? To what extent the bankruptcy of one partner affects the power of the others over the partnership property, is perhaps still a matter of some uncertainty. In *Fox v. Hambury* (Cowp. 448) Lord *Mansfield* expresses a clear opinion, that any fair disposition of the partnership assets by the solvent partner would stand good against the assignees of the bankrupt. The case, however, went off upon the form of the action, as in all events trover could not be maintained by one tenant in common against another. In the case of *Coldwell v. Gregory* (1 Price, 119, 130, and 2 Rose, 149), Lord Chief Baron *Thomson*, delivering the judgment of the Court of Exchequer, says, "It would be a monstrous thing to say, that if an individual in a firm become bankrupt, the other solvent partners may be stripped of their property, and thus be deprived of the means of satisfying the partnership debts." In *Smith v. Goddard* (3 Bos. & Pul. 465), the Court of Common Pleas left it a doubtful point, whether any part of a sum paid to a creditor, after the bankruptcy of one partner, could be recovered back. They held clearly that the whole could not. On the other hand, the Lord Chancellor, in *Barker v. Goodair*, and in *Dutton v. Morison*, holds that the effect of the bankruptcy of one partner is to render it necessary to take an account of the joint estate, and to apply it just as if the whole firm had become bankrupt; and therefore granted an injunction against the proceeding by attachment. Lord *Rosslyn* had held a directly opposite opinion in *Bristow v. Potts* (11 Ves. 81, note), where he [283] decided that the assignees of one of the joint debtors had no equity to obtain an injunction against creditors who had attached the joint estate.

It is to be recollected, that in the cases before the Lord Chancellor, the domicile of the partnership, if I may so express it, was completely *English*; that all its concerns were subject to the *English* law; and that it was by a proceeding in this country that the creditors were endeavouring to disappoint the arrangement, which His Lordship conceived it competent to him to make, for the equal distribution of the partnership property. And, even then, he says in *Dutton v. Morison*, that there is infinite difficulty in the case. But the difficulty seems to me to be insuperable, where a partnership, originating in another country, has at least a divided establishment, and some of the partners continue to reside and carry on the trade in that other country. How are the *West Indian* partners to be controuled in the management of their trade, or restrained, by any proceeding here, from paying and applying the partnership assets as they think fit? Equality of distribution cannot possibly be attained. Are we then to tell a creditor, that, because he happens to reside in *England*, and his debt has been contracted there, he shall not be allowed to take such remedies against his foreign debtor as the laws of their country may permit? In the cases before the Lord Chancellor, the Court, taking from the creditor his separate remedy, professed to give him his distributive share of the whole partnership property. But it cannot, in this case, reach the *West Indian* property, or bind the *West Indian* partners. Then you would take from the partnership creditor one remedy, without substituting any other in the place of it. This would be to say, that the [284] *West India* property must be left for any creditors but *English* creditors.

Then, if *English* creditors are not to be restrained from suing, it would be incongruous to force them to refund what they have recovered.

I think, consequently, the Defendant is entitled to retain what he has recovered or received from the *West Indies*, to the extent of satisfying the joint debts due to him. If he is overpaid (as he must be if the Plaintiffs are right in their proposition that only a very small sum was originally due to him), they have a right to the surplus; which will be applicable as any other joint property that may have come to their hands. There must, therefore, be an account of what was due to him from the two firms at the time of *Pierce's* bankruptcy, and of what he has since recovered or received.

[285] HAZARD and HOLLAND, *Plaintiffs*; against LANE, Widow, and LLOYD, and WIFE, *Defendants*. June 5, August 25, 1817.

Reference of a Solicitor's bill of costs to be taxed, upon the application of one of two Trustees and Executors by whom he had been employed in the conduct of the cause and in other matters relating to the Executorship—the Executor making the application not having acted, and his acting Co-Executor refusing to consent to the application—the bill having been long since paid by the acting Executor—but unknown to the parties beneficially interested—and no settlement of the Executorship accounts having been made, notwithstanding repeated applications, until lately, and the *Cestuy que trusts* (one of them a married woman) having executed a release to the Executors. Motion on behalf of the Solicitor to discharge the order of reference refused—the *Cestuy que trust* having a right to use the name of his Trustee for the purpose of taxation, and the release to the Executors not operating to prevent him from prosecuting against the solicitor the remedy given him by statute.

This was an application on the part of the Solicitor for the Plaintiffs, “that an order made in the above cause, dated the 23d of *January* last, upon the application of the Plaintiff *Holland*, might be discharged, with costs to be taxed by the Master and paid by the said Plaintiff, and that in the mean time all proceedings under the order might be stayed.”

The order sought to be discharged was drawn up in the following terms.

“Upon motion this day made by Mr. *Parker*, of counsel for the Plaintiff *Holland*, it was alleged that the said Plaintiff formerly employed *F.* (on whose behalf the present application was made) as solicitor for him in this and other causes and matters, and the said *F.* has lately delivered to the Plaintiff *Holland* his bills of fees and disbursements—that the said Plaintiff submits to pay him what (if any thing) shall appear due to him on taxation of his said bills, and therefore it was prayed, &c. Whereupon, and the said Plaintiff submit-[286]-ting to pay, &c., His Lordship doth order, that it be referred to (the Master) to tax the bills of fees and disbursements delivered by *F.* to the Plaintiff *Holland* in this and other causes and matters; and, in order thereto, all parties are to be examined, &c., and to produce, &c.; and that the Plaintiff *Holland* do, according to his said submission, pay to *F.* what (if any thing) shall appear due to him on such taxation; and thereupon, or in case it shall appear that he is already paid, the said *F.* is to deliver to the said Plaintiff, upon oath, all books, papers, &c., in his custody belonging to the said Plaintiff; and, in case it shall appear that he is over-paid, he is to refund to the said Plaintiff what the Master shall certify to be over-paid.”

The facts of the case were these.

The Plaintiffs were Trustees and Executors named in the Will of *Lane* (the father of the Defendant Mrs. *Lloyd*), under which Will the Defendants *Lloyd* and his wife, in right of the wife (who was an infant at the time of filing the bill), are parties beneficially interested.

It appeared by the affidavit of the solicitor made in support of the present application, that in *August* 1804 he was employed by the Plaintiff *Hazard* (who seems to have alone acted in the trusts of the will) to file a bill on behalf of himself and his Co-trustee and Executor *Holland*, to carry the said trusts into execution; being also employed by *Hazard* in various other matters connected with the settlement of the Testator's affairs. That, in *December* 1805, he delivered to *Hazard* his first bill of costs on account of such business, amounting to £86, 19s. 1d., and in the [287] year 1813 a further bill amounting to £125, 3s. 11d.; and that on the 31st of *December* 1807, *Hazard* paid him, in discharge of his first, and on account of his second bill, the sum of £116; and the further sum of £96, 3s. (being the balance of two bills) on the 19th of *April* 1814. The affidavit further stated that no bill had been made to any of the charges contained in these bills, and no previous reference to the Deponent of an application being made to the Court for a reference thereon, but that the first intimation he received thereof was by service of a copy of the order in question. That in *August* 1816, *Hazard* finally settled his Executorship account with the Defendants *Lloyd* and his wife, in which account were included allowed the aforesaid payments, and *Lloyd* and his wife thereupon executed to



the Plaintiffs a release of all claims under the will, with full knowledge of, and acquiescence in, such payments.

On the other hand, the Defendant *Lloyd*, by an affidavit filed in support of the order of reference, stated, that besides the affairs of the Executorship in question, *F.* (the Plaintiffs' solicitor) was also employed to prepare a settlement which was made on the marriage of the Defendants, in which settlement the Plaintiffs were named as Trustees;—that the whole of the business was completed in *September 1807*, except the final settling of accounts, and that from that time to the year 1816 the Defendant *Lloyd* made frequent applications to *Hazard*, and also to *F.* (the solicitor) for such final settlement and for the delivery of the bills of costs of the latter, but was constantly put off with frivolous and dilatory pretences, and was unable to procure any settlement till the 22d of *August 1816*, on which day *F.* called on the Defendant and delivered to him the Executorship accounts together with the [288] two bills of costs in question, in which the Plaintiffs were made debtors to *F.* as Executors, for business concluded in *September 1807*, as aforesaid. That, on looking into the accounts, he found the amount of both bills therein charged to the debit of himself and his wife, and there appeared on the face of the accounts to be only a trifling balance due to the Defendant, which was thereupon paid to him accordingly. That, together with the accounts and bills of costs, *F.* also brought and tendered to the Defendant a general release (ready prepared for signature) of all the claims and demands of himself and his wife upon the executors, which he forthwith signed, without having had any opportunity of examining the bills or consulting any professional person as to their propriety; but, shortly afterward, on delivering the bills to his solicitor for his perusal, he was informed that they contained many over-charges and other improper charges, upon which he resolved to apply to have the same taxed. The affidavit then stated applications to have been made by the Defendant's solicitor to both the Plaintiffs for their consent to a reference of taxation (the application for which it was necessary should be made in their names or in the name of one of them), at the same time offering to indemnify them against the costs and expences which might be incurred thereby—that, no answer having been returned to such application, the Defendant himself, together with *Holland*, called upon *Hazard* for the same purpose, when *Hazard* peremptorily refused his consent, but *Holland* consented; and the application was then made to the Court, and the order obtained, in the sole name of *Holland* accordingly. The affidavit went on to point out several items in the bills of costs, which appeared to be gross over-charges; insisting that under these circumstances, the Defendants were entitled to have the bills taxed, notwithstanding the release which they had executed to the Plaintiffs.

[289] In support of the application to have the order of taxation discharged, it was contended, that the order could not be supported, first, as it purported (upon the face of it) to be an order to tax the costs of the Plaintiff *Holland*, whereas in truth they were the costs of both the Plaintiffs; and, secondly, on account of the business having been done so long ago, the Plaintiff *Holland* having been allowed the same in his accounts, and a general release having been executed to him.

To these objections it was answered, in defence of the order, first, that the bills of costs, as described in the order, were delivered to *Holland* by the solicitor for the Plaintiffs, as their solicitor "in this and other causes and matters," under which description it was immaterial whether they were the separate bills of *Holland*, or the joint bills of *Holland* and *Hazard*. That, although in point of fact the bills were not delivered to *Holland*, yet he was (jointly with his co-executor) liable to the payment of them, and the delivery to either would sustain an action against both. And, as to the execution of the release, this was the case of a trustee called upon by his *cestuy que trust* to assist him in having certain bills of costs taxed, which, from a sense of duty, he had agreed to do—and what connection had this with the release which he had executed, to which *F.* was no party, and the taxation of his bill a mere matter between himself and his employers, as to which no release existed? That if, as alleged in his affidavit, the bills were actually delivered to *Hazard* in 1806 and 1807, that circumstance could make no difference in the present case; the delivery of the bills not having been acted upon until *August 1816*, when they were first delivered to the Defendant; and when it was clear that *Hazard*, if he had ever possessed them, must have himself returned them to his solicitor;—and, with regard to the fact of the delivery [290] at all, it was observable that *Hazard* had made

no affidavit, and that, upon the whole, it was evident that this was a case of gross collusion between *Hazard* and the solicitor for the Plaintiffs.

Sir *S. Romilly*, in support of the application to discharge the order of taxation.

*Agar and Parker*, in support of the order, referred to the provisions of the Statute, 2 Geo. II. c. 23, s. 23, which would be defeated, and rendered altogether nugatory and abortive, if, in a case like the present, one of the parties chargeable refusing his consent to the order of reference, should be held a sufficient ground for denying the benefit of the taxation to the persons beneficially interested. That, where any part of a Solicitor's bill relates to business done in this Court, the whole may be taxed, although part of the business was for other persons jointly with the party applying. *Margerum v. Sandiford* (3 Bro. C. C. 233). And, with regard to the release given to the executors, and the objections founded on length of time and acquiescence, they cited *Walmsley v. Booth* (2 Atk. 25, 27), *Newman v. Payne* (4 Bro. C. C. 350; 2 Ves. J. 199). (See also the late cases of *Langstaffe v. Taylor* (14 Ves. 363), *Cook v. Settree* (1 Ves. & Bea. 126), *Plenderleath v. Fraser* (3 Ves. & Bea. 174), and the authorities referred to in each of them.)

The Lord Chancellor considered that this was an extremely important case with reference to general principles. An application made to the Court by one of two trustees and executors, who has himself hardly at all acted, without the consent of his acting co-executor, [291] for the taxation of their Solicitor's bill of costs, which is alleged to have been long since paid ;—after a full settlement of accounts with the *cestuys que trust*, and a release given by them ;—this application supported by allegations of gross over-charges ;—Whether the Solicitor shall be permitted, under such circumstances, to avail himself of the payment by the Trustees and subsequent acquiescence, or to say that, by reason of the length of time, he is deprived of the means, which he might otherwise have had, of defending the propriety of the charges which are now called in question ? His Lordship said he would look into the affidavits, and give his opinion on the case after full consideration.

August 25. His Lordship pronounced judgment in this case—when, after recapitulating the principal facts, he said that he should lay the release altogether out of the question as against Mrs. *Lloyd*, she being a Feme Covert, but that, in any case, he could not have held it as entitled to consideration against the right of a party to have his costs taxed under the statute ; and, on the other points in the case, his Lordship held that a Solicitor cannot be allowed to interpose the payment of his bill of costs, by a person in the situation of a trustee, between himself and the parties (*cestuys que trusts*) for whom he was at the time aware that the person who paid him was no more than a trustee—as, here, an executor acting for the parties beneficially interested under the will.—That the *cestuys que trust*, whose funds were to bear the whole expenses of the suit, had a right to make use of the name of their trustees and executors (giving them proper indemnity), to obtain a taxation of the bill ;—for, although these trustees and executors would be entitled to retain or be paid any money which they had expended, yet the taxation of a Solicitor's bill could operate [292] no injury to them, as the Solicitor could have no right to demand against them more than would be allowed on taxation.

The application to discharge the order for taxation was consequently refused, but without costs.

BENJAMIN MICKLETHWAIT, and MARY his Wife, and OTHERS, *Plaintiffs*, against JOHN MOORE, and SARAH his Wife, and OTHERS, *Defendants*. August 11, 1817.

On a Bill to set aside a partition, on the ground of inequality, and for a new partition, stating a valuation and estimate, the gross result of which, without the particulars, were contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the Defendant was unable to set forth in what particulars it was inaccurate, by reason of such omission ; a motion by the Defendant for production of the valuation, and papers, &c., relative thereto, refused with costs. Where a Defendant seeks the production of deeds, &c., stated to be in the Plaintiff's possession, the usual course is by filing a cross bill ; but such a case as the present would not, even if a cross bill were filed, suffice to obtain an order for the purpose.

The Bill was to set aside a partition of Estates to which the Plaintiffs *Micklethwait* and wife and the Defendants *Moore* and wife were entitled, in right of the

respective wives, as coparceners, and for a new partition. The grounds upon which the former partition was sought to be set aside were gross inequality in value, and concealment and fraud on the part of the Defendants; and the former part of the charge was sought to be supported in the bill, by a statement "that the whole of the estates in question had lately been estimated and valued by Mr. *Thomas Gee*, an eminent land valuer and commissioner, under acts [293] of inclosure; and that the whole of the minerals had been also lately valued by Mr. *Andrew Faulds*, an experienced mineralogist; and from such valuation and estimate (which was alleged to be a true and accurate valuation and estimate), a summary statement whereof, and also of the valuation of the two lots made previous to the execution of the deed of partition (which was sought to be set aside), the Plaintiffs had set forth in a schedule to their bill, it appeared (as it was alleged the fact was), that lot 1. (the share of the Defendants) consisted of 213a. 2r. 38p., and was worth £19,915, and that lot 2. (the share of the Plaintiffs) consisted of 111a. 2r. 15p. only, and was worth £8003, 5s."

The Defendants *Moore* and his wife, by their answer, denied the charges of fraud and concealment, and also of inequality of value at the time of the partition, accounting for any present inequality which might exist, from the change of the times operating on the value of different species of property, and from subsequent alterations and improvements in the share of the Defendants; and, with regard to the valuations said to have been by Messrs. *Gee* and *Faulds*, they denied the accuracy of such respective valuations, but said that, in the statement set out in the schedule to the bill, the gross amount of the same only was given, the particulars, annual value, and number of years' purchase, on which the same were calculated, being omitted in the said statement, and therefore they (the Defendants) were unable to state in what particular respects the said valuation and statement were incorrect and imperfect.

A motion was now made, on the part of the Defendants, "that the Plaintiffs might in fourteen days leave with their Clerk in Court the entire valuation [294] and estimates of the estates mentioned in the bill to have been made by Mr. *Thomas Gee*, with the observations, remarks, and letters of the said *Thomas Gee* relating thereto, and the entire valuation and estimates of the minerals mentioned in the bill to have been made by Mr. *Andrew Faulds*, with the observations, remarks, and letters of the said *Andrew Faulds* relating thereto, and any instructions given in writing by the Plaintiffs or any of them, their or any of their agents or solicitors, to the said *Thomas Gee* and *Andrew Faulds*, or either of them, respecting the same, with liberty for the Defendants, their Clerk in Court, agents, or solicitors, to inspect or peruse the same, and to take copies, abstracts, or extracts thereof; and also that the Defendants or any of them, after having inspected and perused the said documents, may be at liberty to amend their answer, or respective answers to the said bill."

*Bell* and *Harrison*, in support of the motion, referred to Pract. Reg. (Wyatt's ed. p. 161. But no reference is subjoined) Tit "Deeds and Writings," where it is said, "Where a deed in the Plaintiff's hands, mentioned in the Plaintiff's bill, was necessary to the Defendant's making his defence a full answer, the Court ordered the Plaintiff should give him a copy of it." In an anonymous case in *Dickens* (2 Dick. 778), which was an application by the Defendant against the Plaintiff (an Executor) for payment into Court of a balance alleged in the bill to be in the hands of the Plaintiff, Lord *Thurlow* expressed his surprise, saying, "Did you ever know an instance of a Defendant's applying against a Plaintiff, even to produce deeds? If you want it, you must file a cross-bill for the purpose." [295] However, in a late case of *Pickering v. Rigby* (18 Ves. 484), which was a suit for an account between the Executor of a deceased partner and the surviving partner, the Defendant having moved, before answer, for a production and inspection of the partnership accounts, which was resisted on the ground that the Defendant ought to have filed a cross-bill, His Lordship, though he refused the motion, suggested that, if the Defendant in such a case had put in an answer, stating that the bill called for a discovery which he could not make completely without seeing the partnership books and accounts, the same being in the hands of the Plaintiff, it might be possible for him to obtain such an order without filing a cross-bill.

*Pepys*, contra. In *Davers v. Davers* (2 P. Wms. 410), the Court discharged

an order which had been obtained by the Defendant to inspect a deed proved by the Plaintiff in the cause and referred to by the deposition. In *Wiley v. Pistor* (7 Ves. 411), His Lordship refused a motion by a Defendant for inspection of letters referred to by the Plaintiff's depositions as exhibits, with costs, observing that such an application must be very familiar, if there were not some objection to it, and he never heard of such a motion. Even a Plaintiff, though he has a right to the inspection of deeds admitted to be in the Defendant's possession, upon which his own title rests, cannot compel the production of those relating only to the Defendant's title, which is independant of his own, as was determined by Lord *Hardwicke* in *Buden v. Dore* (2 Ves. 445). And in *Atkyns v. Wright* (14 Ves. 211). And see *Evans v. Richardson*, 1 Swanston's Reports, p. 7, and the references in the note, p. 8), the Court [296] refused a motion for a production of deeds and papers, referred to as in the Defendant's possession, but not described by the answer or schedule, and without an offer to produce them.

The Lord Chancellor asked whether the Plaintiff by his bill stated the documents in question to be in his possession; and was referred to the statement in the bill already mentioned, which was contended by *Bell* to be equivalent, the valuation being alleged to be made with a view to the present suit for a new partition.

The Lord Chancellor [Eldon]. The case cited of *Pickering v. Rigby* (18 Ves. 484), is very different from the present. There the bill was for an account of Partnership dealings; the Plaintiff and Defendant were jointly entitled to the possession of the documents, the production of which was the object of the motion; and I then stated that I thought I remembered an instance of an application by a Defendant under such circumstances to stay proceedings for want of an answer until he had been assisted with the inspection sought; and that that sort of motion might do without a cross-bill. But this case goes much further than any I have ever yet heard of; and, even if a cross-bill were filed (which is the usual course), I should not here be able to compel the production of these documents.

Motion refused with costs.

[297] PAYNTER v. HOUSTON. July 28, 1817.

Under the usual decree for an account on a bill by creditors, the Master refused to proceed upon the claim of the surviving partners of the Testator, in respect of a debt alleged to be due to them on the balance of certain dealings between the partnership and the Testator in his separate capacity; but, on motion to be admitted to go in before the Master and prove this debt under the decree, it was referred to the Master to take the account.

This was a Bill filed by the Plaintiffs on behalf of themselves, and all other the specialty and simple contract creditors of the Testator *James Henry Houston* (deceased) who should come in and contribute, &c. The usual decree was made, whereby it was referred to the Master to take an account of what was due to the Plaintiffs and all other the creditors of the said Testator; and a motion was now made on behalf of Sir *John Perring*, Bart., and others, Bankers, surviving partners of the Testator, claiming to be creditors in respect of their dealings as bankers with the Testator in his separate business of a merchant, that the Master might be directed to admit them to go in before him and prove their debts under that decree, and to proceed upon such proof, the Master having refused to proceed upon the claim which they had made in respect thereof.

By the affidavit in support of the motion it appeared that the Testator, on and previous to the first of *January* 1810, carried on business as a merchant in partnership with the Honourable *Simon Fraser*, under the firm of *Fraser, Houston, and Co.*—and that, being so concerned, they (*Fraser and Houston*) at the time aforesaid entered into partnership with the claimants (Sir *John Perring* and others) as bankers under the firm of *Simon Fraser, Perring, Godfrey, Shaw, Barber, and Co.* by virtue of certain partnership articles—That on the same day the house of *Fraser, Houston, and Co.* opened two accounts (one called the separate, and the other the general account), with the banking firm of *Fraser, Perring, &c.*, and that [298] in the course of business the said banking house came under large acceptances for them. That, *Simon Fraser* having died, the business of the mercantile firm was carried

on by the Testator on his own separate account, but still in the name of *Fraser, Houston, and Co.* and the accounts with the banking house were carried on in the same manner as before *Fraser's* death. That, on the 8th of *June* 1811, partnership articles were entered into between the claimants and the Testator, to carry on the business of bankers for fourteen years from *January* 1811, the interest of any partner who should die during the period of co-partnership not to cease until the 30th of *June* or 31st of *December*, which should first happen, after the decease of the partner so dying. That in *August* and *October* 1812, the Testator (being then, in the individual capacity of a merchant, largely indebted to the banking house) executed to a Trustee for the banking house transfers of several bond and mortgage debts due to him, and in each deed of transfer he (*Houston*) covenanted for the due payment of the debt then owing and all sums that might thereafter become due from him to the banking house; and in *October* 1813, as a further security, executed to the same Trustee an assignment of debts due to him from several insolvent persons, and in 1814 also placed in the hands of the said banking house other securities of comparatively small amount. That the Testator died on the 12th of *October* 1814, having made his Will and appointed the Defendants Executors, and being, at the time of his death, indebted to the claimants (as the surviving partners in the banking house) in the balance of both accounts (the separate and general) to the 31st of *December* 1814, when his interest as a partner determined. That the partnership accounts of the [299] banking house were regularly balanced and made up on the 30th of *June* and 31st of *December* in every year, and the books containing the balance sheets of each year respectively up to the 31st of *December* 1812 were duly signed by the Testator, but the Testator being in *Scotland* when the partnership accounts for the year ending the 31st of *December* 1813 were balanced and signed by the other partners, the same were not signed by him, although he frequently promised to sign them, and assented to and received his proportion of the profits by a transfer to his account with the banking house; and since his death credit had been given to his account as a partner in the banking house for the full amount of his interest therein.

The affidavit went on to allege that the estate of the Testator (as a partner in the banking house) could derive no benefit from the debt owing from him (in his individual capacity as a merchant) to the banking house, even if the latter should get in and receive the whole amount thereof, because the whole debt had always been and still remained credited in the partnership books of the banking house as assets thereof, in the same manner as any other property of the partnership of which they were in actual possession; the same being treated as a good and available debt and never transferred to the debit of the partnership among such of the outstanding debts as were considered bad or doubtful.

It was further stated that there remained due from the Testator's estate in respect of such debts, after giving credit for the full amount of monies received or to be received by the claimants in respect of such securities as were available, and for the value (so far [300] as it could be estimated) of such as were uncertain, the sum of £30,000 and upwards, wholly unsecured save by the covenants contained in the above-mentioned deeds of transfer.

Under the decree made in this cause, a charge was on the 26th of *April* 1816 carried in before the Master, supported by affidavit in the usual manner, for so much of the above debt as then remained due, whereby the surviving partners in the banking house claimed to be admitted as specialty creditors by virtue of the said deeds and securities. The charge was opposed on the part of the Plaintiffs, and, after many attendances and much discussion before the Master, was amended at the Master's suggestion, and such amended charge, with an affidavit also in support thereof, left at his office on the 22d of *February* 1817, the solicitor for the Plaintiffs having, long previously, inspected all the books belonging to the Testator's estate, together with all the securities, in order to ascertain from such inspection the state of accounts; and the affidavit stated that this also took place at the Master's suggestion.

Several attendances afterwards took place on this charge so amended, the last of which attendances was on the 5th of *July*, when the Master said that he did not consider himself authorised to receive the proof of the said debt, on the ground (as it was understood) that the partnership *inter se* formed an objection to the

admission of such proof ; in other words, that A. B. and C. surviving partners of A. B. C. and D., cannot be admitted to prove a debt in a suit for administering the effects of D.

By the application now made to the Court, it was sought on behalf of these claimants to be per-[301]-mitted to proceed in their charge before the Master, for the sake of avoiding the expence which would necessarily be incurred by their being driven to have recourse to other proceedings in respect of their debt.

Sir S. Romilly, *Hart, Cooke and Horne*, in support of the motion.

*Bell and Wilson*, contra. Under this decree the Master can go into no accounts that were not liquidated at the Testator's death. He has no power to exhibit interrogatories for the examination of the parties claiming before him. In *Simmons v. Gutteridge* (13 Ves. 262), where leave was given to exhibit an interrogatory for the examination of an Executor as to the fact whether he was indebted to the Testator, that was permitted upon the ground that the examination of an Executor under the usual decree for an account ought to contain such an interrogatory ; a debt due by an Executor being assets ; and the principle was, that this is an interrogatory, not of the party, but of the Master ; but it was expressly directed that the interrogatory should be confined to that purpose merely ;—not to go into an account, which must be the subject of a distinct bill. The contract in respect of which this debt has accrued, is only available in Equity ; for at law no man can bind himself, as a partner in one house, to another house in which he is also a partner. *Bosanquet v. Wray* (2 Marsh. 319).

Sir S. Romilly, in reply. It is objected that the Master, in this case, has no right to exhibit interrogatories under the decree ; [302] but in the case cited in support of this objection the parties resisted the Master's taking the account—Here they consented, and the Master was actually proceeding to do so when this difficulty suggested itself to him.

The Lord Chancellor [Eldon]. This question arises under the usual decree for an account of assets in a creditor's suit, upon a demand made by the surviving partners in a banking house in which the testator himself was a partner, claiming to be creditors of their deceased partner in respect of a balance due on his separate account with the partnership. A late decision of a Court of Law has been cited to shew that no legal debt can be created in respect of such a transaction. It may be so as it is there stated ; but, if that is a right decision, still there is nothing more clear, that that, where an account is decreed, the equitable creditors have a right to be satisfied ; and that no distribution of assets can take place until the accounts of all the creditors of every description have been gone into. Generally speaking, it is the duty of the Master to meet all the difficulties that may arise in the discharge of this office. In some way or other, he must so provide as that all the accounts, both legal and equitable, shall be fully taken ; so that the fact of *Houston's* having been a partner in the house, however it may alter the nature of his debt, is of no weight at all with reference to the right of the claimants to have their account taken.

Then it is said, the Master is not in a situation to receive the claim, for want of a power to exhibit interrogatories with respect to it. But it strikes me that this never can be the case—that the Court cannot place a creditor in such a situation as that his debt is not to be [303] received. It appears to me that the Master is bound to receive such a claim as this. Suppose there had only been a few items on each side to be established, can it be said that the parties must be put to the expence of filing a bill in order to have such an account settled ? I think I have seen reports in which the Master has stated that he is not able to ascertain the validity of such claims without the necessity of a bill being filed for the purpose. The principle is the same, although the difficulty may be greater, in the case of an account where the testator was a partner, than in a mere common case of account between parties standing in no such relation to each other. If the Master finds that he cannot go on without an examination of the parties upon interrogatories, and that it is necessary a Commission should issue, the parties must apply to the Court for the purpose. The only difficulty in this case is as to the settled accounts—and if, with reference to that, it is necessary to ascertain whether the accounts have been settled or not, either a bill must be filed, or the question submitted to the Court by way of motion upon affidavits.

I apprehend that it is the Master's duty to go on with the accounts until he finds

a difficulty arising from the want of sufficient powers; and then an application must be made to the Court, either by the Master or the parties, to do that which is necessary, in order to supply the defect of his authority.

His Lordship concluded by saying that he would speak to the Master on the subject.

An order was afterwards made, by which it was referred to the Master to take an account of the dealings and transactions between the testator, in his own right, and as the surviving partner of the house of *Fraser and Houston*, and the Banking-house in which Sir John [304] *Perring* and the other claimants were the then surviving partners, and of what was due on the balances of such accounts to either and which of the parties; and also to take an account of the partnership dealings and transactions as bankers between the said testator and the said Banking-house, and what was due to or from the said testator on the balance thereof, with liberty to state any matter specially—and, for the better taking the said accounts, the parties were to produce before the Master upon oath all deeds, book, &c., in their custody or power relating thereto, and were to be examined upon interrogatories as the Master should direct, who, in taking the said accounts, was to make unto the parties all just allowances.

JOHN EDMONDS, *Plaintiff*; CHRISTOPHER SAVERY, WILLIAM EDMONDS SAVERY, and OTHERS, *Defendants*. March 12, August 25, 1817.

Defendant to an injunction bill, having suffered the injunction to go against him upon a *dedimus*, the time for answering being expired, although not under an order for time, nor in contempt, *quære*, whether he may demur alone; and it seems that he cannot be allowed to do so.

This was a motion, on the part of the Plaintiff, to take a demurrer, which had been put in by the Defendants, off the file for irregularity.

The Bill was by an heir at law, to have the will of his ancestor (by which the estate in question was devised to the Defendant *Christopher Savery* in trust for his son the Defendant *W. E. Savery*), declared void upon the ground of alleged incompetency in the testator, and for an injunction to restrain proceedings in an action of ejectment, in which the Defendants had obtained a verdict, and also from setting up or making any claim to the estates under the said will.

The Bill was filed on the 19th of *November* 1816. The Defendants appeared on the 22d of the same month, [305] and, according to what was stated to be the usual practice in cases of injunction bills, the Plaintiff's clerk in Court, on the 5th of *December* following (which was a seal day), applied to the clerk in Court for the Defendants, to know upon what ground the Plaintiff should take his injunction,—whether upon an attachment, or upon a *dedimus potestatem* to take the answer of the Defendants; whereupon the clerk in Court for the Defendants gave to the Plaintiff's clerk in Court a note signed by the solicitors for the Defendants, in these words: “Mr. *Drewe*,—Sir, You will let this injunction go upon the ground least prejudicial to the Defendants. What I mean, is, that we shall, on account of the great length of the bill, want all the time we should be entitled to if this was not an injunction bill. Perhaps you will therefore think the ground should be upon an attachment.” To which *Drewe* (who was the agent for the Defendants' clerk in Court) had subjoined in his own hand writing, “On a *dedimus*.” And, in consequence of this note so delivered, the common injunction was issued on the 10th of *December* (the next seal day after the 5th) in the usual form upon a *dedimus*, which form is as follows.

“Whereas, &c., that *J. E.* hath lately exhibited his bill of complaint against you, the said, &c., Defendants, to be relieved touching the matters therein contained, and that you the said Defendants, being served with our writ of subpoena commanding you to appear and answer the said bill, have appeared accordingly, *but for delay have craved a commission to answer in the country*, and yet in the mean time, you unjustly (as it is alleged) prosecute the said complainant at law for and touching the matters in the said bill complained of: We, therefore, in consideration of the premises, do strictly enjoin and command you, &c., to desist from all further proceedings at law against the said complainant [306] touching any of the matters

in the said bill complained of, until you shall have fully answered the said bill and our said Court make other order to the contrary," &c.

The affidavit of the Plaintiff's agent, in support of the application to have the demurrer taken off the file, represented farther that it was the practice of the Court to consider such note as was delivered by the Defendants' clerk in Court to be a note praying a *dedimus* to plead, answer, or demur, not demurring alone; that the injunction which had issued had been submitted to by the Defendants upon the ground that they had prayed a commission to take their answer in the country; and that, therefore, no process of contempt was issued against them for not putting in their answer to the bill. That, on the 7th of *January* 1817 (being seven weeks after the bill was filed), the Defendants filed a general demurrer to the bill, and had not pleaded to or answered any part thereof; and the Deponent had been informed, and believed it to be the invariable practice of the Court, to consider a demurrer so filed as irregular, and that, after such note, a Defendant was not at liberty to demur alone.<sup>(1)</sup> No order for time had been obtained previous to the filing of the demurrer.

Sir *S. Romilly* and *Wakefield*, in support of the motion to take the demurrer off the file.

*Bell* and *Pepys*, contra. This is a mere question of practice, but of very great importance to the Defendants, who are kept out of pos-[307]-session of the estate devised to them by an injunction obtained upon a bill which it is impossible that the Plaintiff could support if the demurrer were properly argued.

If the bill had not prayed an injunction, the Defendants would, according to the common course, have had till the next term after the bill filed to answer or demur, as he should be advised; and this being upon the principle of convenience and reasonable indulgence, it would be great injustice were the practice to be different, merely because the Plaintiff has inserted in his bill a prayer for an injunction, and if, on that account only, the Defendant were refused an indulgence which it is thought right to grant in other cases. We admit that, according to the practice of the Court, if, at the expiration of eight days from the filing of the bill, neither an answer nor a demurrer is on the file, the Plaintiff is entitled to the common injunction;—that the injunction may be had in either of two ways,—upon an attachment, or upon a *dedimus* to take the Defendant's answer;—and that in this case, the Defendant, having the option offered him, preferred that it should go upon a *dedimus*. In *The Attorney General v. Henchman* (3 Bro. C. C. 372), upon a motion to take a demurrer off the file, which had been put in after time for answering was out, but before process of contempt issued, Lord *Thurlow* said that a Defendant, until he is affected by process of contempt, may put in a demurrer. To hold that a Defendant cannot demur after an injunction has been obtained upon a *dedimus*, would be to decide that, in such a case as this—a country cause, and the Defendant not entitled to bespeak an office copy of the bill till after appearance—there can be no demurrer at all; and thus, by adding the prayer for an injunction to a [308] bill of discovery, the Plaintiff will be enabled to obtain indirectly a discovery of facts upon oath, of which he may afterwards avail himself at law against the Defendant, which discovery he has no right to demand according to the principles of equity.

Besides—the *dedimus* upon which the injunction issued, and which is the ordinary *dedimus* returnable without delay, is not the same in point of effect with the *dedimus* which is usually applied for, which is called the *special dedimus*, and is always accompanied with a certain period fixed for the return, whereas in the ordinary *dedimus* there is no limitation in respect of time. See *Hinde's Chancery Practice*, 229, 243. *Beames's Orders*, 117, 118. *Wyatt's Pract. Reg.* 234. This is not such an order as to preclude a demurrer; and it is evident that this was the ground taken in *Elme v. Shaw* (1 Vern. 282)—“Demurrer allowed, but without costs, because it was a demurrer only, without any answer, and came in by commission.”

[In order to illustrate the general practice, and the grounds upon which it is founded, the following authorities were also referred to. Orders in Chancery (*Beames*, 172). *Penn v. Lord Baltimore* (1 Dick. 273), *Kenrick v. Clayton* (2 Bro. C. C. 214; 2 Dick. 685), *Taylor v. Milner* (10 Ves. 444).]

The Lord Chancellor [*Eldon*] took time to look into the practice, and just before the Court ended its sittings in the vacation after *Trinity* Term, mentioned the case again (as I have been informed), with the following observations.



This is the case of an Injunction bill. The time of answering being expired, the Plaintiff's clerk in Court [309] says to the clerk in Court for the Defendants, How will you have the injunction go?—upon a *dedimus*, or upon an attachment?—to which the latter answers, "Take it upon a *dedimus*," and it is on this that the question arises, *viz.* Whether, according to the practice of this Court, a party having returned that answer, and the injunction having issued accordingly, can afterwards be admitted to demur alone. It was contended, on the part of the Defendants, that he might do so, inasmuch as he would not, in a common case, have been obliged to apply for an order for time until *January*, and, having till that time to put in his defence to the bill, he might intermediately demur. I have made much inquiry into the practice; and, from the best sources that I have been enabled to discover, am bound to state it as my opinion (without at present going into the reasons for that opinion), that, after a party has elected to have an injunction taken against him upon a *dedimus potestatem*, he cannot demur alone. I will give my reasons for it hereafter in the presence of the Counsel by whom the question was argued. But, in the mean while, I repeat that I think he is bound by the course he has adopted; for he may proceed to a commission if he pleases.

[I do not hear that the case has been mentioned again, and apprehend that no order has been yet made; but in Reg. Lib. A. 1816, fo. 1284, is the following entry. "19 July 1817. Upon motion by Mr. Wakefield, of Counsel for the Plaintiff *Edmonds*, and upon affidavit stating the bill filed, demurrer put in, a cross bill by the Defendant *W. E. Savery*, filed on the 27th of December 1816, notice of motion to take the demurrer off the file, the motion made accordingly and counsel heard, that his Lordship had not yet declared his judgment thereon, but that the Deponent had been informed and believed that the clerks in Court had certified that the demurrer [310] was irregularly filed; ordered, that the Plaintiff *Edmonds* (Defendant to the cross bill) may have six weeks time to plead, answer, or demur, after the Defendants to the original bill shall have answered the same, or the demurrer shall have been allowed."]

(1) For the grounds of this demurrer, see *Pemberton v. Pemberton*, 13 Ves. 297. *Jones v. Jones*, 3 Mer. 161. The objection to the bill was stronger in this case than in either of those cited, there having been two trials at law, and a verdict in one of them.

BARKER and OTHERS v. The Duke of DEVONSHIRE. *Rolls. June 27, 1817.*

Testator devises to A. and B. (whom he appoints his executors) upon trust to sell for such purposes as he shall hereafter appoint, and then directs his debts to be paid by his executors. Under this devise, A. and B. are authorised to sell for payment of debts.

*Thomas Barker*, by his Will, devised all his estate real and personal to the Plaintiffs, their heirs, &c., to the use of them (the Plaintiffs), their heirs, &c., in trust by application, sale, or mortgage thereof, or of any part thereof, to pay thereout whatsoever he should thereafter by will or codicil appoint. He then appointed the Plaintiffs trustees and executors of his will; and proceeded to direct that his just debts, funeral expences, &c., should be paid by his executors; and devised the residue of his estate and effects (after giving several specific legacies) to his eldest son, provided he lived to attain twenty-one; if not, then to whichever of his sons should first attain twenty-one.

The Plaintiffs, under this devise, contracted with the Duke of *Devonshire*, for the sale to him of part of the estates, for the purpose of raising money to pay debts; and they now filed their bill for a specific performance of that agreement: to which the Duke answered, that he was advised, that, inasmuch as the will did not give to the Plaintiffs a sufficient [311] power to sell for payment of debts, and did not provide that their receipt should be a sufficient discharge to a purchaser, therefore he (the Defendant) could not safely fulfil his contract, except under the decree of the Court.

The question was, whether this was a devise for the payment of debts generally; for, if so, the trustees might make a good title, without the devisee or heir at law joining, and the purchaser could not be bound to see to the application of the purchase

money ; it being settled that, where the trust is for payment of debts generally, the purchaser is not bound to see to the application. (See Sugden, Vend. and Purch. 4th ed. 413.)

*Benyon and Heys*, for the Plaintiffs. *Cooke and Abercrombie*, for the Defendant, contended that, the direction being for the payment of debts by the executors, this shewed that the intention of the testator was to confine it to payment out of the personal estate.

To this it was replied, that the testator, in using the term executors, only meant to describe those persons whom he had previously appointed as his executors, and to whom he had already given his real estate in trust to sell for such purposes as he should appoint.

The *Master of the Rolls* [Sir Wm. Grant]. The testator has given his real estate to certain persons, whom he also appoints executors of his will, upon trust to sell for such purposes as he shall [312] afterwards appoint ; and then directs his debts to be paid by his executors.

In a late case of the same kind, (1) I held that such a direction authorized a sale for the payment of debts ; and I continue of that opinion.

Consequently, a specific performance must be decreed.

(1) I have not been able to ascertain the name of this case ; but it had occurred recently before the decision of that here reported.

CHARLES PECHE, *Plaintiff*, and CHARLOTTE SMITH, JOHN PECHE, and OTHERS, *Defendants*. *Rolls*. July 8, 1817.

A grandfather, in consideration of a bond from the father to grant him an annuity of £50 during his life, enters into a counter-bond with the father conditioned for payment to the son of a like annuity " in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father." The son obtains, through some other interest, a place in the Ordnance office, with a salary exceeding the amount of the annuity. *Held*, that this was not a sufficient provision within the meaning of the bond, being an office only during pleasure, whereas the provision in the contemplation of the parties must have been one of a permanent nature.

Under a Decree by which it was referred to the Master to make certain inquiries, the Master found that *John Peché* (the Testator named in the pleadings) made his will dated the 8th of November [313] 1809, whereby he expressed himself to the following effect :—" Whereas I have given my son a bond subject to my will, to direct my executrix or executor hereinafter named to give a power of attorney to receive £50 a year from my long annuities during his life, and should he die without child or children lawfully begotten the said £50 a year to fall into the remainder of my property."—The Master further found that the testator, at the time of making his will, had living one son (the Defendant *John Peché*) and a grandson also named *John Peché* (who was the younger son of the said Defendant). and that the testator gave to his son the Defendant, a bond, in the penal sum of £500, the condition whereof, after reciting that the testator had agreed (in consideration of a bond from his son the Defendant, by which he bound himself to pay the testator an annuity of £50 during his life, " in case the said *John Peché* the grandson was not sufficiently provided for during the testator's life, exclusive of any allowance from his father ") to give to the said *John Peché* (the grandson) an annuity of £50 during his life, was " that if the (testator) his heirs, executors, &c., should from time to time, &c., during the life of the said *John Peché* (the grandson) pay to the said *John Peché* (the grandson) an annuity of £50 (as therein mentioned) then the bond should be void, or otherwise remain in full force." That the testator had not given any bond to his said grandson, but the Defendant *John Peché* gave to the testator a counter-bond in the same penal sum, conditioned for payment to his father of an annuity of £50 during his life. The Master also found that these bonds were given in consequence of some disputes having arisen in the family, when the testator, thinking his grandson harshly treated by the Defendant his father, had entered with the Defendant into the en-[314]-gagement which appeared on the face of the bonds ; in pursuance of which the annuity was regularly paid

by the Defendant to the testator till the day of his death, and the testator also allowed the like annual sum to his grandson.

The cause coming on for further directions upon the Master's report, by an order dated the 27th of *June* 1815, the Court declared that the above mentioned bequest in the testator's will was meant to be a satisfaction of the bond given by the testator to the Defendant *John Peche* for his (the Defendant's) son *John Peche*; and it was referred back to the Master to enquire whether the last mentioned *John Peche* had been provided for within the intent and meaning of the bond; with liberty for him to apply to the Court, and further directions.

The Master made his report in pursuance of this order, stating the substance of several affidavits which had been laid before him relative to the appointment of *John Peche* (the grandson) to a place in the ordnance office, with a yearly salary thereto annexed (the amount of which yearly salary was at first £68, and had subsequently been increased to nearly £200 *per annum*); and it appeared that this appointment, which had taken place in the life-time of the testator, and before the date of his will, but subsequent to the bonds being executed, was obtained without the interference of his father, the Defendant *John Peche*. Under these circumstances, and particularly adverting to the amount of the salary, with reference to the bond, the Master was of opinion that *John Peche* (the grandson) was sufficiently provided for within the intent and meaning of the bond.

[316] The report was excepted to, and the exception came on this day to be argued; when *Dowdeswell*, in support of the exception, laid the principal stress on the nature of the office held by the exceptant, which was during pleasure only, and from which he was consequently liable to be discharged at any period.

Sir *S. Romilly* and *Bell*, for the Master's report.

The Master of the *Rolls* [Sir *Wm. Grant*] held, that a permanent provision must have been meant by the testator, and in the contemplation of both parties to the bond;—that the office in question, though its continuance might become more or less probable, could never be rendered certain, as it must always be subject to the casualties of illness or other incapacity, and consequently was defective in that which he considered as the indispensable requisite of the intended provision. His Honour consequently allowed the exception, and declared that the exceptant was not provided for within the meaning of the bond.

[316] His Majesty's ATTORNEY GENERAL (at the relation of JOHN LEE MARTYN, Clerk), *Informant*, and GEORGE GROTE, *Defendant*. *Rolls*. July 21, 22, 1817.

[See *S. C.* on appeal, 2 *Rus. & My.* 699. See also *Boys v. Williams*, 1831, 2 *Rus. & My.* 695; *Hart v. Tulk*, 1852, 2 *De G. M. & G.* 310; *Gordon v. Duff*, 1860–61, 28 *Beav.* 520; 3 *De G. F. & J.* 664.]

Testatrix gives to the minister, &c., of *A.* £5 *per annum* Bank long annuities; to the minister, &c., of *B.* £5 *per annum* like Bank annuities; to the treasurer of *C.* and *D.*, £100 long annuities stock, each; to the governors of *E.* £100 long annuities stock; and "£30 *per annum*, further part of my Bank long annuities," upon trust to apply the interest and dividends to and for the use of *L. D.* till she attains 21, and then to transfer "the said £30 *per annum* Bank long annuities" to the said *L. D.*—She then gives to *W. C.* £150 Bank long annuities stock, and £10 *per annum* "further part of my long annuities," in trust for *H. G.*—By a codicil, reciting, "Whereas I may have made a wrong calculation of the value of my fortune in the funds at the time of my decease," she directs that in case of deficiency, it may be deducted out of the residue, as she would have all her legacies paid to the full. The testatrix was at the time of her death possessed of only £385 long annuities, and her personal estate was insufficient to pay her debts. Upon a question whether the treasurer of *C.* was entitled to a legacy of £100 long annuities stock, or only to £100 to be raised by the sale of stock to that amount, *Held*, that it was a specific legacy of so much stock, and decreed accordingly. "Will not to be construed by something *dehors*, as by the state of the property, where no latent ambiguity."

The Information stated that *Letitia Pitts* being possessed of a considerable personal estate, and (amongst other things) of monies in the public stocks, and in

particular of long annuities to the amount of about £400 a year, duly made her last will dated the 30th of *December* 1805, whereby, after appointing certain persons to be Trustees of her will, she proceeded to the effect following :—" I give and bequeath to the minister and churchwardens of the parish of *Great Brick Hill* in the county of *Bucks* £5 *per annum* bank long annuities, and I give to the minister [317] and churchwardens of the parish of *Wargrave* £5 *per annum* like Bank annuities, in trust for the poor of their respective parishes, and to be laid out for them in bread or meat every half-year when and as the dividends or yearly proceeds thereof shall become due and payable ; and I give and bequeath to the Treasurer for the time being of *Saint Bartholomew's Hospital* in *London*, and to the Treasurer for the time being of the *Foundling Hospital* near *Queen Square, London*, £100 long annuities stock, each, to be applied for the use and benefit of the said respective Hospitals ; and I give to the Governors for the time being of the Charity School of *Saint George the Martyr, Queen Square*, £100 long annuities stock, to be applied for the use and benefit of that charity. I give and bequeath £30 *per annum*, further part of my Bank long annuities, in trust to receive and apply the dividends and yearly proceeds thereof to and for the use of *Letitia Deighton*, spinster, until she attain her age of twenty-one years, and, when and so soon as she shall attain that age, then upon trust to transfer the said £30 *per annum* bank long annuities unto the said *Letitia Deighton* to and for her own use and benefit ; but in case the said *Letitia Deighton* should depart this life before she attains her said age of twenty-one years, then upon trust that my said trustees or the survivor of them do and shall transfer the said sum of £30 *per annum* Bank long annuities unto the said Mr. *William Culverden*, his executors and administrators, to and for his and their own use and benefit ; and I give unto the before-named Mr. *W. Culverden* £150 Bank long annuities stock, and I give Mrs. *Culverden* £20 for mourning ; and I also give and bequeath £10 *per annum*, further part of my Bank long annuities, in trust to pay the dividends and yearly proceeds thereof to Mrs. *Hannah Gearing* (who [318] lived in my service many years) and her assigns, for and during the term of her life ; and I desire that all my legacies, debts, and funeral expenses may be paid within one month after my decease, or bear interest at £5 *per cent. per annum* after that time, until they are discharged." That the testatrix afterwards made the following codicil to her will : " And I give and bequeath to Mr. *William Culverden* a further sum of £100, I have before bequeathed him in my will. And whereas I may have made a wrong calculation of the value of my fortune in the funds at the uncertain price they may be at the time of my decease, I will and direct that, if there should be any deficiency, it may be deducted out of the residue of my personal estate, as I would have all the legacies and bequests paid to the full."

The information, filed at the relation of the Treasurer of the Charity School of *St. George the Martyr*, claimed on behalf of the charity a legacy of £100 long annuities stock.

The Defendant *Grote* (who had taken out administration, with the will annexed) by his answer, stated that the testatrix was at the time of her death possessed of £385 *per annum* Bank long annuities, but to no other monies in any of the public funds ; and that, exclusive of the said long annuities, the personal estate was by no means sufficient to satisfy her funeral and testamentary expenses and debts. He submitted that, according to the true construction of the will, and under the circumstances aforesaid, such legacy was not to be considered as a specific bequest of £100 *per annum* long annuities, part of the long annuities standing in the name of the said testatrix at the time of her death, but that the charity was entitled to so much only of the [319] said stock as by a sale thereof would raise the sum of £100.

*Bell and Roupell*, for the Information.

*Hart and Palmer*, for the Defendants, cited *Kirby v. Potter* (4 Ves. 748), and *Fonnereau v. Pointz* (1 Bro. G. C. 472. And see *Page v. Leapingwell*, 18 Ves. 463).

The *Master of the Rolls* [Sir Wm. Grant]. There can be no doubt that, if the testatrix had given a single legacy of " £100 long annuities stock," the legatee would have been entitled to a long annuity of that yearly amount. But a doubt is raised, partly from the circumstance that she had not stock enough to answer all the legacies she had given in these terms, if they are considered as annuities, and partly from her having in other instances specified her legacies as consisting of so much *per*

*annum* in Bank long annuities. These circumstances do, I admit, create a doubt whether the testatrix meant to give £100 *per annum* when she has not expressly said so. But, if she did not mean that, I am greatly at a loss to say what it was that she did mean. For it is hardly conceivable that any person intending merely to give £100 in money should use the words "long annuities stock."

In *Fonnereau v. Pointz* (1 Bro. C. C. 472. And see *Page v. Leapingwell*, 18 Ves. 463) Lord *Thurlow* was struck with the enormous disproportion between the stock the testatrix had, and what, by the construction which was contended for, she must have been taken to have given; the latter being ten times as much as the former. In a case precisely the same, I might be disposed to follow that precedent, although, even there, it was not without great difficulty that the Court was prevailed upon to admit the extrinsic evidence as to the state of the property, in order to explain the intention of the testatrix. In this case, there is not nearly such a disproportion; and the testatrix appears to have herself entertained some apprehension that she had given more than her funded property would be sufficient to satisfy. It is true that her doubt is founded on the uncertainty of the price of the funds. And upon that it is fairly enough observed that if she had throughout given portions of stock, the price of the funds would be wholly immaterial. But, on the other hand, the apprehension was absurd, if she meant gross sums of £100, instead of £100 *per annum*. For a single £100 of her long annuities would have been much more than sufficient, at the lowest price of them, to pay all her legacies, if considered merely as pecuniary.

With regard to her having used different expressions in her different bequests, the whole will is too inaccurately worded to admit of any certain inference being drawn from that diversity. There was a case before Lord *Thurlow*, of *Stafford v. Horton* (1 Bro. C. C. 482), in which the same variation of expression occurred. The testator gave to his daughter £100 *a-year* long annuities, to the Plaintiff £50 long annuities, and to another person £50 long annuities, to be laid out in charity at his discretion; and Lord *Thurlow* held all the legacies to be specific, and directed a transfer of so much long annuities. In *Fonnereau v. Pointz*, there was some ground for holding the legacies to be of money, and not of stock, from the expression "*the sum of* stock" used in each of them. And in the ultimate judgment stress was laid on other peculiarities of expression which do not occur here.

[321] Under these circumstances, the question comes round to this:—whether, as the words used are properly descriptive of so much stock of bank long annuities, it appears (as Lord *Thurlow* thought it did in *Fonnereau v. Pointz*), "perfectly clear, from other circumstances, which amount to demonstration, that the testatrix did not mean them in that sense"? I think it does not, and that therefore I am not warranted in striking out, or leaving inoperative, the words "long annuities stock." To authorise a departure from the words of a will, it is not enough to doubt whether they were used in the sense which they properly bear. The Court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be used. A legacy of £100 is a different thing from a legacy of £100 stock. The testatrix has expressly given "£100 long annuities stock"; but I am desired to hold that she meant £100 in money, or such a portion of stock as would be equivalent to £100 in money. I do not say it is not doubtful whether she may not have meant this;—but there is not enough to shew clearly that it is what she did mean. I must therefore abide by the words of the will, and decree accordingly.

[322] WILLIAM DIXON, JAMES MOFFAT, and JAMES DIXON, *Plaintiffs*; WILLIAM EWART, WILLIAM TAYLOR, MYERS, MATHER, TORIN, BAYLEY, RITCHIE, and MOFFAT, *Defendants*. July 30, August 1, 8, 1817.

The Bill of Sale passes the absolute property in a ship at sea, subject only to be divested in case of the indorsement on the certificate of registry not being made within ten days after the return of the ship to port. Power of Attorney to sign an indorsement on the certificate, not revoked by bankruptcy of the vendor subsequent to the execution of the power, but previous to the indorsement; being a power only to do a mere formal act, which the bankrupt himself might

have been compelled to execute notwithstanding his bankruptcy, and for a consideration. Therefore, in this case, the indorsement on the certificate made within the ten days under a power of attorney, the grantor of which since become bankrupt : Held a sufficient compliance with the terms Registry Act.

The Defendants *Ritchie* and *Moffat*, carrying on business as merchants at *Liverpool* under the firm of *Ritchie* and Co., applied in 1814 to the Defendants *Ewart* and others, brokers (in partnership under the firm of *Ewart, Rutson*, and Co.) for advances in money to the extent of £10,000, on the security of goods, the property of *Ritchie* and Co., then in the hands of them the said *Ewart, Rutson*, and Co. which they consented, on *Ritchie* and Co. procuring sufficient securities for the amount of any deficiency that might happen. *Ritchie* and Co. then applied to the Plaintiffs (who were also merchants and partners at *Liverpool*), and requested to become such sureties, upon a representation that the goods in the hands of *Ewart, Rutson*, and Co. were much more than sufficient in value to cover the amount of the proposed advances ; and the Plaintiffs, confiding in such representations, agreed (together with another house of *Grays, Wilson*, and Co.) [323] to become sureties accordingly ; and immediately afterwards, in pursuance of an arrangement made for the convenience of *Ewart, Rutson*, and Co., *Ritchie* and Co. drew bills of exchange, dated the 28th of September 1814, and made payable 12 months after date, to the amount of the advances agreed upon ; which bills afterwards renewed from time to time, on the sole guarantee of the Plaintiffs. In September 1815, when £2500 (part thereof) was paid off, and the remaining bills were still further renewed to the 6th of March 1816.

In December 1815, *Ritchie* and Co. applied to *Ewart, Rutson*, and Co. for a further advance of £30,000, which they also agreed to make on condition that the payment thereof, and of all other sums advanced or to be advanced to them as aforesaid (including the £7500 then remaining due on the said bills of exchange), should be secured to them on certain ships, the property of *Ritchie* and Co., which they had sent to the *West Indies*, and the cargoes and proceeds thereof. The advance of £30,000 was made accordingly, at different times, from December 1815 to March 1816 ; and (among other securities for the repayment which were entered up in pursuance of the agreement between the parties) bills of sale of the ships were regularly executed by *Ritchie* and Co. to *Ewart, Rutson*, and Co. ; with power of attorney, enabling certain persons therein named, jointly or separately, to execute an instrument on the certificate of registry of each ship within ten days next after its arrival at the port of *Liverpool*, or any other port or ports in *Great Britain* or *Ireland*, notifying the transfer thereof to *Ewart, Rutson*, and Co., according to the form of the statutes. Copies of these bills of sale were within due time delivered, and each thereof endorsed on the affidavits of the certificates and memoranda made in the books of registers, and notice given to the commissioners [324] of customs, in every respect conformably with the provisions of the registry acts for the effectual transfer of ships at sea ; and by an indenture of defeazance, bearing even date therewith after reciting the circumstances of the transactions and the agreement between the parties, it was witnessed that the assignments and transfers of the said ships so made as aforesaid were upon trust (if the said *Ewart, Rutson*, and Co. should not in the mean time be otherwise satisfied the amount of their advances) upon the arrival of the said ships, or of any of them, in any port or ports of *Great Britain* or *Ireland*, upon giving seven days' notice in writing to the owners, to make sale and dispose thereof in such manner as to them (the said *Ewart, Rutson*, and Co.) should seem meet, and to apply the money arising from such sale or sales, in the first place, in payment of the expenses of the said assignments and taking possession thereof, and of making and completing the indorsements on the certificates of registry thereof, and of any actions or other proceedings to be brought or instituted relative thereto ; and of reasonable commission, &c. ; then to reimburse themselves the amount of their advances made or to be made as aforesaid, and all other charges and expenses ; and lastly, to pay over the surplus to *Ritchie* and Co., or as they should appoint. After these bills of sale and other securities had been completed and on being informed thereof, the plaintiffs agreed to a still further renewal, understanding that they were to have the protection of these new transactions. Upon

the arrival in *England* of the several ships so assigned, *Ewart, Rutson, and Co.* took immediate possession; and, within ten days after their respective arrivals, caused the proper indorsements to be made, notifying the transfers upon the affidavits of the certificates signed by some or one of the persons legally authorised by virtue of the powers of attorney. They afterwards sold the ships and received the [325] produce. On the 19th of *August* 1816, previous to the indorsement being made on the certificates, *Ritchie and Co.* became bankrupts, and the Defendants *Mather, Tobin, and Bagley*, were appointed their assignees. An action was afterwards commenced by *Ewart, Rutson, and Co.*, against the Plaintiffs as indorsers of the bills of exchange, and the present bill was filed to stay proceedings in such actions, praying that the Plaintiffs might be declared entitled to the benefit of all the securities to the extent of the bills, and that the same might be delivered up to be cancelled; or, in case the Defendants *Ewart and Co.* should not admit assets arising from the several securities so sold by them to cover the amount of advances, then for an account, &c.; and, if necessary, that an issue might be directed to try whether *Ritchie and Moffat*, or either of them, had by any act of their own made the property assigned by them to *Ewart and Co.*, and the proceeds thereof, liable to the payment of the bills so indorsed by the Plaintiffs.

Upon a motion being now made for a perpetual injunction according to the prayer of the bill, the principal question, viz. whether the bills of exchange, so drawn by *Ritchie and Co.* and indorsed by *Ewart and Co.* to the Plaintiffs, for the accommodation of, and as sureties for, *Ritchie and Co.*, had not in fact been satisfied, and the Plaintiffs become exonerated from their liability as indorsers, (1) appears to have [326] been considered as too clearly in favour of the plaintiffs to admit of argument. But another question was raised by the answer of the assignees,—viz. whether a valid indorsement on the certificate of registry upon the transfer of a ship can be made by a person duly constituted for that purpose by power of attorney, the power of attorney being executed before, but the indorsement executed not till after, an act of bankruptcy committed by the vendor and a commission issued:—in other words, whether the power is not revoked by the bankruptcy?—and this question now came on to be argued.

The provision of the last registry act relative to the indorsement on the certificate, is as follows.

“That if any ship or vessel shall be at sea, or absent from the port to which she belongs, at the time when any alteration in the property thereof shall be made, so that an indorsement on the certificate cannot be immediately made, the sale, or contract or agreement for the sale, thereof shall, notwithstanding, be made by a bill of sale or other instrument in writing as before directed, and a copy of such bill of sale or other instrument in writing shall be delivered, and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the book of registers, and notice of the same shall be given to the commissioners of the customs in the manner thereinbefore directed, and, within ten days after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made and signed by the owner or owners, or some person legally authorised for that purpose by him, her, or them, [327] and a copy thereof shall be delivered in manner thereinbefore mentioned: otherwise such bill of sale, or contract or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever, and entry thereof shall be indorsed, and a memorandum thereof made, in the manner hereinbefore directed.” (34 Geo. 3, c. 68, s. 16.)

*Leach*, for the assignees. The single question now before the Court is, whether this power of attorney was revoked by the bankruptcy? In point of fact, no interest passes under the assignment until its completion by the indorsement on the certificate; and, admitting that, if the owner of the ship had not become bankrupt, he could not have revoked the power which he had given, that has nothing to do with the present case, which turns solely on the policy of the registry acts, and is to be decided by a strict attention to the provisions of those acts.

Generally speaking, a power of attorney is determinable and revocable at pleasure; and it is immaterial in what terms it is expressed in the instrument which passes it. But this general way of stating the proposition is subject to qualification in cases where the power is given for a valuable consideration, or, in other words, where an act has been done, by which the owner of property is converted

into a trustee, but there remains some formality to complete it, and a Court of Equity would compel the performance. Generally speaking, also, such a power is revoked by bankruptcy. *Hovill v. Lethwaite* (5 Esp. Rep. 158), *Watson v. King* (4 Campb. 272. See Abbott on Shipping, 77)—and that even in cases where the power is coupled with interest; [328] although I allow that this also admits of qualification and that here also the true question is, whether the bankrupt himself could have been compelled to do the act required, if he had not been a bankrupt; because, if that is to be decided in the affirmative, then are his assignees equally compellable with himself; and, *vice versa*, if the bankrupt would not himself have been compellable to make the indorsement on the certificate, so neither can his assignees be compelled to make it.

Now, if I have stated the point in this case correctly, it is one which really does not admit of argument, the law on the subject being perfectly established by the cases which have been decided. It is a question entirely surrounded by authority. A Court of Equity has not, by the policy of the registry acts, any power to aid a defective conveyance, or to compel the performance of that which rests upon covenant. *Hibbert v. Rolleston* (3 Bro. C. C. 571), followed by *Mestaer v. Gillespie* (11 Ves. 625, 642). The only cases in which this point can be considered as having been left at all doubtful are those of fraud; and, even in such cases, the Master of the Rolls (*Grant*) has expressed a strong opinion against the Court's interference, *Speldt v. Lechmere* (13 Ves. 588).—And later cases appear to have gone the full extent of denying it. (2) Without denying, therefore, that, if the power of attorney had remained unrevoked when the ship arrived in port, the subsequent bankruptcy of the vendor would not have operated as a revocation, in this case the party had no longer any power when the ship arrived, and the subsequent act is, therefore, a mere nullity.

[329] Sir S. Romilly, *Bell*, and *Spence*, contra. Admitting these cases to have established the point contended for, they do not apply to this, where there has been an indorsement actually made, and the only question is, whether it has been made by persons properly authorized. Enough has been conceded to us in the admission that this was a power of attorney of such a nature as not to be revocable either by the act of the party or by bankruptcy, being given for a valuable consideration, and in order to effectuate a conveyance which had been actually made. It is clear that, in any other case, where these Acts of Parliament do not operate, the Court would compel the execution of the only requisite remaining to perfect it. Then what alteration do the statutes make in such a case as the present? All the penalties required by the statutes have been complied with. What object of public policy can remain unfulfilled, when an attorney has been properly constituted to do the act required? It is not a case resting on covenant, but the actual completion of the conveyance, so far as it was possible that it should be completed. Did the bankrupt, by executing the bill of sale, and complying with all the requisites of the statute, so far as they could have been complied with, divest himself of the property, so that no interest in it remained to pass to his assignees? That is the true question, and it is a question which can only admit of one answer. The bankruptcy of the party revokes a power of attorney given by him, only in cases where no estate or interest passes previous to the execution of the power. What is the reason assigned by Lord Coke, why a power of attorney to deliver seisin is countermanded by the death, not only of the feoffer, but of the feoffee also, and the deed itself thereby "becomes of none effect"? "Because in this case, nothing doth passe before livery of seisin; for, if the feoffor dieth, the land descends to [330] his heire, and, if the feoffee dieth, livery cannot be made to his heire, because then he should take by purchase where heires were named by way of limitation." (Co. Litt. 52 b.)

The cases cited from *Espinasse* and *Campbell* were of powers for sale and for the receipt of money, giving a lien, but no actual conveyance, and so not at all applicable to the present question. But it has in fact been already decided by the Court of King's Bench, in a very late case, *Palmer v. Moxon* (2 Maule & Sel. 43), in which the cases of *Moss v. Charnock* (2 East, 399), and *Hubbard v. Johnstone* (3 Taunt. 208; and see *Ritchie v. St. Barbe*, 4 Taunt. 768), were fully discussed, and the principle was established, that the property in a ship passes instantly by the bill of sale;—that it is divested, subject only to be re-vested if the provisions



of the statutes are not complied with. Now, what are those requisites provided by the statutes? The act of King William (7 & 8 W. 3, c. 22, s. 21), provides that, "in case there be any alteration of property in the same port, by the sale of one or more shares in any ship after registering thereof, such sale shall always be acknowledged by indorsement on the certificate of register, before two witnesses, in order to prove that the entire property in such ship remains in some of the subjects of England, if any dispute arises concerning the same." And the effect of the indorsement is not altered by any of the subsequent statutes; the last of them (34 Geo. 3, c. 68, s. 16), referring to the laws then in force (among which is this act of King William) enacting that, if any ship shall be at sea, &c., at the time when such alteration in the property thereof shall be made "as aforesaid, &c.," the sale, or contract for sale shall, notwithstanding be by [331] bill of sale, &c., and an indorsement made within ten days after her return, and a copy thereof delivered "in manner hereinbefore mentioned," &c.—evidently pointing at no alteration in the effect of the indorsement, but merely extending it to the case which was meant to be provided for, of a ship at sea.

Upon the whole, this was only a power to do that which the bankrupts might have been compelled to do, and might still do, notwithstanding their bankruptcy,—a mere formal act for the completion of a title, which is already perfect, to the extent of divesting out of the bankruptcy the entire property in the ship, and for which they have received a valuable consideration. (See *Lempriere v. Pasley*, 2 T. R. 485.)

*Leach* in reply. The principle laid down by *Coke* unquestionably governs the case; but the question still remains, whether the indorsement is not an act necessary to perfect the conveyance—whether it is not the same in effect as the livery of seisin, which is essential to pass an interest in land, and to complete the feoffment. The material principle of the policy of the navigation laws is, that the name of the true owner shall appear on the documents evidencing the property of the ship; and, until that is effected by the indorsement being actually made, the property remains where it was, notwithstanding the deed of transfer. The indorsement is the substantial act—the mode in which, and in which only, the statutes declare that a transfer can be effectually made. *Palmer v. Moxon* decides nothing as to this. The whole argument in that case proceeded upon the principle of relation to the time required by the statute, and, by excluding the present question, actually establishes the contrary [332] conclusion to that which is contended for. The case therefore returns to the original question,—whether the bankrupt could himself have been compelled to execute the indorsement,—or whether he could execute it, if no power of attorney had been given, notwithstanding his bankruptcy. The case is very material upon general principle; and the point has nowhere been decided.

The Lord Chancellor. I am glad to have been referred to the case of *Palmer v. Moxon*; for I thought something had been said on this subject in the courts of law since *Moss v. Charnock*, upon which I formerly observed in *Mestaer v. Gillespie* (11 Ves. 637). It strikes me very forcibly that the principle must be similar to that of the cases under the annuity act (17 Geo. 3, c. 26), by which it has been decided that the grant of the annuity passes the ownership instantly, subject to be divested in case of non-compliance with the provisions of the act by inrollment within the twenty days thereby limited; and this appears to be Lord *Ellenborough's* opinion in *Palmer v. Moxon*; for I cannot think that the decision of the Court of King's Bench in that case can be satisfactorily accounted for by the doctrine of relation. The ship might have been taken in execution within the ten days; but property must be in actual possession when execution is executed; and, therefore, if the property were not passed by the bill of sale, there could be no valid execution. There is no doubt that there can be no such thing as an equitable title to a ship; and the case before the Vice Chancellor (*Thompson v. Smith*, 1 Madd. 395), is, as to this, also very material. When the former act (26 Geo. 3, c. 60) passed, there was not sufficient attention paid, in framing its enactments, to what might be its effect upon the principles adopted in [333] Courts of Equity; and it was to remedy that deficiency that the last act was introduced (34 Geo. 3, c. 68), by which it is now completely established that there can be no such thing as the equitable ownership of a ship. I well know that a bill does not lie to compel the execu-

tion of the indorsement after the ten days are expired ; but, if it were possible for him to bring his case before the Court within the time limited, would the Court refuse to entertain it ?—or, if the Legislature had given twelve months instead of ten days, would the Court refuse to aid the party in such a case by the exercise of its jurisdiction to compel the specific performance of an agreement ? I cannot imagine that the Legislature meant to declare that there may be a sale of a ship at sea, but that there shall be no means, either at law or in equity, of compelling the execution of those formalities which it has directed to accompany the transfer. The legislature could not have meant to deny to the suitor, in such a case, the advantage of equitable relief. Its meaning must have been, to give the party an inchoate right to the property which is the subject of the assignment.

August 8. The *Lord Chancellor* [Eldon]. When this case was before me, I considered that there are some important points of law which will be involved in its decision, and resolved, before I did any thing further, to have the opinion of some of the Judges upon these questions. I have since received from Mr. Justice *Abbott*, now on the Circuit, a note containing the opinion of himself and the Lord Chief Justice of the Common Pleas, which is, in substance, that the transfer of a ship at sea, if all the requisites of the registry acts [334] have been duly complied with at the time of the transfer, vests the property in the vendee, subject only to be divested upon the neglect of the vendor to make the indorsement on the certificate of registry within the ten days after the return of the ship into port. That, if a bankruptcy intervenes before the arrival of the ship, the indorsement, being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself. And that (as in this case) if the vendor has given a power of attorney to perform this act of duty previous to the bankruptcy, his attorney may carry it into effect notwithstanding the act of bankruptcy has intermediately occurred.

This is the opinion which these Judges have given ; and on the authority of their communication I shall act as if it were the settled law of the case, which indeed, upon looking into the acts of parliament, and considering the opinion delivered to me, I think that it is. But, if any of the parties should think otherwise, and should chuse, after this, to have a case for the decision of a court of law, I will give it them.

The injunction accordingly issued.

(1) " A Surety is entitled to every remedy which the creditor has against the principal debtor ; to enforce every security and all means of payment ; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety ; having a right to have these securities transferred to him, though there was no stipulation for it ; and to avail himself of all these securities against the debtor." See *Craythorne v. Swinburne*, 14 Ves. 162.

(2) See *Ex parte Yallop*, 15 Ves. 60. *Thompson v. Leake*, 1 Madd. 39, and cases referred to in *Thompson v. Smith*, *ib.* note, p. 399. *Brewster v. Clarke*, 2 Mer. 75.

[335] JAMES SKEY the Younger, *Plaintiff*, against THOMAS BARNES, MARY SKEY, GEORGE SKEY, and JAMES SKEY the Elder, *Defendants*. *Rolls*. December 1816.

[See *Davis v. Fisher*, 1842, 5 Beav. 214 ; *Templeman v. Warrington*, 1842, 13 Sim. 271 ; *Williams v. Clark*, 1851, 4 De G. & Sm. 474 ; *Daniel v. Gosset*, 1854, 19 Beav. 484 ; *In re Theed's Settlement*, 3 K. & J. 379 ; *Hardcastle v. Hardcastle*, 1862, 1 H. & M. 411 ; *In re Hudson*, 1882, 20 Ch. D. 414.]

Testator gives his personal estate to trustees, upon trust to pay the interest to his daughter *E. S.* for her life, and, after her decease, to pay and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment to go to and be equally divided among them ; and if but one, then to such only child ; the portions of sons to

be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one, or marriage. If no issue, or all die before their respective portions become payable, then over. The shares are so given as to vest immediately in the children of *E. S.* though liable to be divested by all dying under twenty-one, without issue. The share of a child so dying was therefore held to pass to its representative.

*John Brockhurst* by his will devised his real estates to the Defendant *Barnes* and another (whom he also appointed executors of his will) and their heirs, during the life of his daughter *Eleanor* (wife of the Defendant *James Skey*) upon trust, during her life, to pay the rents and profits to her separate use; with remainder to the use of her first and other sons in tail-male; in default of such issue to the use of all and every her daughters as tenants in common in tail with cross remainders; and for default of such issue to the use of his nephew *Thomas Brockhurst* in fee. He also gave and bequeathed to his said Trustees, their executors, &c., all his personal estate and effects, in trust to sell, and invest the produce on real or government securities, and to pay the interest to his daughter *Eleanor* during her life for her separate use; and after her decease, "to pay and divide the whole of the said trust monies to and amongst all and every the child or children of the body of my said daughter lawfully to be begotten and the lawful issue of a deceased child," in such proportions as his said daughter should by will appoint; [336] and in default of appointment then the same "to go to and be equally divided between them share and share alike, and, if there should be but one child, then to such only child; the portion or portions, parts or shares of such of them as shall be a son or sons to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage first happening; but, in case there shall be no such issue of the body of my said daughter, or all such issue shall die without issue, before his or their respective portions should become payable as aforesaid," then £1000 for his sister *Mary* and her family, as therein mentioned; and, as to £1500, for his niece *Ann Wells* and her family, in like manner; and in case there should be no issue of either, for his said nephew *Thomas Brockhurst*, whom he also made his residuary legatee. The will contained a proviso that it should be lawful for the Trustees, &c., to pay and apply the interest of the respective children's portions towards their education and maintenance until their respective portions should become payable.

The Testator died after making his will, leaving the said *Eleanor Skey*, his only child, who received the interest, &c., of the personal estate for her life, and died on the 18th of December 1794, intestate, and having made no appointment, leaving the Defendant *James Skey* (her husband), the Plaintiff (her son), the Defendant *Mary Skey*, and *Frances, Sarah, and Elizabeth Skey* (all since dead), her daughters, her surviving; of whom *Elizabeth* died in January 1811, under twenty-one, unmarried, and intestate; *Sarah* died in October 1811, having attained 21, and having by her last will appointed the Defendants *George Skey, and Mary* (her [337] sister), executor and executrix; and *Frances* died in 1813, intestate and unmarried, but having attained twenty-one. Administration both to *Elizabeth* and *Frances*, was taken out by the Defendant *James Skey*, their father.

The question was as to the share of *Elizabeth* (who had died under twenty-one and unmarried), to which the Plaintiff claimed to be entitled, together with the Defendant *Mary* and the representatives of *Sarah* and *Frances*, respectively, by right of survivorship.

The Defendant *James Skey* (the father), on the contrary, insisted that the share of *Elizabeth*, was a vested interest, transmissible to her personal representatives, and he claimed to be entitled to it by having taken out administration.

*Hart, Bell, and Dowdeswell*, for the Plaintiff. A general rule of construction, relative to the vesting of legacies, is that, "when a legacy is given to *A.* to be paid, or payable, at a given period, the legacy will be considered as vested immediately, although not to be paid until the period assigned, as *debitum in præsentì, solvendum in futuro*; the time being annexed to the payment only, and not to the legacy itself." (1 Roper on Legacies, 151, referring to *Jackson v. Jackson*, 1 Ves. Sen. 217. *Bolger v. Mackell*, 5 Ves. 509, &c.) But, "when the time appointed for payment of a

" legacy is annexed to the very substance of the gift," as a gift to A. " at, or if, or when, " or *provided* he attains 21," the legacy will not vest in such cases before the arrival of the prescribed period. And, wherever the will necessarily requires a different construction, so as to give it effect, the rule will yield to such necessary construction. *Scott v. Bargeman*, (1) *Mackell v. Winter* (3 Ves. 536), *Worlidge v. Churchill* (3 Bro. C. C. 465), *Anon. Dyer*, 303. Upon the whole context of this will, it is evident that it was intended the shares should not vest till twenty-one ; but that, in the event of the death of any under that age, the others should take by survivorship. If there should be but one child, the whole was to go to that child. The limitations over are only in the event of *all* dying under twenty-one, or (if daughters) unmarried. The gift, and the time of payment, are clearly annexed to each other. The shares are given to trustees, until they respectively become payable, with a discretionary power of applying the interest of the respective shares towards the education, or maintenance, or other benefit, or advantage, of the several legatees, until their respective portions should become payable, subject to the said contingencies of his daughter dying and leaving no children, [339] or all dying without issue before their respective portions become payable.

The case of *Scott v. Bargeman* [2 P. Wms. 69] is a direct authority for this construction.

Sir Samuel Romilly, Agar, and J. Martin, for the Defendants. This is a mere question of construction, as to which there is no case in point except *Scott v. Bargeman*. The interests are vested, subject to be divested in the event of all dying under twenty-one. In this way of putting it, there is no inconsistency or contradiction. The question is, only, whether it is or not a vested interest ; and this depends on another question, whether the postponement arises out of the character of those who are to take, or the nature of the fund. Here the payment is necessarily postponed on account of the life-interest of the mother. *Scott v. Bargeman* has never been referred to as authority in any subsequent cases ; and the argument upon which the decision appears to be founded is altogether fallacious.

The case in *Dyer* was a case of necessary implication. The testator there said, the estate should not go over to his right heirs except upon failure of all his issue. Therefore it necessarily followed that there must be cross remainders.

In *Mackell v. Winter* [3 Ves. 536], only one case of survivorship was provided for, but others were held to be implied.

This is the mere ordinary case, of dying under twenty-one without leaving issue.

[340] In *Harrison v. Foreman* (5 Ves. 207), the doctrine of Lord Alvanley is that, where there are clear words of gift, creating a vested interest, the Court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened, in which it is declared that the interest shall not arise. That it must be determined that, upon the words of the will, there was a vested interest, which was to be divested only upon a given contingency ; and the single question was, whether that contingency had happened.

The *Master of the Rolls* [Sir Wm. Grant]. Upon the face of the will, and independently of authority, I should have found little difficulty in deciding this case. I should have said, The shares of the residue are so given as to vest immediately in the children of the daughter, though liable to be divested by their all dying without issue under twenty-one. The contingency on which they were to be divested has not happened. They therefore continued vested, and the share of a child dying under twenty-one passes to its representative. But it was said that such a decision would be in contradiction to the authority of *Scott v. Bargeman* (2 P. W. 69), and of *Mackell v. Winter* (3 Ves. 536). I shall shew hereafter that this case cannot be affected by the last of these decisions. As to the first, though I think the decision right in its result, I doubt much whether the Reporter can have correctly stated the reason on which it was grounded ; for it seems to imply a proposition that is untenable in point of law, namely, that the mere circumstance of all the shares being given over on a contingency does, of itself, and without more, prevent any of the shares from vesting in the mean time. I take it [341] to be clear, that a devise over upon a contingency has no such effect, provided the words of bequest be, in other respects, sufficient to pass a present interest. Such a devise over of the entirety may indeed be called in aid of other circumstances to shew that no present interest was intended to pass ; and

there is another question I shall presently mention, on which it may very materially bear. But, that it is alone sufficient to prevent vesting, cannot, I think, be maintained.

In *Ingram v. Shephard* (Amb. 448) the point was indeed made; but Lord Northington with great clearness decided against it. There, a residue of real and personal estate was given to the children of *Frances Shepherd*; but it was to go over if she died without leaving issue. The children that had come into *esse*, filed a bill for the rents and profits of the residuary estate. "The Devises over contended that the children took no interest in the *residuum* in the life of their mother, but that the whole "was contingent till her death; and that the interest and profits were intended to "accumulate in the mean time."

"Lord Northington was very clearly of opinion, that the daughters took a de- "feasible interest in the residue; and put the case of a legal devise of the residue to the "daughters, with a subsequent clause, declaring, that if all the daughters should die "in the life-time of their mother, then the residue should go over; that would be "an absolute devise with a defeasible clause, and the daughters would, in that case, "be clearly entitled to the interest and profits till that contingency happened. And "decreed according to the prayer of the bill, with liberty to apply in case of the birth "of any other child."

[342] I have said that I thought the decision of *Scott v. Bargeman* right in its result, though not for the reason assigned. There was no gift to the daughters, but in the direction to the trustee to divide the fund among them at their respective ages of twenty-one years. The age of twenty-one was therefore part of the description of the legatees among whom the division was to be made.

On that principle, Lord Rosslyn, after consideration, and looking into the authorities, decided the case of *Batsford v. Kebbell* (3 Ves. 363). There, the testatrix gave to A. the dividends that should become due after her decease upon £500 3 *per cent.* Bank Annuities, until he should arrive at the full age of 32 years, at which time she directed her executors to transfer to him the principal sum of £500 of her 3 *per cent.* Annuities for his own use. A. died before he attained 32; and the question was, whether the vesting of the legacy, or the time of payment only, was postponed till the legatee should attain the age of 32. The Lord Chancellor (*Loughborough*) said it struck him that there was a very precise distinction in that case between the dividends and the fund, and that, if he construed it a gift of the fund, he must strike at the suspension of it till the age of 32; and afterwards, upon reading over the bill and looking at the cases, said he was confirmed in his opinion, adding as follows: "Upon the cases it appears that dividends are always a distinct subject of "legacy, and capital stock another subject of legacy. In this case there is no gift "but in the direction for payment; and the direction for payment attaches only "upon a person of the age of thirty-two. Therefore he does not fall within the descrip- "tion. In all the other cases the thing is given, and the profit of the thing is given."

[343] If Lord *Macclesfield*, in *Scott v. Bargeman* (see note, 3 Mer. 338), had upon this ground decided that the legacies did not vest in daughters under twenty-one, the circumstance that all the shares were given over on the death of all under twenty-one might bear very materially on the question that would then arise, whether the survivors would be entitled to the share of a daughter dying under the prescribed age. *Prima facie* there was no survivorship, as the shares were given equally. Yet the share of a daughter dying under twenty-one could not be said to be undisposed of, so as to sink into the residue, or go to the testator's next of kin, for there was an event in which the devisee over might become entitled to it. Therefore, as the mother was to be entitled to the whole if all died under twenty-one, and yet was entitled to nothing unless all did die under twenty-one, survivorship among the children themselves seems to be implied, though not provided for in words; and it is here, and here alone, that the analogy from cross remainders has any application. It has no bearing whatever on the other and primary question, whether the shares do or do not vest. That is a question which cannot arise in cases of cross remainders. The only estates that are given, namely estates tail, do vest. The question is, what is to become of each portion of the property, as each estate tail determines. If the limitation over is not to take effect till a failure of the issue of all the devisees in tail, and if the whole is then to go over, an inference arises, that, in the meantime, the several devisees in tail are to succeed to each other. But, with respect to personal property, if a share once

vests, though liable to be divested on a contingency, the question of reciprocal succession or survivorship never can arise. If the contingency happens, the share goes over ; if the contingency does not [344] happen, the share remains vested, and passes to representatives.

In the case of *Mackell v. Winter*,<sup>(2)</sup> although Lord Rosslyn uses some expressions not unlike those which are attributed to Lord Macclesfield in *Scott v. Bargeman*, yet there is not to be found in his judgment any thing like a distinct proposition that, by the devise over, without more, the vesting was prevented. He makes two questions.—First, whether the shares vested. If they [345] did, there was an end of the granddaughter's claim : The representative of the surviving grandson was entitled. If they did not, still there was a second question to be considered ; whether the granddaughter was entitled to the whole by survivorship, there being no provision for survivorship in the case that had happened. And it is to this second question that Lord Rosslyn (after having decided upon all the grounds which the will furnished, taken together, that the shares did not vest) principally applies the argument drawn from the mode in which the shares are given over. But what are the grounds on which he holds the shares not to have vested ? Not merely because they are given over—but because he thought it apparent from different provisions in the will, that the testatrix did not mean any of the legatees to take an interest in the residue before twenty-one, except in so far as the executors were authorized to make an expenditure for maintenance or preferment. Every thing beyond what might be wanted for those purposes was to be accumulated.—Until twenty-one, none of them was to have any right to the accumulation ; and, if they all died under twenty-one, the residue with the accumulations was to go over to the testatrix's nephew. That, to be sure, was inconsistent with the notion of a vested interest in a residue, which entitles the legatee to the produce of such residue, even when the payment is postponed till twenty-one. But in the present case, there is not a single circumstance or expression in the will, that has been relied upon, as shewing an intention to defer the vesting, excepting the bequest over. The directing payment to be made at twenty-one does not postpone vesting, even in the case of a common legacy, still less in the case of a residue. There is, indeed, a clause authorising the executors to apply the interest and dividends of the children's portions for their education, [346] maintenance, or other benefit or advantage ; but there is nothing that can exclude their right to the surplus of income that might not be so employed ; nor is there any thing that could entitle those who were to take in the event of all the children's dying without issue under twenty-one, to claim the surplus interest and produce of the residue during the lives of those children. Not one word is said about survivorship among the children ; whereas, in *Mackell v. Winter* there was an anxious provision for survivorship in all the cases that had occurred to the testatrix, and it was evident that it was by a mere slip that it was not provided for in the case that actually happened.

On the whole, the present case comes round to what is stated at the outset—namely, that the shares vested from the beginning,—that the contingency has not happened on which they were to be divested,—consequently the share of the deceased child has been properly paid to her representative.

(1) 2 P. W. 69. " One having a wife and three daughters devises to his wife, upon condition that she would pay £900 into the hands of J. S. in trust to lay out at interest, and pay the interest to his wife during widowhood, and after her death or second marriage in trust to divide the same equally among the three daughters at their respective ages of twenty-one or marriage ; provided that if all his three daughters, should die before their legacies should become payable, the mother should have the £900. The wife married again. The two eldest daughters died under twenty-one, and unmarried. The third attained twenty-one ; and the question being whether she was entitled to all, or what part of the £900, the Lord Chancellor (*Macclesfield*) held she was entitled to the whole, because (according to the report) the shares did not vest absolutely in any of the daughters under age, in regard it was possible all the three might die before twenty-one or marriage, in which case it was devised over. But, as to the ground assigned for the decision, see the judgment of the *Master of the Rolls* in the present case.

(2) 3 Ves. 536. There the testatrix directed her household goods, &c., to be

sold, and the produce, together with the residue of her personal estate, she bequeathed to her two grandsons and her grand-daughter, "to be equally divided between them share and share alike; the shares of her grandsons, with the interest and accumulations (after a deduction for maintenance and advancement), to be paid to them respectively upon their attaining their ages of twenty-one, and the share of her grand-daughter, with the interest and accumulation, at twenty-one or marriage." Then, after a direction for maintenance and advancement, she declared that in case her grand-daughter should die under 21 and unmarried, her share should go to and be equally divided between her grandsons; and, in case of the death of either of them, the whole should be paid to the survivor; and that, in case either of her said grandsons should die under twenty-one, the share of her said grandson so dying should go to the survivor; and, in case both her grandsons should die under 21, and her grand-daughter should die under 21 and unmarried, the whole of her respective shares should go over.

The two grandsons died under 21; the grand-daughter married. The *Master of the Rolls* declared the Plaintiff (who was the devisee over) entitled to the two-thirds, and the grand-daughter to her one-third only. But on appeal, the decree was reversed and the grand-daughter declared entitled to the whole, upon the ground of *necessary implication*.

[347] RICHARD HARDMAN, *Plaintiff*, and JOHN JOHNSON, HENRY LAWRENCE and BENJAMIN CORFE, *Defendants*. *Rolls*. July 25, 1815.

[See note to *Randall v. Russell*, 1817, 3 Mer. 190, and also, *Aberdeen Town Council v. Aberdeen University*, 1877, 2 App. Cas. 553.]

[The following case was decided before the period at which these Reports commence; but it is inserted in this place on account of its reference to the principle of one of the points in *Randall v. Russell*, which see 3 Mer. 190.]

Testator gives to his daughter *B.* a leasehold, held under the corporation of *L.* for 3 lives and 21 years after the death of the survivor, "for all his estate and interest therein." He gives other parts of his property to his son, and two other daughters; and the residue of his estate, real and personal, to be equally divided between his three daughters and his son; with a proviso that, in case of the death of any without leaving issue "the dying child or children's *share or shares*" should go over to and be divided among the survivors; followed by a clause that any or either of his said children who should dispute his will should have no benefit from any thing therein contained, but the *share or shares* therein before given to him, her, or them should go to the others. *B.* enters on the leasehold given her by the will, and, after the expiration of the three lives, but during the twenty-one years which commenced on the death of the survivor, obtains a renewal. She then dies, after the expiration of the twenty-one years, without issue, having by her will given the premises to *J. J.* "for all her estate and interest therein." On her death, *S.*, the only surviving child of the testator, enters by virtue of the proviso in his will. *J. J.* brings ejectment and recovers possession; and afterwards purchases the reversion in fee, for which the option is given him, as tenant of the premises, by the Corporation. *Held*, That the proviso in the will, with reference to the subsequent clause, extended to all the interests taken by the children under the will, and was not confined to the residue only; the meaning of the word *shares* being explained by that subsequent clause. *Held*, also, That the renewed lease was purchased by *B.* as trustee of the term, and went over to *S.* upon her death without issue. But, with respect to the reversion in fee, it was further held, That *J. J.* was a purchaser thereof for his own benefit, there not being enough in the case to extend to it the principle upon which the renewed lease was held to be taken for the benefit of those in remainder.

*Robert Johnson*, being possessed of certain messuages and premises at *Liverpool*, under a lease from the Mayor and Corporation, for the lives of [348] himself and two other persons and the life of the survivor, and for a term of twenty-one years expectant on the death of the survivor, made his will, by which, after devising certain other estates to his son *Thomas Johnson* (subject to certain annuities), he

gave and devised the premises in question to his daughter *Betty Johnson*, her executors, &c., during all his term and interest therein. He then gave another leasehold estate to his daughter *Ellen*, her executors, &c., for and during all his term and interest therein; the reversion of certain other estates (subject to a term years subsisting therein) to his two daughters, *Betty* and *Ellen*, their heirs assigns for ever, as tenants in common; the reversion of other premises, also lease, to his daughter *Sarah*; his household goods, furniture, &c., to his wife, during her widowhood, and, upon her death or second marriage, to be divided among three daughters, or such of them as should be then living; and the residue of all estates, real and personal, to his said son and daughters, their heirs, executors, &c. to be equally divided; with a proviso, "that in case any of his said children should die without issue living at his or her decease, the dying child or children's share or shares of his said estate therein before respectively given to him, her, or them, should go to and be equally divided among the survivors or survivor, their, her, or her heirs, executors, &c."; and he thereby directed that, if any of his said children should cause any differences, disputes, or law-suits, to be had or brought touching any matter or thing in his will contained, with intent to alter the plain sense, true intent, or meaning thereof, or should refuse to comply with the same then and in such case, such of his said children as should cause such differences should have no benefit or advantage from any thing in his said will, but the shares or shares therein before given to him, her, or them, should go to the others of his said children; [349] and he thereby appointed his said wife and son, and his daughter *Ellen*, executors of his will.

The Testator died on the 20th of *April* 1760, leaving his son *Thomas* his heir at law, and his three daughters named in the will; and after his death *Betty Johnson* entered into the possession of the corporation lands devised to her, and continued to possess thereof till her death. In 1769, the last of the three lives for which the same were holden expired, whereupon the term of twenty-one years expectant on the death of the survivor commenced; and, in the month of *December* of that year *Betty Johnson* obtained a renewal of the lease for the lives of herself and of two other persons, and twenty-one years expectant on the death of the survivor.

*Thomas Johnson* (the son of the Testator) died in the life-time of *Betty*, leaving son, *John* (the Defendant), his heir at law, and heir at law of the Testator. *Ellen* survived *Thomas*, and also died in the life-time of *Betty*, without issue and unmarried. In 1764, *Sarah* married *Richard Hardman* the Plaintiff.

*Betty Johnson* died in 1798, without issue and unmarried, leaving her nephew the Defendant *John Johnson*, her heir at law, and *Sarah* (the Plaintiff's wife) the only remaining child of the Testator, her surviving, having first made her will whereby she gave the premises in question to the Defendant *John Johnson*, her executors, &c., for all her estate and interest therein (subject to the payment of debts and legacies in case the residue of her estate should be insufficient for that purpose) and appointed the said Defendant, and *Richard Hardman* (the Plaintiff), her executors.

Upon the death of *Betty Johnson* without issue and unmarried as aforesaid, the Plaintiff and his wife entered [350] into possession of the premises in question notwithstanding her will, claiming to be entitled under the will of the Testator by the Plaintiff's wife having survived all the other children of the Testator. In 1800 the Defendant *John Johnson* brought an ejectment, on which he recovered possession of the premises; the Court of K. B. being of opinion that, *Betty Johnson* having procured such renewed lease of the premises, the same passed by her will; and since taking possession, he had bought the reversion of the same premises by virtue of an option granted him by the Corporation, as the person appearing to be entitled to the lease thereof. The Plaintiff's wife died in the same year, 1800, leaving the Plaintiff her husband (who had taken administration) and *Richard Hardman* the younger, her eldest son and heir at law. This *Richard Hardman* had become bankrupt, and the other Defendants were his assignees.

The bill, stating these facts, insisted that, the Defendant *Johnson* having purchased the reversion under such circumstances, the Plaintiff ought to be held entitled to the benefit of the purchase; offering to pay the money for the same; charging also that *Betty Johnson* took the new lease of *December* 1769, subject in equity to the same conditions, limitations, and provisos, as the original lease was made subject



to by the will of the Testator ; and therefore prayed, that the Defendant *John Johnson* might be decreed to convey the premises comprised in the deed of the 15th of *December* 1769 to the Plaintiff and his heirs for ever, and to deliver up possession thereof, and also to convey to the Plaintiff the reversion in fee expectant on the determination of the last-mentioned grant, and to account for, and pay over to the Plaintiff the rents and profits during the time he had been in possession or receipt thereof ; [351] the Plaintiff offering to pay him such part of the fine for renewal (if any) as he should appear to be entitled to, and also the purchase money for the reversion, with interest, in case it should appear that that purchase money was not a distinct sum from the purchase money of the other premises purchased by him ; and a reference to the master to ascertain and state what was the value of the reversion at the time of the purchase, and what ought to be paid to the Defendant by the Plaintiff in respect thereof.

The Defendant, by his answer, insisted that the clause of survivorship was confined to the residue ; which, by the clause immediately preceding, was given to all the children, equally to be divided among them. That the premises in question were devised to *Betty Johnson*, absolutely, for all the testator's interest therein, which interest expired long before her death, and she afterwards, to the time of her death, continued in possession under the new lease granted her by the Corporation and purchased with her own money. That, in the trial of ejectment, the merits of the case had been solemnly argued. He further said, that he had purchased the reversion for a valuable consideration, together with other lands adjoining, without distinction, under the same contract.

*Bell and Parker*, for the Plaintiff.

*Sir S. Romilly and Horne*, for the Defendant.

The *Master of the Rolls* [*Sir Wm. Grant*], on the first question (*viz.* whether the proviso in the will of *Robert Johnson* referred to, and controuled, the former specific bequests or alluded only to the gift of the residue immediately preceding it), observed that the word "shares" ("the [352] dying children's *shares* of his said estates") was more applicable to property given generally than to what was specific, *viz.* the distinct portions before given to all the children ; but that the question must always be, in what sense it was used in the particular instance :—that here it might be doubtful, on the first clause, what was actually meant, but that which followed, excluding from all benefit or advantage under his will such of his children as should dispute it, and directing that their "shares" should go over to the others, made it clear that, in using the word, he had reference to every bequest under that will.

As to the other question, he said it was (as far as respected the reversion purchased by the Defendant) a new one ; but he should hesitate a good deal before he refused to apply it to the principle which had been established as to the renewal of a lease ; and that it would be dangerous to allow the trustee of a term to resort to the owner of a reversion to become a purchaser for his own benefit ; for by that means he would debar his *cestuy que trust* of the fair chance of renewal, getting into his own hands the power to grant a renewal or not at his option. As a new point, His Honour said he would take time to consider it.

On a following day, His Honour stated it to be his opinion, that the Plaintiff was entitled to the benefit of the renewed lease ; but not to the benefit of the purchase made by the Defendant of the reversion.

[353] The ATTORNEY GENERAL, at the Relation of BENJAMIN MANDER, and the Reverend JOHN STEWARD, Informant, and the said BENJAMIN MANDER and JOHN STEWARD, Plaintiffs, and JOSEPH PEARSON, JOSEPH STANLEY, JOSEPH BAKER, THOMAS WILLIAMS, BENJAMIN STANLEY, and ABEL WHITEHOUSE, Defendants. July 14–17, 1817.

[See *Att.-Gen. v. St. John's Hospital, Bath*, 1876, 2 Ch. D. 565 ; *Att.-Gen. v. Bunce*, 1868, L. R. 6 Eq. 371 ; *R. v. Ramsay*, 1883, 48 L. T. 738 ; *Att.-Gen. v. Anderson*, 1888, 57 L. J. Ch. 549.]

Information and Bill to quiet the possession of the Relators and Plaintiffs (one claiming as the surviving Trustee, the other as Minister, of a protestant dissenting meeting-house) ; for an appointment of new Trustees ; and an injunction to

stay proceedings in ejectment by the Defendants, claiming also to be Trustees of the meeting-house. Upon motion for an injunction, it appearing that the meeting-house was erected in the year 1701, under a trust-deed, whereby the purpose was declared to be "for the worship and service of God"; the Plaintiffs and Relators contending, from the purpose so expressed, that the intention was for promoting the doctrine of the Holy Trinity, and that the trust could not be diverted from the purpose for which it was intended; the defendants insisting that the intention was as general as the purpose expressed, and had no regard to any particular tenets; it being also made a question, whether a trust for supporting Unitarian worship is legal and can be supported; and it being further disputed who, according to the true construction of the deed, were entitled, as Trustees, to the possession; and whether the Minister of a dissenting congregation, elected for a limited period, is afterwards removable at pleasure; and also as to the construction of the deed, and as to an alleged agreement or understanding between the parties, with regard to such removal: the injunction was granted (upon the parties undertaking to abide by such order as the Court should thereafter make), and it was referred to the Master to inquire in whom the legal estate was vested, the particular object (with respect to worship and doctrine) for which the trust was created, the usage of protestant dissenters as to the election of Ministers, and the duration of their office, and whether any agreement or understanding relative thereto subsisted between the parties.

The Information and Bill, filed on the 1st of *February* 1817, stated that about 150 years ago, a meeting-house, or place of worship for Protestant Dis[354]-senter from the established church, was erected in *John-street, Wolverhampton*; and, as well at the time of erecting the same, as from time to time since, various grants and pecuniary bequests and other endowments had been made thereto by different persons, for the purposes of supporting a Minister, and of defraying the expenses of repairing and maintaining the same, and for other purposes of a like nature. That the said meeting-house, together with an adjoining building, which was used as a school-room and as a vestry for transacting the secular affairs of the congregation, and together with a dwelling-house, also adjoining, which had for many years past been used as the residence of the Minister for the time being officiating in the said meeting-house, was originally vested in the names of Trustees for the purposes aforesaid, and declarations of trust thereof were duly executed by such Trustees; and, as such Trustees had from time to time died, or become incapable to act in the trusts, new Trustees had been nominated and appointed, and the said meeting-house and premises had [355] been, by proper conveyances from the surviving or continuing Trustees, conveyed to and vested in such surviving or continuing Trustees and the new Trustees jointly, upon the trusts aforesaid, and the rents and profits, &c., from time to time paid to the Trustees, or to the Minister for the time being, and by them applied to the purposes for which the same were so given. That, in the year 1776, the Plaintiff, *Mander* (with other persons since deceased), was duly nominated and appointed to be a Trustee jointly with the then surviving or continuing Trustees, and the trust premises were by proper deeds conveyed to and vested in them, jointly with the continuing or surviving Trustees, and the same were then become vested in *Mander* solely by right of survivorship. That the meeting-house was originally built by protestant dissenters, professing Trinitarianism, and for many years such principles were professed by the subscribers and congregation assembling therein, and the said several funds and endowments were by the trusts thereof declared, or by the intentions of the donors directed, to be expended (and were accordingly for many years laid out) in maintaining and promoting a belief in the doctrines of the Holy Trinity, and the Ministers from time to time officiating in the said meeting-house were Trinitarians; but, in the year 1782, a division in opinion arose between the then Trustees (about ten in number) and the subscribers, as to who should succeed to the then vacant office of minister, and The Reverend ——— *Jameson* was thereupon elected by a considerable majority of the Trustees and subscribers, and was duly invited to preside over the congregation; but the minority of the then acting Trustees and Subscribers obtained possession of the meeting-house and premises, and entirely excluded *Jameson* therefrom, and proceeded to elect and call The Reverend *Samuel Griffiths*

to the office of minister, which call was accepted by him, and he [356] officiated therein for several years, during which time he received the profits and emoluments of the office arising out of the said grants and endowments, although he never preached, nor professed to believe, the doctrines, for the maintenance of which the meeting-house was originally built and the said grants and endowments made; and ever since that time the trust premises had been appropriated to support and teach doctrines wholly opposed to those of the original founders, and contrary to the original trusts or intentions of the institution. That, since *Mander* was appointed a Trustee, there had been no regular nomination of Trustees, but various persons had from time to time intruded themselves, without being properly elected, or having the premises duly conveyed to them, and had received and misapplied the rents, &c. That the Defendants then claimed to be Trustees of the premises, and were in the possession and receipt of the annual income arising therefrom. That the Plaintiff, *Steward*, was then, and for some time past had been, Minister, and was entitled to the full emoluments of the office, arising as well from the endowments, as from subscriptions for pews, and voluntary subscriptions; and the plaintiff, *Mander*, as surviving and sole trustee, was entitled to the possession of the trust premises, and to receive the annual income arising from the said funds and endowments, pursuant to the trusts thereof.

The Bill and Information charged that, according to the custom established in the meeting-house, and to the original trusts thereof, no new Trustee could be chosen, without the consent of all the surviving or continuing Trustees. That *Mander* had never assented to the nomination of the Defendants; and that, at no time since he (*Mander*) was appointed a Trustee, the whole of the Trustees for the time being had concurred in the choice [357] of new Trustees, and therefore the Defendants were not properly authorised to become Trustees, or to take upon themselves the execution of the trusts, and there had been no legal or effectual conveyance made to them. That the intention of the donors was to promote the belief of the Holy Trinity, and that the Meeting-house was built by the voluntary subscriptions of persons having like intentions; but the Defendants had not so employed the same, and, since they had been in possession, the doctrine of the Holy Trinity had not been taught in the Meeting-house; but that they belonged to a sect of Protestant Dissenters called Unitarians, professing themselves to be opposed to Trinitarianism; and, therefore, the said meeting-house and premises, and the annual income of the said trust-funds and endowments, had not been applied pursuant to the trusts thereof.

The Plaintiff *Steward* charged, that he was Minister of the congregation, and did then conscientiously and publicly profess to believe in the Trinity, and as such was entitled to the use of the Meeting-house, for the purpose of public worship, and to the occupation of the school-room and dwelling-house thereto adjoining, and to receive and be paid the surplus revenue of the trust-funds and estates, after all out-goings were deducted. That he had been Minister for more than three years, and, during that time, the Defendants had not only allowed him a very small part only of the revenues by way of stipend, but had endeavoured to get possession of the meeting-house and school-room, and to exclude him from the occupation thereof, and for such purpose had lately affixed new locks and bolts to the doors, and locked up the iron gates leading into the court yard, and the front doors of the meeting-house, and refused to allow to the Plaintiff any part of the annual income arising from the trust premises.

[358] The Information and Bill further charged, that the Defendants threatened to proceed to elect a new Minister, and permit him to receive the revenues, but, not being Trustees duly appointed, were wholly incompetent so to act; and nevertheless they had proceeded to serve the Plaintiff *Steward* with a notice to the following effect:—"20th January 1817. We, the Trustees of the Dissenting Meeting-house, and the property thereunto belonging, in *John-street* in this town, beg to acquaint you that we have, in conjunction with the subscribers, elected the Reverend Mr. *Guy* to be the Minister of the aforesaid Meeting-house. We therefore give you notice thereof, and desire that you will, without delay, give us possession of the same. We request your immediate attention, and, should we not receive your answer in the affirmative, on or before *Thursday* next, we shall conclude it is not your intention to comply with this notice"; which notice was signed by four

of the Defendants; and they then threatened to proceed to law to obtain possession of the premises: whereas the said Plaintiff charged, that, as Minister, he could not be dismissed without his own consent, or gross immoral conduct; that he had been guilty of no such gross immorality of conduct, but had constantly performed the duties imposed upon him: and further, that, as well the Plaintiff as a majority of the then subscribers to the Meeting, were in favour of continuing in the said office.

The Plaintiff *Mander* also charged, that the Defendants had obtained possession of title-deeds, &c., relating to the premises, and refused to permit the Plaintiff to see or have possession thereof.

The prayer was for an account of the trust premises:—a declaration that the Plaintiff *Mander* was entitled to [359] retain possession of the meeting-house, & upon the trusts aforesaid, and that he might be quieted in such possession by injunction:—a declaration also that the said Plaintiff was entitled to receive the annual income of the trust premises, to be by him applied to the purposes aforesaid, and that the Defendants might be decreed to deliver up to him all title-deeds, &c., in their possession, and to account with him for all monies received by them in respect of the premises, and of the application thereof, and to pay to him what should appear to be due from them on such account, to be by him applied to the purposes aforesaid:—that the Plaintiff, *Steward*, might be quieted in his office of Minister, and in the use of the meeting-house, for the purpose of public worship, and in the occupation of the school-room, vestry, and dwelling-house, by the like injunction, until he should have been legally dismissed, and a new Minister duly elected; that new Trustees might be appointed jointly with *Mander*, and that the trust premises might be duly conveyed to *Mander* and such new Trustees, jointly:—an injunction to restrain the Defendants from intermeddling with the meeting-house and premises, and from all proceedings at law to recover possession thereof, and from interfering in the execution of the trusts thereof, and from electing or nominating any other Minister in the room of *Steward*, without *Mander's* consent.

The Defendants, by their answer, stated that, in the year 1701, a meeting-house or place of worship for Protestant Dissenters from the Established Church, or for such purposes as mentioned in the deed after stated, was (under such circumstance and in such manner as therein stated), erected in *John-street, Wolverhampton*. That, by an indenture of feoffment, dated the 18th of September 1701, between *John Russel* of the one part, [360] and *Joseph Turton* the Elder, *Thomas Sutton*, *John Scott*, and *Abraham Pearson*, of the other part, it was witnessed that, in consideration of £10, the said *Russel* granted, enfeoffed, and confirmed unto the said *Turton*, &c., their heirs and assigns, the premises whereon the said meeting-house was erected, and on which it was then standing, to hold unto the said *Turton*, &c. their heirs and assigns for ever.

That, by an indenture dated the 30th October 1701, between the said *Joseph Turton* the Elder, *Thomas Sutton*, *John Scott*, and *Abraham Pearson*, of the one part, and *John Stubbs*, Minister, together with several other persons therein named parties thereto, of the other part, after reciting as aforesaid, and further reciting that since the time of the purchasing of the above-mentioned parcel of land, at the charge of all the parties thereto, and others, there was then erected and built a large new structure thereon; it was thereby witnessed, that it was granted, agreed, and declared by and between the parties thereto, that the aforesaid grant was in trust for the purposes after mentioned, and the purchase-money remitted by the said *Joseph Russel*. And it was the true intent of all the parties to the said grant, and all others who had contributed towards the building, that there should be a house built upon the said parcel of land (which had since been done accordingly), and the same was intended for a meeting-house for the worship and service of God. That the pewes therein should, from time to time, be disposed of by the order of the Trustees for the time being, or the major part of them; and that, upon the death or removal of any one or more of the Trustees, it should be lawful for the residue, or the major part of them, within two months next following, to nominate and elect such persons to be Trustees, for the purposes therein mentioned, as should supply the vacancies of such as should so happen to die, or remove [361] their habitations out of the town of *Wolverhampton*, and the precincts thereof. That the number of the Trustees should be continued to twelve or more, and that they, or the major part of them,

should from time to time, upon any meeting to be appointed to consult upon matters in any respect relating to the said meeting-house, make such orders therein as they should think convenient; such orders to be binding on all parties concerned. That due notice should be given of all such meetings, and a book kept for such orders so to be made thereat. And then followed this clause; viz. "That if, at any time thereafter, meetings for the worship and service of God should be prohibited by law, and thereby the meeting-house should become useless, it should be lawful for the Trustees for the time being to sell and dispose of the same, the money raised therefrom to be disposed of to such charitable uses as the Trustees, or the major part of them, should appoint; or otherwise to convert the said meeting-house into dwellings for the use of the aged, infirm, and impotent people, who live in the fear, and attend upon the worship of God, to dwell in, as the said Trustees, or the major part of them, should nominate or appoint." And it was thereby further provided, "that if any of the Trustees for the time being should misbehave themselves in the management of the trust, or should do any thing scandalous or offensive to the residue of the Trustees, or any of them, it should be lawful for the residue of the Trustees to call a meeting in manner aforesaid, and, upon hearing such misbehaviour, &c., they the said Trustees, or the major part of them, should have power to remove any such persons from the trust, and to elect other fit persons in their places."

That by indentures of lease and release (17th and 18th of December 1742) between William Pearson, of [362] the one part, and Joseph Turton and others therein named as parties thereto, of the other part, after reciting the deed of 1701, and that Abraham Pearson had survived Joseph Turton the Elder, Thomas Sutton, and John Scott, and died leaving the said William Pearson (party thereto of the first part), his son and heir, whereby the title in law to the premises vested in him the said William Pearson, and that the several parties thereto of the second part had been duly chosen Trustees of the said meeting-house, the said William Pearson, in fulfilment of the above trusts, did grant, &c., unto the said Joseph Turton and others (parties thereto of the second part), their heirs, &c., all the said premises, upon the trusts aforesaid.

That, by indenture of feoffment, dated the 18th of April 1772, made and executed by and between John Mansell and others, of the first part, the said Joseph Turton and others (among whom was the Plaintiff Mander), of the second part, and John Cole, Dissenting Minister, of the third part, reciting that all the Trustees appointed by the last-mentioned indenture were since dead; except the said parties thereto of the first part, and that the said parties thereto of the second part had been chosen Trustees for the purposes aforesaid, it was witnessed, that the said parties of the first part did grant, &c., unto the said parties of the second part, their heirs, &c., all the said premises, in trust for the purposes, &c., mentioned in the said deed of 1701. This indenture contained a power of attorney to deliver seisin, with a memorandum of livery of seisin indorsed.

The answer further stated, that, by indentures of lease and release (1st and 2d of February 1720) between John Scott, of the one part, and Joseph Turton, and others therein named as parties thereto, of the other [363] part, it was witnessed, that, for the considerations therein mentioned, the said John Scott did grant, &c., unto the said Joseph Turton, &c., their heirs, &c., an acre of land therein described, in trust to permit the rents, issues, and profits to be received by Abraham Pearson (long since deceased), during his life, and after his decease by the Minister for the time being, who should be the stated and settled Minister of the congregation or society of Dissenting Protestants belonging to the said Meeting-house, towards the support and maintenance of such Minister, for ever. But in case the statute then in force, entitled, "An Act for exempting their Majesties' Protestant Subjects dissenting from the Church of England from the Penalties of certain Laws" (the Toleration Act, 1 W. & M. c. 18), should at any time thereafter happen to be repealed, and the said congregation should by law be prohibited to assemble for the worship and service of God, that then and in such case, the Trustees should from time to time, during such prohibition, pay the whole of the rents, issues, and profits to the person that was Minister of the congregation at the time of such repeal or prohibition, for and during his life, for his sole use and benefit, and, after his death, to and for the use and benefit of such silenced Protestant Dissenting Minister, or Ministers, as the Trustees for the time being, or the major part, should nominate and appoint; provided that, when and as often as any of the Trustees should die, or desert or forsake the said congregation, and should change

or become of any other religion or persuasion whatsoever, contrary to and different from the said congregation; or in case any of the said Trustees should, at any time thereafter, remove eight miles distant from the town of *Wolverhampton*, to inhabit or dwell, that then and in every such case the [364] surviving or other Trustees, or the major part, should, within ——— days next after such decease, desertion, or removal, by any note or memorandum in writing, to be subscribed by the said Trustees, or the major part of them, elect and nominate one of the most sufficient substantial persons of the congregation to be Trustee, in the place of him or them so dying, deserting, or removing; and, in case the said Trustees, or the major part, should refuse or neglect, within such time, so to elect and nominate, &c., then it should be lawful to and for the Minister of the said congregation for the time being (if any such there be), or else for such silenced Dissenting Protestant Minister, or Ministers as aforesaid, for the time being, to whom the rents and profits of the premises thereby granted should of right appertain, by any note, &c., under his or their hand, to elect and nominate such Trustee or Trustees, upon the same trusts as aforesaid, and so from time to time, &c., whereby the said trust might have a perpetual continuance, and might not come to or vest in the heirs of any surviving Trustee, or in any person or persons whatsoever not of the said congregation.

That by indenture of feoffment (6th of August 1772), made and executed by and between *Richard Fowler*, of the first part, the said *John Marshall* and others (among whom were the Plaintiff *Mander* and one *Isaac Headley*), of the second part, and the said *John Cole* of the third part, after reciting the indentures of 1720, and that *Richard Fowler* (one of the parties thereto of the second part) had survived all his Co-Trustees, and was since dead, leaving the said *Richard Fowler* (party to the now stating indenture), his son and heir, whereby the title in law to the said premises vested in him, and that the said *John Marshall*, and the several other persons (parties thereto of the second part), had been duly chosen Trus-[365]-tees; and the said *John Cole*, as Minister of the said meeting-house, had requested the said *Richard Fowler* (party thereto), to convey, &c., it was witnessed, that, in pursuance, &c., the said *Richard Fowler* did grant, &c., unto the said *John Marshall*, &c., their heirs, &c., all the said premises, &c., upon the trusts aforesaid. This Indenture also contained a power of attorney to deliver seisin, with a memorandum of livery of seisin indorsed.

The answer further stated, that, in or about the year 1782, a sum of £200 was given by the will of the said *John Marshall* to and for the use of the Society of Protestant Dissenters attending the said meeting-house, and another sum of £200 was also given by the will of *Abraham Hill*, to and for the use of the said Society. That the two last-mentioned sums (with £99, 15s. which had from time to time been accumulated) were invested by the trustees of the meeting-house in the purchase of £800 3 per cent. reduced annuities, which was sold out in the year 1807, under the authority and direction of the major part of the said trustees, and produced the sum of £502, £240 (part whereof) was applied in the purchase of certain leasehold houses, and the residue, amounting (after certain deductions) to £260, lent out at interest to a brother of the Plaintiff *Mander*, upon the security of his promissory note. That the sum of £100 was, in 1800, given by the will of the said *Benjamin Corson*, upon trust to be put out at interest, or invested, and the produce from time to time to be paid to the minister, for the time being, who should officiate at the said meeting-house; and that in March 1793, the trustees therein named, together with the then trustees of the meeting-house, purchased therewith, and with £63, raised by voluntary subscription, a leasehold [366] stable, which then stood in front of the meeting-house, and had since been removed.

The Defendants admitted that there was adjoining to the meeting-house a building used as a school-room and a vestry for transacting the affairs of the congregation, but said that the same was built in the year 1794, and the expense discharged by voluntary subscription of the Defendants and other members of the congregation, neither of the Plaintiffs (to the best of their knowledge) having contributed thereto.

They also admitted that there was a dwelling-house adjoining the meeting-house, which had sometimes (but not uniformly for many years past) been used as the residence of the minister, but said that the same had at other times been let to other persons in such manner as the trustees for the time being, or the majority, had thought proper.

They admitted that, as the trustees of the meeting-house and premises had from time to time died, or become incapable to act, or declined, or disqualified

themselves from acting, new trustees had been appointed, and the premises conveyed to and vested in them jointly with the surviving or continuing trustees. That, since they (the Defendants) had been trustees of the premises, and (they believed) prior to that period, the rents and profits had been from time to time paid to the trustees, or to the minister, for the time being, and by them applied to the purposes for which the same were so given. They admitted that all the trustees named in the deeds of the 18th of April, and 6th of August 1772, respectively, were since dead, with the exception of the Plaintiff *Mander*; and said they were advised that the legal estate in one fifth of the premises comprised in the first, [367] and in two sixths of the premises comprised in the second, of the said deeds, had become vested in the said Plaintiff solely by right of survivorship. They could not set forth, of their belief or otherwise, whether the meeting-house was originally built by Protestant Dissenters professing Trinitarianism, nor whether for many years, and down to what time, such principles were professed by the congregation assembling there; save that, in the year 1780, some of the congregation (as they believed) professed to be Trinitarians, and others professed different sentiments. They denied (to the best of their belief) that the trust funds and endowments were by the trusts thereof declared, or by the intentions of the donors, or by any other means, directed to be, or that the same were for many years or down to any time expended in maintaining and promoting a belief in the doctrine of the Holy Trinity; and on the contrary, they insisted that the meeting-house and premises were by the said deeds appropriated for the purpose of promoting the worship and service of Almighty God, and for the use of Protestant Dissenters, without any mention of Trinitarianism, or any other doctrine whatever, to be preached in such meeting-house; and said that such funds and endowments had been (as they believed) so applied accordingly. They knew not whether the ministers, from time to time, were Trinitarians or how otherwise; but they stated that, in the year 1782, a division in opinion arose among the then trustees (ten in number), and the subscribers, as to who should succeed to the office of minister, then vacant. That Mr. *Jameson* was not upon that occasion elected by a majority, but, on the contrary (as appeared by a memorandum-book in their possession, containing a full and particular account of all matters relating to that occasion), that much dissension took place among the then trustees as to the invitation of *Jameson*, which was objected to by six out of the [368] ten, and actually given by a minority of four, the six who objected refusing to sign the invitation, and also subsequently refusing to allow *Jameson* to officiate as minister. That the majority (and not the minority) of the said then acting trustees and subscribers obtained possession of the meeting-house and premises, and excluded *Jameson* therefrom, by reason of his not being duly invited or elected. That the majority in like manner proceeded to elect Reverend *Samuel Griffiths*, who accepted their call, and officiated as minister, from his appointment in 1782, to his death in 1804, and, during such time, received the profits and emoluments of the office arising out of the said grants and endowments. They denied (to the best of their belief) that *Griffiths* never professed to believe, or never preached, the doctrines, for the maintenance of which the meeting-house was originally built and the said grants and endowments made, and said that (on the contrary) he did (as they believed) preach the word of God, which were the doctrines, for the promotion whereof the said meeting-house was erected. They said that, prior to January 1793, all the trustees appointed by the deed (18 April 1772) had died, except *Benjamin Corson*, *Peter Pearson*, *Abraham Harper*, *John Hickcox*, and the Plaintiff *Mander*, and all the trustees appointed by the deed of 6th August 1772, had died except the said *Benjamin Corson*, *Peter Pearson*, *Abraham Harper*, and *John Hickcox*, together with *Isaac Headley*, and the said Plaintiff. That, from the year 1783, the Plaintiff *Mander* declined and ceased to act as trustee under either of the deeds, and changed his place of worship, and ceased to be a subscriber to the meeting-house, or to frequent the same, and he was therefore to be considered (as Defendants were advised) to be no longer a trustee under such last-mentioned deeds, or either of them. That the said *Isaac* [369] *Headley* never acted as a trustee under the deed of 6th of August 1772, and died without having ever so acted.

That about the latter end of 1792, a meeting took place (pursuant to the powers contained in both deeds of 1701 and 1720) for the election of new Trustees in the place of such as were then dead or had declined or ceased to act under the trusts

of the said deeds respectively ; and it was, upon such occasion, agreed by the surviving Trustees then present or the major part, that the several persons therein mentioned (among whom were the Defendants, *Baker, Pearson, and Joseph and Thomas Stanley*), should be elected and appointed to act as Trustees under both deeds, together with *Corson, Peter Pearson, Harper, and Hickcox*, in the place or stead of the Plaintiff *Mander*, and *Headley*, by reason of their having so ceased or declined to act as aforesaid ; and, in pursuance of such arrangement, a deed (9th January 1793) was duly made by and between the said *Corson, Peter Pearson, Harper, Hickcox*, and the Plaintiff *Mander* (as such surviving Trustees of the premises contained in the deed of 1701), of the first part, the said several persons, together with *Headley* (as such surviving Trustees of the premises contained in the deed of 1720), of the second part, and the four Defendants, together with the other persons so elected as aforesaid, of the third part, whereby, after reciting that for the purpose of preserving and continuing the charitable uses therein mentioned, the said surviving Trustees had proceeded to the choice of new Trustees as aforesaid, it was witnessed that they the said parties thereto of the first and second parts respectively did grant, &c., unto the said parties thereto of the third part, their heirs, &c., all the said respective premises upon the trusts of the said indentures of 1701 and 1720 respectively. This deed also contained a power of attorney from the parties thereto [370] of the first part, to *Griffiths*, "to give quiet and peaceable possession" and seisin of the premises in the name of the whole unto the several parties thereto "of the third part, or any two or more of them to the use of all, to be had and held according to the tenor thereof." But no livery of seisin was indorsed thereon. The last stated deed was duly executed, by the parties of the first and second parts respectively, except *Mander*, who refused to execute the same when tendered, and had never since executed, and *Headley*, who also never executed, and was since dead. Two of the Defendants (*Whitehouse* and *Benjamin Stanley*), said that, although they considered themselves as having been duly nominated Trustees under the said deed, yet they had long since declined, and did then decline, to act in the trusts thereof.

The answer went on to state, that about the end of *March* 1813, the office of Minister was vacant, and the four other Defendants (as the sole acting Trustees), with the privity and consent of the congregation then attending the meeting-house, invited the Plaintiff, *Steward*, to officiate as Minister, and, after he had so done for a short time, and had declared himself of religious opinions approved by the congregation, and preached and enforced doctrines in unison with their sentiments, he was invited, at the desire of the congregation, to become the minister and preacher of such meeting-house for the limited period of three years from the 23d of *May* 1813, and, having accepted such invitation, thereupon entered into possession, as from the said 23d of *May* 1813, of the dwelling-house. That, after the expiration of the three years, he continued, without any renewal of his appointment, to take upon himself to officiate as such Minister ; and that the said four Defendants, and the other members of the congregation, having become dissatisfied with [371] his conduct, and having discovered (as the fact was) that he had changed his religious tenets, it was determined by them that he should no longer so officiate ; whereupon, on the 1st of *September* 1816, a meeting took place of the Trustees and other members of the congregation, when the following resolutions were proposed and adopted by all present (except two or three who immediately afterwards acceded thereto), viz. "That we do not consider or acknowledge the Reverend *John Steward* as Minister of the congregation since the 23d of *May* last. That his continuing to officiate since that time is against the wishes of the Trustees and Subscribers, and a violation of the terms on which he was invited. That we have reason to suppose a change has taken place in his sentiments, which, together with his time having expired on the 23d of *May* last, it is not the wish or inclination of the Trustees to renew the connexion. That he be immediately informed of this determination, and that he be requested to leave the chapel, dwelling-house, and premises, without delay. But in order that he may not complain of any illegality or unfairness, it is resolved, that he be requested to supply the congregation for a term not exceeding three months, and that he be remunerated for his services during that time." That such resolutions were afterwards communicated to *Steward*, accompanied with an intimation from the Trustees that the same had



been passed in the expectation that he would not, during his stay, preach any doctrines objectionable to the congregation, but he nevertheless did preach doctrines objectionable to the congregation, and refused, at the expiration of the time therein mentioned, to give up the occupation of the dwelling-house, or to desist from acting as Minister, and continued, in defiance of the remonstrances and exertions of the Trustees, to live in the said dwelling-house, and to officiate as such Minister, [372] and that he still continued so to do. They admitted that, since the expiration of the three months, he had not received, and insisted that, from that time, he was not entitled to receive, the emoluments of the office. They denied that *Mander*, as sole surviving Trustee, was entitled to the possession of the premises, and the receipt of the annual income thereof. They denied that, according to the custom established, and to the original trust, no new Trustees could be chosen without the consent of all the continuing Trustees, it being expressly declared by the deeds that the act of the major part should be binding; and they insisted that *Mander* must be considered (more especially by reason of his having permitted the Defendants to remain in the undisturbed possession for twenty-three years, and more, from *January 1793*, to *September 1816*), to have assented to their nomination as Trustees; and they therefore also insisted on the deed of *9th January 1793*, as a legal conveyance.

They did not know that the intention of the donors was to promote the belief of the Holy Trinity, no such intention being expressed in the trust-deeds. They admitted that while they (the Defendants) were in possession of the meeting-house the doctrine of the Holy Trinity had not been taught there, except by the Plaintiff *Steward*, who, after having for three years preached and inculcated the Unitarian doctrine, in or about the beginning of *October* then last (for the first time, as the Defendants had been informed) began to preach and inculcate the doctrine of Trinitarianism. They said that they (the Defendants) were not, each of them, of exactly the same religious opinions; but, although of different persuasions, they all believed in the existence of God, and the propriety of worshipping and serving God, and insisted that the question as to their [373] religious belief was irrelevant to the matter in dispute in the cause, and that the intention of the persons endowing the chapel was, that it should be a meeting-house for the worship and service of God, and for the benefit of Protestant Dissenters, without regard to any particular tenets.

The answer went on to state, That *Steward* was originally invited by a letter from the said four Defendants and the Subscribers, to the following effect:—"To the Reverend Mr. *Steward*. We, the under-signed Trustees and Subscribers of the Dissenting meeting-house in *St. John's Street, Wolverhampton*, do hereby invite you to become our Minister for the period of three years from the time you commence your duties among us. *Wolverhampton, 5th April 1813.*" That, after receiving the same, *Steward* informed them that he was much pleased that the invitation was for only three years, and, shortly afterwards, wrote and sent to them an acceptance of such invitation, addressed "To the Trustees and Subscribers" of the said meeting-house, wherein he expressed himself (among other things) to the effect following:—"Christian Friends, I accept the invitation which you have given me, with cordiality. *John Steward.*"—The four Defendants admitted, that, about the 20th of *October* then last, they endeavoured to get possession of the meeting-house and school-room, and (in consequence of his not acceding to the condition annexed to his prolonged invitation, but having, in violation thereof, preached religious doctrines objectionable to the whole congregation), to exclude *Steward* from the occupation thereof, and insisted that they were justified in so doing. They, in like manner, admitted their having affixed new locks and bolts to the gates, as mentioned in the information, but said, that, on the 20th of the same [374] month, *Mander* (together with other persons hired for the purpose) did, in the presence of *Steward*, break open the meeting-house, and take possession thereof, and had, ever since, unlawfully retained possession thereof; that he instigated *Steward* to continue to preach there, and informed him that he would protect him in so doing; that, therefore, *Steward* continued still to preach, though he had no authority, and, in consequence thereof, all the persons who had theretofore frequented the meeting-house, and subscribed to its support, had withdrawn therefrom, and ceased to attend the same.

The answer further stated, that, on the 20th of *January* then last, *Joseph Guy*,

a Dissenting Minister, was duly elected, nominated and appointed by the said four Defendants (as such acting Trustees), with the unanimous consent of the congregation theretofore attending the meeting-house, and of the subscribers to the support thereof, in the manner prescribed by the said deeds, and especially the deed of 1701, to be the Minister and Preacher of the said meeting-house, and insisted that he thereupon became entitled to officiate in the said meeting-house, and to have possession of the dwelling-house belonging thereto, as well as the rents, issues, and profits of the trust premises; submitting that, under these circumstances, the said *Joseph Guy* was a necessary party to the suit.

The Defendants therefore insisted, that they ought not to be restrained from proceeding at law to obtain possession of the premises. They also insisted that *Mander* ought to be declared by the Court to have abandoned his trust, and to have given up the same, and to be compelled forthwith to make and execute proper conveyances of the premises to the four Defendants, and such new Trustees as they might appoint; that he was [375] not entitled to have the title-deeds, the possession of which they (the Defendants) admitted; and, generally, that the Plaintiffs were not entitled to any part of the relief prayed.

The Plaintiffs now moved for an Injunction to restrain the Defendants from further proceeding at law in the ejectment brought by them, with another, against the said *Benjamin Mander* and *John Steward*, for the recovery of the meeting-house and premises in the pleadings mentioned, and from all other proceedings at law to recover possession thereof, until the hearing.

Sir *Samuel Romilly*, *Hart*, *Shadwell*, and *Ching*, in support of the motion. That institutions of this nature are properly charities, calling as such for the interference and protection of this Court, in cases of abuse, has been long completely established, and lately recognised in *The Attorney-General v. Fowler*. (1) The Minister of such an institution, where there is an endowment, is entitled to his mandamus to be admitted, or restored, to the office; as in *The King v. Barker* (3 Burr. 1265); *The King v. Jotham* (3 T. R. 575). The question now before the Court is one which, in this view of the nature of the institution, there can be no doubt of the Court having authority to decide, *viz.* Whether the Trustees can be suffered to divert the charity from that which was its original and only proper object, by devoting it to another, which could not, by any possibility, have been within the intent of the founder.

[376] It must be admitted, that nothing appears, as to this object, upon the face of the trust-deed: but the very silence of that instrument is enough to establish the [377] proposition contended for, because the doctrine now preached, and attempted to be supported in that place of worship, was, at the time of its foundation, illegal; being expressly excepted out of the provisions of the Toleration Act (1 W. & M. c. 18), then recently passed; an act framed for the indulgence of Dissenters in all forms and modes of worship then in use among them; the enactments of which the great body of Dissenters themselves had a principal part in drawing up; and yet, so far were they from considering the doctrine of Unitarianism as among the objects of the protection then sought by them, that the 16th section (which received their general assent and sanction) provides, "That any person, in his preaching or writing, denying the doctrine of the Blessed Trinity, shall be excluded from every benefit and advantage thereof." At the time of the foundation of this charity, therefore, Unitarian worship was neither legal nor tolerated; (2) and it was consequently impossible that any public place of worship could exist in the eye of the law, which was expressly framed for preaching that doctrine. Can it then be contended that the Trustees of this institution have the right of capriciously displacing a Minister who happens to preach the contrary doctrine, which alone the law recognizes and allows to be promulgated? and when, also, it appears to have been by no means the intent of the founder that the Trustees should have such a power, or that the Minister should in any case be liable to removal, except for neglect of the duties of his situation, or immorality of conduct? But even if it were possible so to contend, had the purposes of the institution in other respects been adhered to, it could not be said that the present Trustees retain the right which is so imputed to them, since the number, which ought to have been kept up to twelve, has been suffered to fall to five only, and no authority whatever is vested but in a majority of the whole constituted list. Besides which—to say nothing of its being contrary to every principle of public policy, as recognised by the practice of the Court, to permit a

person sustaining the character of a spiritual pastor, or teacher, to be so dependent on the will of those whom he ought to direct, as he must be, if holding less than an estate for life in the office he fills—in this case, the three years which are represented by the Defendants as the term of probation for which Mr. *Steward* was invited to preside over the congregation, having expired some months before any complaint made, or any measures resorted to for his expulsion, the Trustees must be taken to have acquiesced in his continuance, and, upon their own shewing, to have no longer retained any power of removing him, except upon one of the general grounds already adverted to, neither of which appears here to have existed.

[379] The proposition was then more strongly stated and maintained by *Shadwell*, that the publicly impugning the doctrine of the Trinity is an offence indictable at Common Law; therefore, not to be taken as within the contemplation of the founder of this institution, or, if considered as part of its system, that the system itself was not entitled to the recognition, much less to the protection, of a Court of Justice.

By *Hale*, C. J., in the case of *The King v. Taylor* (1 Vent. 293), it is said, that "Christianity is parcel of the laws of England; and, therefore, to reproach the Christian religion is to speak in subversion of the law." And, to the same purpose, Lord *Raymond* in *Woolston's Case* (*The King v. Woolston*, 2 Stra. 834; Fitzgibb. 64), referring to this doctrine of *Hale*, says that "Christianity, in general, is parcel of the Common Law of England, and, therefore to be protected by it." (3)

[380] The question then arises, What is Christianity in the eye of the Common Law—that is, in the sense of that [381] which is here considered as entitled to the protection of the Law, making it criminal to speak or write against [382] it? And, to answer that question, we must trace the history of our religion back to the period antecedent to the Reformation, when the religion acknowledged by law was the religion of the Church of *Rome* as established by successive councils, all of which had uniformly recognised the doctrine of the Trinity as its most essential ingredient. (4) The Reformation itself effected [384] many important changes both in the forms and doctrines of Christianity, but left that doctrine untouched, which still constitutes the main article of belief in our established religion, as much as it was in the days of Popery. Then how has the question been affected by subsequent acts of the Legislature? The first which has any bearing upon it is that taking away the writ "*De Hæretico Comburendo*" (29 Car. II. c. 9), but which, by abrogating certain proceedings in the Ecclesiastical Court in matters of heresy, only leaves the Common Law more absolute and unrestrained in the exercise of its functions. Then follows the Toleration Act (1 W. & M. c. 18), which, as already observed, leaves the law as to this description of Dissenters precisely where it found it; and then the statute (9 & 10 W. III. c. 32), "For the more effectual suppressing Blasphemy and Profaneness," the strong expressions of which, both in the preamble and in the passage immediately introductory to the enactment, sufficiently inform us, both as to the public denial of the doctrine of the Trinity being an offence in the eye of the law, and as to the degree of criminality which the [385] law attaches to it. (5) The late act (53 Geo. III. c. 150), only repeals the penal clauses of the statute last mentioned, and repeals also so much of the Toleration Act as provides "that the same shall not be construed or extend to give any ease, benefit or advantage to persons denying the Trinity"; that is, it virtually extends to that class of persons the benefit of the repeal of certain penal statutes in that act expressly mentioned, which applied to dissenters in general. But this also leaves the Common Law offence as it was, and can neither be construed directly, nor by implication, as having any reference to it or giving any relief against its consequences.

In further support of this opinion the Court should be informed that, at this moment, prosecutions are actually pending against individuals for impugning the doctrine of the Trinity, as an offence at Common Law. (6)

[387] Upon the whole, it is therefore evident that the founders of this institution, in expressing it to be intended "for the worship of Almighty God," must be taken to have comprehended the doctrine of the Trinity in the worship designed by them. And, if any further argument in support of this proposition were requisite, it might be found in the ulterior provisions of the deed in question, which devotes the charity-funds to other purposes, in case that for which they were first intended should ever cease to be tolerated—an expression which cannot be understood as applying to

the preaching of doctrines which the founders must have known, at the time of using it, to be at that very moment out of the pale of toleration.

The *Solicitor General* [Sir Robert Gifford], *Benyon*, and *Phillimore*, for the Defendants. Much of the discussion which this case has produced is irrelevant to the question at issue, and not arising out of or in any way connected with the pleadings. The real points of the case lie in an extremely narrow compass, and are these—whether a majority of the Trustees shall not be held to have the management of the trust, so long as they act in conformity with, or not in direct violation of, the express intent of the founder—and whether a Trustee, who has not acted for thirty years, shall, in contradiction to the express directions of the founder, be considered as having any longer an interest in the administration of the charity.

What then is the object of the original trust? It is expressed, in words as general and comprehensive as can be imagined, to be “for the worship and service of Almighty God,” not containing a single iota as to the form of worship or the doctrines to be inculcated. Then, [388] if no particular form of worship or mode of faith is prescribed, how can it become a part of the province of this Court to impose either? The question as to the change of opinions in the Minister, whom the majority of the Trustees had elected, does not arise. They had elected him for three years, and had a right so to elect him. At the Expiration of the term for which they elected, they are desirous to remove him; and what restriction is there on his removal? It does not even appear that his removal is for the cause alleged, *viz.* his change of doctrine. The Defendants themselves state that they are by no means unanimous in their opinions on points of doctrine—holding only one tenet in common; *viz.* that of absolute freedom in matters of opinion. All they now insist upon is the liberty of choice; and nothing that has been said at all tends to limit their powers in this respect, as derived from the same instrument to which all the rights of the Minister are in like manner to be exclusively referred. Suppose it granted, that the doctrine of Unitarianism, being a doctrine not tolerated by Law at the time of the foundation of this charity, cannot be taken to have been in the contemplation of the founder; it is incumbent on the other party to shew clearly to the Court that the removal of Mr. *Steward* by the Defendants is occasioned by their intention to have these doctrines exclusively preached—an inference which cannot strictly be drawn from any thing that appears on the pleadings. And again, on the other hand, suppose this inference to be established, the point which remains, *viz.* as to the legality of the doctrine in question, is one upon which this Court has no jurisdiction to decide, which cannot be discussed before it, but must be removed to another tribunal.

If, then, as Mr. *Mander* alleges, the trust has been misapplied, how is it consistent with his character as [389] Trustee to have remained silent for the last thirty years during which this misapplication has been subsisting, and what right can he have to expect that his complaint on the subject shall now be regarded? Since the year 1782 he had seceded from the congregation upon the avowed principle of his dislike to the doctrines generally inculcated there; and now, in 1817, he comes forward to complain of those doctrines being preached. Admitting that he has not by this desertion altogether renounced his character of Trustee, his conduct in the business has at least been such as to make the Court extremely cautious in listening to his representations.

The short ground of defence to this application is, that the party making it has not shewn on the face of the pleadings that the doctrines preached at this chapel are contrary to Law, and all that has been said to this effect in argument resolves itself into the principle laid down in two cases which have been cited, *viz.* that the law does not allow of the preaching of doctrines contrary to Christianity—these doctrines not having been shewn to be contrary to Christianity—and the question, whether they are so or not, being one into which it is impossible for this Court to enter.

If Christianity be part of the common law, and if that which the law understands by Christianity be the religion of the country at the time of the Reformation, so far as the doctrines of that religion remained untouched by the Reformation; then is, not only the doctrine of the Trinity, but every doctrine of the Church of England, an essential part of Christianity so considered; and the impugning of any one—the least important of those doctrines—is as much an offence indictable at common

law as the denial of the Trinity. According to the argument we have just heard, therefore, this is the situa-[390]-tion in which not only Unitarian dissenters, but all dissenters from the Church of England in any, the minutest, of its doctrinal points, at this day stand—liable to this undefined species of prosecution and punishment ; and thus the Toleration Act is a nullity—the late Act of his Majesty a mockery and an insult—and the present age, with all its boasted advances in liberality and illumination, is no better in these respects than the worst of those that have preceded it. On the contrary, however, the principle which has been relied upon in support of this monstrous and dangerous doctrine, when properly understood, is no more than this—that the law will restrain and punish all open and public attacks upon religion—upon the authority of the Scriptures, and the divine mission of the Founder of Christianity—because the belief in religion, so construed, constitutes the only binding obligation among men, and its denial tends to the subversion of all law and order in society. This is the principle, even, which is laid down in express words by the very cases that have been appealed to in behalf of a notion entirely different and altogether unwarranted—cases, which, if they are but read instead of being cited generally, will be found most carefully to guard against the further extension of the principle.

But the case does not really turn upon this question ; nor is the point in any manner raised by it. It is enough to shew that it was competent to the trustees to choose the minister either for life, or for any limited period—that they did in fact exercise this power by inviting Mr. *Steward* to undertake the office for the term of three years—that he accepted their invitation—and that, the term being expired, the trustees are now desirous of resuming the exercise of their power by appointing another minister to supply his place. And it is for the [391] other side to shew (which they have not attempted to do), that *Mander* and *Steward* have jointly a paramount right of preventing the general wish of the entire congregation.

It was also objected, that, according to the practice of the Court, the injunction moved for, *viz.* to stay all proceedings in the action, was too general, and Plaintiff in equity, after declaration, being entitled to the injunction to stay execution only, and not trial—at least, in the first instance.

Sir *S. Romilly* in reply. The question is, What is proper to be done by the Court ?—it being quite clear that something must be done to put an end to the discord at present prevailing in this congregation. Whether the Defendants are to be allowed to recover four undivided fifths of the trusts property—it being certain that they are entitled to no more, even upon the case made by themselves—and thus to perpetuate the existing confusion ?—Or whether the Court will not see fit to grant the injunction in order to prevent so hopeless a train of consequences—and whether the injunction, if granted, must not, for the same reason, extend not only to stay execution, but trial also ? It cannot be seriously contended that *Mander*, by discontinuing to act in the trusts, when he thought the objects of the charity mistaken or disregarded by his co-trustees, has virtually abandoned them. Being at variance on these important points with the majority, he could not, consistently with his duty as a trustee, or with the obligations of conscience, have otherwise acted. The question on which he differed from the rest now comes directly before the Court for its decision ; and still less can it be pretended that the Court has nothing to do with the point of doctrine, that being in fact the [392] true and only question it is called on to determine, and which is strictly within its ordinary jurisdiction, *viz.* what is the nature of the trust, and what was the intent of the foundation ? Indeed, the question as to *Mander's* own conduct, in so long discontinuing to act in the trust, is immediately and necessarily dependent upon it ; since the very words of the deed, “ where and so often as any of the trustees should happen to die, “ or desert or forsake the congregation, and change or become of any other religion “ or persuasion contrary to and different from the said congregation,” must lead the Court to enquire and determine what was the religion or persuasion, the profession of which was essential to the congregation, the desertion or abandonment of which is thus contemplated. For, if the congregation has changed or become of a different religion or persuasion from that which is here contemplated, it has ceased to be the congregation which the trustee is supposed to desert or forsake—and the very expressions are such as it is impossible to apply to the conduct of a person who remains fixed in his persuasion, being the same which the congregation

originally professed, and has since abandoned. Besides, if the Court is to see that the trust is carried into effect, how can it do so without first seeing what the trust is which it is to have carried into effect? And how can the Defendants avoid this necessary consequence? The majority of the trustees have no power under the trust deed to alter or divert the purposes of the institution, however they may be entitled, as such majority, to regulate the charity agreeably to such purposes. Then the question directly arises, whether those purposes have not in fact been altered, and the institution diverted from the intent of its founder. In 1701, land was settled, and a meeting-house built for the service and worship of God, and there can be no question, in a court of justice, that by that expression is meant [393] the worship and service of God according to the Trinitarian doctrine, because the opposite doctrine with respect to the nature and character of the Supreme Being had at that time no legal existence, being expressly excepted out of the provisions of the Toleration Act. A change of opinion has since taken place in the majority of those who are entitled, as trustees, to the management of the trust—but does this change of opinion at all alter the nature of the trust itself?—and are they themselves not guilty of that very desertion and abandonment of the trust which they impute to their co-trustee, when they would divert the institution to purposes which are already shewn to be altogether foreign from, and directly hostile to, the purposes of the foundation? And is not this still more manifestly the case when the purposes to which they would so divert this institution are, as they have been shewn to be, illegal, and such as this Court could not decree to be carried into effect, even in the case of an institution expressly founded for such purposes?—For, the Court could no more carry into effect a trust for promoting Unitarianism, than it could carry into effect a trust for the preaching of Judaism; and this it has been expressly decided that the Court will not do, in the case of *Da Costa v. Depaz*. (7) Nor is the one purpose at all more contrary to law, and incapable on that ground of being [394] supported in a court of justice, than the other; and this has been too clearly established in the course of the preceding argument to render it at all necessary for me to enter again upon the discussion. At the same time it is a very different thing to say that, at this time of day, a prosecution could be maintained, even if it were not too illiberal to be attempted or thought of, against any persons or description of persons, for holding these or any other religious opinions in particular. But there are many acts for the establishment or protection of which a Court will refuse its interference, even on the ground of illegality, and yet which are incapable of sustaining a criminal prosecution; and this, which has been called a common law offence, and may in some sort be so considered, of publicly denying the doctrine of the Trinity, may well enough be ranked in the number of such acts as above referred to. (8)

[395] Another point which was made at the opening of this cause, but has been barely noticed by the other side, is nevertheless of no light moment, viz. whether these trustees were competent to appoint a minister only for a limited term—as for three years—and not for life. This, as a general proposition, may fairly be contended to be inconsistent with the intent of institutions of this description, and at variance with the principles of good policy. In the case of schools, wherever the trustees have endeavoured to keep the master dependent upon them by a limited appointment, although it may be perhaps in many such cases greatly desirable that they should possess such a controul, the Court has uniformly resisted the introduction of any such limitation. But in the case of a spiritual teacher, who ought to be the director and guide, in matters of religion, of the congregation committed to his charge, so long as he acts conformably with the designs of the foundation, it would be still more obviously contrary to reason and policy that he should be placed in a condition of subserviency to the arbitrary dictates of any individuals whatsoever. Accordingly, the policy of our church establishment has always been to make the minister independent of the caprice of his hearers, and to give him a freehold interest in his sacred office. And I am not aware of any single instance in which a court of justice has ever acted upon or admitted the contrary principle.

The *Lord Chancellor* [Eldon]. There are so many considerations in this case, of great importance, not only to the individuals concerned in the controversy, but to the public at large, that I should not execute my duty in stating any opinion I may at this moment entertain, as final and conclusive, until after I shall have had an opportunity of reading the Bill and Answer.

[396] The questions that have arisen are many and various. If it were a case that presented nothing more than the title of the parties—a Protestant Dissenting Congregation—to have certain trusts established, and seeking to have them administered by this Court, there would be no difficulty attending it; and, in considering what is to be done, I do not think that we should have occasion to disturb ourselves with any question on the practice of the Court as to this being the case of a common or special injunction, and so forth; because, taking it to be a trust, in the nature of charity, for religious purposes, I conceive that the Court is in the constant habit, in such cases, of saying, that, provided it sees any way of deciding the points at issue, it will not allow the parties to go to trial, but will itself find the means of putting the matter into a course which may save all the expense of such a proceeding. And, if it should turn out to be clear, upon the Bill and Answer, that a certain portion of the legal trust estate is vested in the Plaintiff, and a certain other portion in the Defendants, I take it to be quite within the compass of the Court's jurisdiction to say, I will put the parties exactly in the same condition, as to the point at issue, as if there had been a trial, judgment and execution at law. If, however, this be any thing more than a mere suit for the administration of a trust, where it is clear who are the parties having the legal estate, and what are the trusts which are sought to be administered, I must precisely understand the nature and extent of the questions, before I attempt the decision of them.

It is represented that this is an institution for the benefit of a Protestant Dissenting Congregation, consisting in the application of certain trust property to the maintenance of a preacher to that congregation. It [397] may be stated that this Court is unquestionably bound to administer such a trust, and to administer it (as it should every other trust), with all the expedition possible. But it must on the other hand be admitted, that these are not cases in which justice can always be administered with the promptitude which the parties desire; and, if the present be not the case of a simple trust, at its first creation, or if it be the case of a trust which has been rendered complex by the parties—by the acts of the trustees having the legal estate—by requiring the accession or consent of subscribers, or of the whole congregation, to their acts,—in short, if any of those various questions arise in it, which are of such frequent occurrence in cases of this description,—although it is very easy to apply to this Court for a remedy, it is rather more difficult to find out what is the remedy that ought to be administered.

Now, it is insisted, that this was, originally, a Protestant institution for the celebration of divide worship—and, although thus generally expressed, yet it is also further insisted, that the very instrument creating the trust bears on the face of it evidence, that the worship intended to be celebrated was a worship consonant with the acknowledgment of the doctrine of the Trinity—For, say they, the deed contemplates the possibility of the legislature, at some future period, making it unlawful to celebrate divine worship in the mode thereby intended—which renders it evident that the mode so intended was not at that period unlawful—whereas the doctrine of those who impugn the Trinity was then an unlawful doctrine, being expressly excepted out of the provisions of the Toleration Act, and consequently could not be in the contemplation of that clause in the deed. On the other hand it is contended, that the late act, [398] extending the benefit of the Toleration Act to persons impugning the Trinity, and repealing another act of *William*, which inflicted certain penalties on the offence, has removed the difficulty. Now, it is certainly true that the legislature has so done—it is also true that it has by the same act repealed a Scottish Statute which (as I recollect) inflicted the punishment of death on the offence of denying the Trinity, (9) and that it has, within [399] the very last week, passed an act having a similar operation on the laws respecting the same offence as they regarded Ireland (10)—but of this I am satisfied—that, in one house of parliament at least, it was never intended by these measures to do any thing that should alter or in any manner affect the common law. I do not, sitting here as a Judge in equity, presume to say what is the doctrine of the common law as to the subject in question, nor what effect, intended or not intended by the legislature, these late acts may have upon it—but, if the common law remains yet unaltered, and if the impugning the doctrine of the Trinity be an offence indictable by the common law, it is quite certain that I ought not to execute a trust the object of which is illegal. The business of a Judge is, not to consider what is the

kind or degree of toleration which he would himself be inclined to extend, but what is that which the law has granted—not what he would do if the question were left to his own discretion in the exercise of his judicial authority—but what the legislature has authorized or forbidden.

[400] But there is another view in which the case should be considered—and it is this—that, where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question, than through the medium of an inquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon inquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out—(and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland)—that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, “We have changed our opinions—and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions.” In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to, as the guide for the decision of the Court—and that, [401] to refer to any other criterion—as to the sense of the existing majority,—would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court.

In this view of the case, it is of the first importance to see what the record before the Court says upon the subject of the original institution. Without entering into what may be the effect of the late statute repealing several then existing laws on the subject—a question which it is not for me, sitting in a court of equity, to determine, and which would certainly be much better decided by the judges of the courts of common law)—without even so much as looking to the point, whether it be, or be not, legal, at this day, to impugn the doctrine of the Trinity (although that is a point upon which indeed I have an opinion,—only I do not find myself called upon now to declare it)—what I have now to enquire is, whether the deed creating the trust does, or does not, upon the face of it—(regard being had to that which the Toleration Act at the time of its execution permitted, or forbade, with respect to doctrine).—bear a decided manifestation that the doctrines intended by that deed to be inculcated in this chapel were Trinitarian? Because, if that were originally the case, and if any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus manifest, were intended by the founders. I apprehend that they are seeking to do that which they have no power to do, and which neither they, nor all the other members of the congregation, can call upon a single remaining trustee to effectuate. In this view of the case, also, supposing even that, at the time of the establishment of this institution, it had been legal to impugn the doctrine of the [402] Trinity, yet if the institution had been established for Trinitarian purposes, it could not now be converted to uses which are Anti-trinitarian. For (meaning, however, to speak with all due reverence on such a subject) to allow such a conversion, would be to allow a trust for the benefit of A. to be diverted to the benefit of B. And the question then resolves itself into this—whether such a conversion, in the case of a trust, can possibly be supported. If, therefore, this appears, on the face of the deeds, to be the nature of the present case—as I am inclined to believe it does—it disposes, of the question; affording a short and direct reason for not refusing the interference of the Court.

I am fully aware of the importance, with a view to conciliation, and abating the heat with which I am sorry to see controversies of this sort generally carried on.



that a final determination should speedily be made ; but at the same time, if deeds have been framed with so little in them that leads to a right understanding of the objects they had in view, it is impossible that the Court should decide without a previous inquiry, which, according to the necessary course of business, must greatly postpone the decision. And this, though it may be lamented, is not the fault of the Court, but the fault of the parties by whom the trusts were originally constituted.

With respect to the choice of the Minister—regard being had to the circumstance that this is the case of a Protestant Dissenting Minister—I am not sufficiently acquainted with the principles upon which these congregations usually act, to say much upon that subject, without more information than has yet been communicated to me. It may be according to general usage, among certain classes of persons dissenting [403] from the Establishment, to appoint their ministers for limited periods, or to make them removable at pleasure ; and, although a Court of Equity may not be disposed to struggle hard in support of such a plan, yet, were the Court to find such a plan established, I know of no principle upon which the Court would not be bound, if called upon for the purpose, to carry it into effect. The policy of the Established Church has been, by giving the Minister an estate for life in his office, to render him (in a certain degree) independent of his congregation. But I do not see how this policy can be extended so as to govern the decision of the Court in a case of this nature, where the trust which the Court is called upon to establish is otherwise constituted.

So again, with respect to those in whom resides the right of election, I apprehend that here also the Court must not be governed altogether by what it finds on inquiry to have been the established usage. On this subject various statements have been made in the present case, but the deeds are silent. At the same time, however, that I am fully aware of the difficulties the Court has to encounter in executing a trust of this kind, I also know that it is the duty of the Court to struggle with them ; and I shall endeavour to execute the trust as well as I can. But, while so many points are unascertained, it is impossible to come to any right decision—it is impossible for the Court to execute any trust until it knows who are the persons in whom it is vested, and what are its objects.

Of one thing at least I am certain—that there must be no proceeding to trial of the ejectment ; which cannot, under these circumstances, be attended with any other than a most fruitless and unnecessary expense to the parties ; and because, if I can find out the true state of [404] the case, with reference to the subject-matter of these inquiries, I shall thereby be enabled to make such an order as will embrace all points in dispute between them.

*July 17. Lord Chancellor [Eldon].* The motion before me was made in a cause in which the *Attorney-General*, at the relation of *Benjamin Mander* (the surviving Trustee under certain instruments which I shall have occasion to mention), and the *Reverend John Steward* (who alleges himself to be Minister of the congregation of Protestant Dissenters assembled at *Wolverhampton*), are Plaintiffs, and the Defendants are *Joseph Pearson* and four others, representing themselves to be (together with *Mander*) the Trustees of the property in question (which property has been given, as it is expressed in some of these deeds, to the charitable purpose of maintaining this meeting-house) ; and further contending that *Mander* ought not to be considered, under the circumstances of this case (created by his own conduct), as being a Trustee, or, if he be considered as having vested in him the legal estate in a certain portion of the premises, still that he ought to be held incapable of acting by reason of these circumstances. And this information (as I understand it), is filed for the purpose of preventing those who, it alleges, are not to be considered as Trustees, from acting in the discharge of what does not belong to them ; or, on the other hand, if they be invested with the character of Trustees, by reason of having the legal estate in them, then the information is to be considered as insisting that, being invested with the character of Trustees for one purpose, they are proceeding to act in that character for a purpose wholly different, and upon this ground contending, that the Plaintiffs are entitled [405] to certain relief prayed—particularly to that which is the subject of the present application.

[His Lordship here described the several instruments, and other charitable donations mentioned in the statement of this case, together with the existing state of the trust-funds and premises.]

It becomes here necessary (not for the purpose of expressing an opinion on some of the doctrinal points argued at the Bar, but in order to see what may be collected by way of fair inference, as to the meaning of the original founders), after observing that the first trust-deed is dated in 1701, to state that, in the year 1689 (1 *Will. & Mary*) was passed the act commonly called the Toleration Act (1 *W. & M. c.* 18), which exempted certain persons, coming under the description of Protestant Dissenters, from the penalties of certain laws therein mentioned; and, as I again observe, the object seems to have been merely as stated in the title of the act, *viz.* "to exempt His Majesty's Protestant subjects dissenting from the Church of *England* from the penalties" of the laws therein mentioned; (1) not appearing, therefore, either upon the terms or substance of it, to have done, or to have intended to do, any more—leaving the Common Law exactly as it was with respect to all Common-law Offences against religion or religious establishments. And in that act there is an express provision, s. 17, "that no clause or article therein should extend to "give any ease, benefit, or advantage to any Papist, or Popish recusant whatever, "or any person who should deny the doctrine of the Blessed Trinity declared in "the Articles of Religion." Afterwards, in the 9th & 10th of *William*, an act passed (9 & 10 *W. 3. c.* 32), entitled, "an Act for the [406] more effectual suppressing "of Blasphemy and Profaneness," and it recites that, whereas many persons had of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this kingdom; therefore, "for the more effectual suppressing of the said "detestable crimes," it was enacted that "If any person or persons, having been "educated in, or at any time having made profession of, the Christian religion, "within the realm, shall, by writing, printing, teaching, or advised speaking, deny "any one of the Persons in the Holy Trinity to be God, or shall assert or maintain "that there are more Gods than one, or shall deny the Christian religion to be true, "or the Holy Scriptures of the Old and New Testament to be of Divine authority; "and shall, upon indictment or information, be thereof lawfully convicted, upon "the oath of two witnesses, such person shall," for every such offence, and for the repetition thereof, incur such several and distinct disabilities and penalties as by the said act are provided.

Now, it is to be observed that the opinions, the publication of which in any of the modes specified it is the intention of this act to prevent, are not thereby expressed to be opinions contrary to those of the Church of *England*, but contrary to the Christian Religion. And the act proceeds to point out more precisely what is the nature of those opinions which it thus declares to be contrary to the Christian Religion, *viz.* the denial of any one of the persons in the Holy Trinity to be God, &c. It is further to be observed, that the information which was to lead to conviction, where the consequences were so extremely penal, is by the statute required (in [407] the case, at least, of words spoken), to be within three months of the time of the words being spoken, and that an opportunity is also given to the offender publicly to renounce his error in the same Court where he had been convicted, and thereupon to be discharged from all penalties incurred by such conviction. There can be no doubt (at least so I apprehend), that, prior to this statute, blasphemy was an offence punishable at Common Law; and it is impossible to contend (as it appears to me), that (whether the preamble is, or is not, to be taken as a ground of ascertaining that the doctrine reprobated in the enacting parts amounts to blasphemy—on which it does not become me to give an opinion) the penalties inflicted by the statute give any foundation for supposing that there could no longer exist a punishment for Blasphemy at Common Law, independent of the statute. On the contrary, the Common Law is left by the statute exactly as it was before the statute passed. (3)

The late act (53 *Geo. 3. c.* 160), which repealed this statute of *William*, also repeals certain acts against Blasphemy in *Scotland*, which are therein particularised. [Here his Lordship read the Scottish statutes above referred to. See 3 Mer. 398 (n.).] These statutes remained in force till the 53d year of his present Majesty, and then the act passed, which repealed the excepting clause of the Toleration Act, which repealed the statute of the 9th & 10th of *William* (so far as relates to the denying the doctrine of the Trinity), and which repealed the Scottish statutes;

and I should observe that there did not (upon the occasion of passing the act in question) seem to be any difference of opinion among the members of either House of Parliament, but that they all agreed (without entering into the consideration of the question, [408] as to whether it were or were not an offence against the Common Law, or whether the Common-law punishment, if any existed, had been taken away by the statutes which it was intended to repeal) that the penalties, upon that which was considered as Blasphemy by the 9th & 10th of *William* and by the Scottish statute, enacted by those statutes, were penalties which it was very difficult to say were proper to be inflicted. The act of the 53d of the King therefore did what I have stated; but I apprehend that it left the Common Law exactly where it was; and, conceiving the object of this information to be as I have already represented it to be; and, remembering that (whatever may have been stated at the bar, with respect to the question of what is, or what is not, criminal in the conduct of the parties), I (sitting here) can only administer the civil rights of the parties, this Court having no office to determine what is or is not an offence or crime, except where the question arises, as of necessity, by its being called upon to administer trusts, or regulate civil rights, which are involved in its decision; I will therefore confine myself entirely to the consideration of the civil question, namely, what, in respect to doctrine, was the intent of the founder of this charity.

It must be recollected that, by the Toleration Act, the benefit of that act was declared not to extend to persons impugning the doctrine of the Trinity. That act passed in 1689: and in 1701 (shortly after the opinions in question had been thus expressly declared by the Legislature not to be proper subjects for the toleration which the Legislature had been granting to every other class of Dissenters) the first of those deeds upon which the questions in the present cause arise, was executed.

[409] [His Lordship then read the deed of the 30th of *October* 1701, from the answer, observing the allegation in the answer that the feoffment was followed by livery of seisin, a circumstance which, His Lordship said, he did not see alleged, or that it could be made out, as to some of the subsequent feoffments; and, upon the purpose for which the meeting-house was declared to be erected—*viz.* "for the worship and service of God," His Lordship remarked that the terms were very general.]

Several passages of this indenture have been particularly taken notice of in the course of the discussion at the Bar. There is quite sufficient of allegation in the information to shew that it was a body of Protestant Dissenters who established this meeting-house, in order to have preached in it the religious doctrines to which they were attached; and, more especially, if it cannot be said for the express purpose of inculcating the doctrines of the Trinity, yet that they were Dissenters entertaining such a class of opinions, as that the doctrine of Unitarianism would be directly at variance with their purpose in founding this meeting-house. I observe upon this particularly; because I take it that, if land or money were given (in such a way as would be legal notwithstanding the statutes concerning dispositions to charitable uses) for the purpose of building a church or a house, or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, this Court would execute such a trust, by making it a provision for maintaining and propagating the Established Religion of the country. It is also clearly settled that, if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters—promoting no doctrines contrary to [410] law, although such as may be at variance with the doctrines of the Established Religion,—it is then the duty of this Court to carry such a trust as that into execution, and to administer it according to the intent of the founders. In this case, it is impossible to doubt that the trust was originally created for the purpose of maintaining a Protestant dissenting institution; and it would be doing violence to the intention of the parties to these deeds to say, that, the worship and service of God being the object expressed by them, the trust must be administered in such a way as to maintain the religion of the Established Church. Nevertheless, I take it from the experience of many years in this Court, that, if any body of persons mean to create a trust of land, or money, in such a manner as to render the gift effectual, and to call upon this Court to administer it according to the intent of the foundation, whether that trust has religion for its object or not, it is incumbent on them, in the instrument by which they endeavour to create that trust, to let the Court

know enough of the nature of the trust to enable the Court to execute it ; and therefore, where a body of Protestant Dissenters have established a trust without any precise definition of the object or mode of worship, I know no means the Court has of ascertaining it, except by looking to what has passed, and thereby collecting what may, by fair inference, be presumed to have been the intention of the founders. From this deed, I can collect that the founders were Protestant Dissenters, and thence presume that their object was the maintenance of Protestant dissenting worship ; but I have nothing to inform me what species of doctrine this institution was intended to maintain, except as I may be able to infer from some of the clauses of the deed, and particularly from that clause which alludes to the possibility of the future prohibition by law of the worship thereby intended to be established, and also from that [411] which relates to the binding effect of orders to be made by a majority of the trustees, upon matters relating to the meeting-house *only* ; from which it should appear, both that the founder meant to establish an institution which was not then contrary to law, and that they did not mean to invest in the Trustees, or the major part of them, any right to vary the system or plan of doctrinal teaching which was to be maintained in this meeting-house according to their own discretion.

When I look to the date of the deed of 1701, and to the dates of the Toleration Act, and of the Act of the 9th & 10th of King *William*, and also to the deed executed in 1742, which contains the same clause with the former, it is impossible to say, that while the founders contemplated the eventual abrogation of the existing system of Toleration, they were in fact intending to create by that very deed a system which was at that time illegal, and which, only three years before, was excepted out of the Toleration Act, as a system unfit to be included in the Toleration which was extended by it to all other modes of Protestant dissent ; the Legislature at that time intending to embrace all the doctrines that could be safely included in that Toleration. This clause therefore seems to afford extremely strong countenance to the allegation, that the institution was not intended to be for the maintenance of those opinions which impugn the doctrine of the Trinity. And, with respect to the clause which invests the Trustees, or the major part of them, with the power of making orders from time to time upon matters relating to the meeting-house, I think it would be doing violence to all the principles of construction upon which we act, to understand it as meaning that those Trustees, or the major part of them, should have power to convert that meeting-house, whenever they thought proper, into a meeting-[412]-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended. I say, that appears to me to be as inconsistent with the probable meaning of the original founders, as it would be to hold that they meant it should be converted, at the discretion of the Trustees, into a place of worship according to the form and doctrines of the Church of *England*.

With regard to the clause which is supposed to affect *Mander's* character as a Trustee, from his having withdrawn himself from the congregation, it is to be observed, first, that he could not be discharged under it without a regular proceeding on the part of the remaining Trustees to replace him by a successor ; and, next, if the meaning of these parties has been to divert the institution from its original purpose, by causing it to maintain doctrines such as these that are charged by the information, this Court would never permit that he should be discharged from the office of Trustee, for endeavouring to preserve the object and ends of the institution, for the protection of which the very clause now insisted upon as depriving him of his character of Trustee, was introduced into the instrument.

Another part of the trust is settled by a deed of the 1st and 2d of *February* 1720. [His Lordship here read the deed in question, which is stated above, p. 362.]

Upon the provisions of this deed there arises a question (upon which usage will have great effect). Whether, according to the original constitution of this society, the Minister, Preacher, or Pastor could be appointed for three years only, or, whether, according to the general [413] principles of this body of Dissenters, the congregation and Minister might agree, that the one will give, and the other accept, a nomination for three years only. It appears highly probable, that the person who gave this part of the fund contemplated a provision for the Minister for his life, since he has expressly given it to him for life, even when he could no longer officiate as Minister ; but, on the other hand, it may turn out to be established by usage, that he was only a temporary

Minister, elected with the concurrence of the congregation, and liable to be removed in the same manner as he was called upon to officiate.

Upon the clause respecting the desertion or removal of any of the Trustees, which occurs in this deed also, and contemplates the event that the Trustees "should change, or become of any other religion or persuasion whatsoever, contrary to, and different from, the said congregation," I must observe that, if the question comes before this Court, in the execution of a trust, whether a Trustee has been properly removed, and that point depends upon the question, whether the Trustee has changed his religion, and become of another (as in this instance) different from the religion of the rest of the society, it must then be *ex necessitate* for the Court to enquire, what was the religion and worship of the society from which he is said to have seceded,—not for the purpose of animadverting upon it, but in order to ascertain whether or not the charge is substantiated. It must then (I say) be necessary that this Court should enquire what religion the congregation is of, and also what is the religion of the man who is, or is sought to be, removed from the Trusteeship because he is of a different religious persuasion from that of the congregation.

[414] Then follow the words of the clause relating to the appointment of new Trustees, in any of the events before contemplated. Now, this trust, being created in 1720, became, in 1792, vested in *Mander* and eleven others, including a person, who (it is insisted by the Defendants) never acted: and the object of the information is to alledge, first, that *Mander* is the only Trustee, and that the Defendants have no right to interfere at all; and, next, that, if the Defendants can be considered as being invested with the character of Trustees, as well as *Mander*, they have no right to act as they are now doing, by reason of their not having observed due forms in their proceedings, and being engaged in introducing a doctrine and mode of worship into the meeting-house directly contrary to that which it was the original founder's intention should be preached and maintained in it. If the Defendants have not been duly elected Trustees, then *Mander* must be admitted to be certainly the surviving and only Trustee, as all the other Trustees named in the deed of 1772 are dead, and the Defendants admit that the legal estate, in a fifth of a part of the property, and in a sixth of another part, is still vested in *Mander*; but they nevertheless contend that, *Mander* not having done any act in the execution of the trust since 1792 or 1793, this legal estate must be in him only subject to the trusts being administered by them (the Defendants), according to their own discretion.

Now, with respect to the intent of the donors, as it is to be collected from the answer of the Defendants, they state it in this way.

[His Lordship here read the admissions and denials of the answer relating to this part of the case; which see *ante*, page 367, 372, &c.]

[415] I agree with these Defendants, that the religious belief is irrelevant to the matters in dispute, except so far as the King's Court is called upon to execute the trust; but, even if they make it out that this was a trust, merely for the establishment of a Dissenting meeting-house, without regard to any particular tenets, still that must be qualified, by shewing that it was a meeting-house that could be legally sanctioned and established; and in that point of view the Court is bound to consider the question as relevant.

They seem, however, to have gone on harmoniously in this meeting-house till the election of Mr. *Jameson* by some part of the congregation, and the invitation of a Mr. *Griffiths* by another part of the congregation, some of the Trustees being for one, and some for the other. That dissension ended by Mr. *Griffiths* keeping possession of the meeting-house and the pulpit; and (if I have not misunderstood what is meant to be stated in this answer), this Mr. *Griffiths* was a gentleman whose opinions leaned more to Unitarianism than to the contrary doctrine. He kept possession of the meeting-house and pulpit till the year 1804.

It appears that, in 1793, a deed of feoffment was made of both estates to twelve persons; but *Mander*, who had a portion of the estate, although made a nominal party to that deed, refused to execute it, and *Headley*, in whom, by the prior deeds, the estate had been vested, as a Co-trustee of part of the property with *Mander*, but who had never acted, also did not execute. The consequence of that would be this;—that, whatever interest was vested as to the legal estate in *Mander* and *Headley*, the interest so vested in them would not pass to those who were attempted to be made new Trustees; and in this kind of transaction I apprehend that the

Court would [416] be bound to interpose ; since this Court would never permit the entirety of the estate to be split among different Trustees, from a consideration of the inconvenience that must necessarily result from such a division. It does, however, appear, that *Mander* would not execute the deed, and *Headley* did not execute it, for this reason (as I collect it), *viz.* that they considered the congregation to be one having a different system, and maintaining a different religious belief, and hearing the preaching of a different kind of doctrine, from what it was originally intended should be taught in that meeting-house. To make this feoffment effectual, also, it would be necessary that livery of seisin should have been made ; and it is not alledged by the answer that this was ever effected ; and, although it appears by the deed, that persons were appointed to deliver seisin, there is a difficulty too about that, which may raise the question, where the legal estate is at the present moment. For the deed states it to be a joint power of attorney to deliver seisin, and, if all the persons thereby appointed to deliver seisin did not do so, the question then is raised, whether authority can be given to deliver seisin as to part of the premises only ? I do not say how it would turn out ; but it is a matter still to be examined, whether the Defendants have any estate at all in the premises.

Towards the end, however, of the year 1813, the major part of those persons elected *Steward* to be the officiating Minister ; and they say that, in 1816, upon the change of his religious tenets, they called upon him by a notice (alleged to be given with the consent of the congregation) to withdraw ; intimating to him, nevertheless (as I understand the answer), that, having formerly taught the doctrines of Unitarianism, if he will now abjure the contrary doctrines, and continue to preach those of Unitarianism, they will have no objection to re-[417]-tain him as Minister, and that, at all events, they will let him remain there for three months, preaching any doctrine he may think proper.

I repeat that I have nothing to do here in the way of pronouncing any opinion as to any religious doctrine whatever. This case must be discussed exactly as if it were the case of a charity properly created, having no relation whatever to any religious purpose, but a case in which one party contends that the trust was originally for purposes of a particular description (and has a right so to contend), against another party who insists that it was originally for other purposes. And the Court is bound to determine this question, if it arises. It would not, perhaps, be difficult to decide where the legal estate is ; but, after that has been disposed of, there still remains the other question ; *viz.* for what purpose that legal estate was vested in the persons in whom it now resides ? For the Court will not permit that purpose to be altered, unless it be obvious, from the original nature of the institution, that it was meant to be capable of such alteration.

Now, where a clergyman is presented to a living in the Church of *England*, we know the duties committed to him, and the grounds upon which he is bound to execute those duties ; but, as the justice of this country has, for the ease of men's consciences, permitted them to secede from the established Church, and to form religious institutions for themselves, to a certain extent, it has become the duty of this Court, and others of a like nature, to enforce the execution of trusts for such institutions, and to give the parties who are Trustees that relief which the Legislature meant they should have. It is necessary, therefore, to look to the instruments, to know what are the trusts which the Court is called upon [418] to enforce the execution of ; and, if the parties themselves do not give the information which is requisite, it is in vain to look for a prompt decision with reference to the point in controversy ; because, till inquiry has been made as to the nature of the trusts, a Judge must remain in ignorance of the duty he has to perform. Where, then, a charitable institution of this kind is founded—or, say it were for a civil purpose, that we may the more temperately discuss the subject—I apprehend then, that where a man gives his money to such an institution for a civil purpose, one of the duties of this Court is to take care that those who have the management of it shall apply it to no other purpose so long as it is capable of being applied according to the original intention. And if, upon enquiry, it shall be found that in this case the land was originally given, and the money originally subscribed, for the purpose of forming an institution such as the *Attorney-General* in his information has alleged that this institution should be, then those who object to any change in the institution from its original purposes are not guilty of departing from the institution, but are only doing their

duty in endeavouring to prevent such a departure from the purposes of the institution in others ; and, if the allegation is, that there has been such an alteration of sentiments on the part of the congregation, they certainly do throw great difficulties in the way of the Court's carrying the trusts into execution in any manner whatever.

I must here again advert to the principle which was, I think, settled in the case to which I referred the other day as having come before the House of Lords on an appeal from *Scotland*—viz. that if any persons seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders ; [419] and if others of those who are interested think proper to adhere to the original system, the leaning of the Court must be to support those adhering to the original system, and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be. Upon these grounds, I have nothing at all to do with the merits of the original system, as it is the right of those who founded this meeting-house, and who gave their money and land for its establishment, to have the trusts continued as was at first intended. It is necessary, therefore, to make enquiries as to what was the nature of that original system ; and in the mean time, it is perfectly absurd that any ejectment should be going on.

For these reasons, I shall now grant an injunction, not till the hearing of the Cause, but till the further order of this Court ; the parties undertaking to account for the intermediate rents and profits (except so far as is necessary to maintain the Minister), and to obey such order as the Court shall make. If the parties will submit to give that undertaking, I don't know how to go more promptly to a decision than by allowing the matter of inquiry to go to the Master immediately. I wish there were any shorter mode of deciding it ; and, if by *Mandamus*, or by any other proceeding you can propose, such a decision can be accomplished, I shall have no objection.

[The parties having acquiesced in regard to the proposed undertaking, His Lordship then proceeded to direct the inquiries, which were afterwards drawn up according to the form of the following Minutes :]

[420] " The Relators and Defendants undertaking to obey such order as this Court may hereafter think fit to make, with respect to the possession and intermediate rents of the meeting-house, &c., Let the Defendants be restrained by the Injunction of this Court from further proceeding at law in the ejectment, &c., and from all other proceedings at law to recover possession, &c., until the further order of this Court ; and refer it to the Master to enquire, in whom the legal estate of and in all the trust premises, &c., is vested ; and who have a right to call in the money due on the promissory note for £260. And let the Master enquire what was the nature and particular object (with respect to worship and doctrine) for the observance, teaching, and support of which, each and every of the said charitable funds or estates respectively were or was created or raised, distinguishing when and by whom the same were or was respectively created ; and let the said Master enquire and state, &c., the usage of Protestant Dissenters as to the election of their Ministers, and the duration of their office as such, and particularly whether any agreement or understanding was entered into between the Relator, *John Steward*, and the Defendants, *Joseph Pearson*, *Joseph Stanley*, *Joseph Baker*, and *Thomas Williams*, or any of them, and the persons for the time being members of the congregation attending the said meeting-house, and subscribing to its support, touching the duration of the ministry of the said *John Steward* in the said meeting-house, &c."

(1) 15 Ves. 85. And see *Attorney-General v. Lord Dudley*, Coop. 146.

The principle of these cases, it is conceived, can be no other than that which was laid down by Lord *Mansfield*, in *Evans's* case,\* when, speaking of the Toleration Act, he is reported to have said, that non-conformity is rendered by that act " not only innocent but lawful," and that the protecting clauses of the statute " have put it, not merely under the connivance, but under the protection of the law—have established it. For nothing can be plainer, than that the law protects nothing in that very respect, in which it is, at the same time, in the eye of the law, a crime. Dissenters, by the Act of Toleration, therefore, are restored to a legal consideration and capacity." " The judgment of the Court of Delegates," observes Dr. *Furneaux*, in his first letter

to *Blackstone* upon the subject of the case referred to, "was grounded entirely upon this opinion. That the Toleration Act removed the crime, as well as the penalty of mere Non-Conformity." And again, "The more the idea of legal protection is examined, the more will it appear to justify the strong expression of Lord Mansfield, concerning the Dissenting worship—That it is established. If the Justices of the Peace at Quarter-Sessions, or the Register of the Bishop's Court, should refuse to register a Dissenting place of worship, a *Mandamus* always is, and must be, granted upon application, to compel them to the discharge of their duty." It is upon the same principle, that, in *The King v. Barker* (Burr. 1265), Lord Mansfield observes, "A dispute, who shall preach Christian charity, may raise implacable feuds and animosities, in breach of the public peace, to the reproach of Government, and the scandal of religion; and to deny this writ would be putting Protestant Dissenters, and their religious worship, out of the protection of the law. The case is entitled to that protection, and cannot have it in any other mode than by granting this writ."

(2) Surely this does not follow. The worship of the Supreme Being according to Unitarian principles was never illegal; and it is believed to be an historical fact, that many Unitarian congregations qualified under the Toleration Act, and were protected by that Act in their worship. And see 3 Mer. 383, note.

(3) The above are the cases commonly referred to as establishing the principle of interference by Courts of temporal jurisdiction, in cases of the third of those classes into which offences against religion have been divided by the text-writers, viz. offences against God and religion in general, commonly called *Blasphemy* or *Profaneness*. The other two are *Heresy*, of which (I apprehend) it is certain that the Common Law has no cognizance; and *Non-conformity*, the crime of which (as has been shewn), was taken away by the Toleration Act. (Note: The term *Blasphemy* does not seem in itself to define any particular species of offence. *Heresies* even, of which the Common Law had no cognizance, were so styled. Its proper meaning, when used at Common Law, appears to be *profaneness* against the general principles of religion and morality.)

The case of *The King v. Taylor* was of "an information in the Crown Office for uttering blasphemous expressions, such as that Jesus Christ was a bastard, religion a cheat, &c. Hale said, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and, therefore, punishable. For, to say religion is a cheat, is to dissolve all moral obligation, whereby civil societies are preserved; and Christianity is parcel of the law; and therefore, to reproach the Christian religion, is to speak in subversion of the law." And see the report of the same case, 3 Keble, 607–621, where it is added, "these words, though of ecclesiastical cognizance, yet, that religion is a cheat, tends to the dissolution of all government, and therefore punishable here."

The power of the Temporal Court was called in question in *Curl's* case (2 Stra. 789).—An information for printing and publishing an obscene book. The Defendant moved in arrest of judgment, on the ground that, as an offence *contra bonos mores*, it was of ecclesiastical cognizance, but no libel for which he was punishable in the Temporal Courts; and Lord C. J. *Raymond*, in deciding the question, said, "If it reflects on religion, virtue, or morality—if it tends to disturb the civil order of society—I think it is a temporal offence."

Then followed the case of "*The King v. Woolston* (2 Stra. 834), for blasphemous discourses, denying the miracles of our Saviour." And there the Court "would not suffer it to be debated whether to write against Christianity in general was not an offence at Common Law, punishable in the Temporal Courts, it having been so settled in the former cases." They desired, however, it might be taken notice of, that they laid their stress on the word *general*, and did not intend to include disputes among learned men upon controverted points." In the Report of the same case in *Fitzgibbon*, 64, L. C. J. *Raymond*, after referring to Lord Hale's opinion, in *Taylor's* case, above mentioned, is made to say he would have it taken notice of, "that we do not meddle with any difference of opinion, and that we interpose only where the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme, the New Testament, and the whole relation of the life and miracles of Christ being denied."

See, as to the doctrine of this case, *Starkie's Law of Libel*, 495, 496; and, on the subject of the prosecution of *Woolston*, the preface to *Lardner's* "Vindication of the miracles of our Saviour," against his attacks.



As to this head of offence, in general, the division made by the text-writers should be remembered ; viz. into the following heads :—

1. Denying the being or providence of God, and contumelious reproaches of Christ (for which we are referred to *Taylor's* case, above noticed).

2. Profane scoffing at the Scriptures, or exposing any part thereof to contempt or ridicule.

3. Impostures of religion, &c. (for which *Nailor's* case is cited).

4. "Certain immoralities"; as tending to subvert all religion or morality, which are the foundation of government.

5. "Seditious words, in derogation of the established religion," as tending to a breach of the peace.

(See *Hawkins*—Pleas of the Crown, c. 5.)

To the same effect are the following : "Blasphemy consists in the denial of the being, attributes, or nature of, or uttering impious and profane things against God, or the authority of the Holy Scriptures. But it is only committed by uttering such things in a scoffing and railing manner, out of a reproachful disposition in the speaker, and, as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion. The like sentiments, uttered dispassionately, are still criminal, but constitute a crime of a different sort, rather heresy, or apostacy, than blasphemy." Hume on Crimes, Vol. II. c. 518 ; and, in support of the same doctrine, the writer cites *Voel* and *Clarus*.

*Aikenhead's* case, the single instance to be found of capital judgment for blasphemy under the Scotch statutes, tends strongly to confirm this doctrine. The indictment there was said to be founded "on the law of God, the law of this and all other well-governed realms, and specially the 21st Act, 1st Parl. Ch. 2, and the 11th Act, 5th Sess. of 1st Parl. Will. III." ; and it charged (*inter alia*) that the pannel had called the Old Testament *Ezra's Fables* (profanely alluding to *Æsop's Fables*), Christ an impostor, who had learned magic in Egypt, &c. ; that he rejected the mysteries of the Trinity and Incarnation ; maintained that God, the world, and nature, were the same thing ; preferred Mahomet to Jesus ; hoped he should see Christianity extirpated, &c. The Court found "*Cursing or railing upon any of the persons of the blessed Trinity relevant to infer the pains of death ; and the other crimes likewise relevant to infer an arbitrary punishment*" ; and the Jury finding that the pannel had railed against the first, and also cursed and railed upon the second, person of the Holy Trinity, and the other crimes in the libel proven, the Court adjudged him to be hanged, and he was executed accordingly. (*MacLaurin's* Crim. Cases, 12.)

The remarks of *Hume* (Hume on Crimes, cit. sup.) on this case are, that "it appears to have been tried with a rigorous disposition, not on the part of the Court, but of the Assize, who found the Pannel guilty of railing at and cursing Christ, without proof of his having directly done so, and only upon inference from opinions occasionally vented ; whereas in the trial of crimes which consist in uttering words, and are made capital by statute, it seems to be the sounder, as it certainly is the more humane construction, that the thing itself must be said explicitly and directly in such a palpable and open form that every one who hears the words shall know the Law to be infringed."

(4) The Statute 1 *Eliz.* c. 1, applies to offences of the first class, or those which come under the denomination of "Heresy" ; and by that statute it is declared, that no tenets shall be considered heretical by the High Commission Court (thereby established) but those which had been settled to be so, first, by the words of the Canonical Scriptures ; secondly, by the first four general councils, or such others as have only used the words of Scripture ; or, thirdly, which should thereafter be declared such by Parliament with the assent of the clergy in convocation. Now, if this statute be taken as defining what is Christianity by the Common Law of England (as it seems to be that which is alluded to in the above argument), then the denial of the Trinity can be considered as an offence against the Common Law, only as coming within one of the two first of the above descriptions, viz. as settled to be heretical, either by the words of the Canonical Scriptures, or by such of the general councils as aforesaid. If by the former, it may be asked, who is to settle the question, when the parties asserting and denying the doctrine of the Trinity equally appeal to the Canonical Scriptures in defence of their respective opinions ? The High Com-

mission Court is abolished, and the authority given to that Court in matters of heresy is extinct, as well as the crime of heresy itself. The only ground (as is settled by the cases referred to in the preceding note) upon which the magistrate can now interfere to restrain or punish any principles relating to religion is on account of their tendency to the subversion of government, or those injuries to social order which fall under the denomination of a breach of the peace. If his interference is permitted in such cases upon any other principle, there is an end of religious liberty. But if that which constitutes the assertion of the doctrine in question to be an offence against Common Law be the authority of councils, then there is no reason for restraining the authority of councils to the heresy of denying the Trinity, and not extending it to every doctrine which the same councils have pronounced to be heretical. Lord *Coke* observes upon this Act of Parliament, "that no statute standeth now in force, and at this day no person can be indicted or impeached for heresy, before any temporal judge, or other that hath temporal jurisdiction." The High Commission Court was abolished by 16 *Car. I. c. 11*. But by its abolition little would appear to be gained to the cause of religious liberty if, as (seems to be the unavoidable consequence of admitting the validity of this argument) the King's Courts are to be considered as now invested with precisely the same authority.

(5) By the Statute 29 *Car. 2, c. 9*, the writ "*De Hæretico comburendo*" was taken away, and the offence of heresy is considered, and (I believe) admitted by all, to have been then left subject only to ecclesiastical censures. (Note: The Toleration Act suspends all ecclesiastical censures against the persons protected by it—so that even the ecclesiastical jurisdiction over heresy is now done away with.) The statute 9 & 10 *W. 3, c. 32*, revives the temporal jurisdiction over that species of heresy which consists in the denial of the Trinity; and the preamble, and introductory part of the enacting clause of that statute seem to be treated in this part of the argument as defining, by legislative authority, the supposed offence at Common Law. That statute, however, has been repealed by the 53d of the King; and it is conceived that heresy, considered as a civil offence, has expired with it. Supposing this to be the case, then the denial of the Trinity, if still a crime at Common Law, must be so by reason of its falling under the head of blasphemy or profaneness. But the ground upon which offences of that description are cognizable by the temporal courts is their tendency to subvert, or to disturb, the security of civil society. And then, if the language of statutes is to be taken as declaratory of the law by inference only from the expressions contained in them, the statute of 19 *G. 3, c. 44*, extending the benefit of the Toleration Act to such persons as shall sign "a declaration of their belief that the Scriptures contain the revealed will of God," when coupled with the late statute admitting Unitarians to the like benefit, may be considered as containing the sense of the Legislature upon that which is essential to the security of the state in matters of religion. And, on the other hand, if statutes, made for a particular purpose are, though repealed, to be taken as declaratory of legislative intentment, there can be no use at all in repealing them. In some of the statutes repealed by the Toleration Act, non-conformity is stigmatized as *felonious*. Will it therefore be contended that, although those statutes are repealed, yet their language must be taken as declaratory of the Common Law, and that non-conformity therefore not only was then, but remains to this day, a felony?

See also what is said by Mr. Justice *Ashurst*, in *The King v. Annett*, Blackst. Rep. 395, with respect to the ground upon which the Christian Religion is said to constitute part of the law of *England*. And see, in general, the articles "*Heresy*" and "*Profaneness*," 2 Burn's *Eccl. Law*, 304; 3 Burn's *Eccl. Law*, 215; and the references to *Hawkins* and *Gibson*. See also, with respect to the law of *Scotland*, which stands on precisely the same footing, Hume on Crimes, under the same heads as above.

(6) The prosecution against Mr. *Wright of Liverpool*, the only one, it is apprehended, which could be intended to be here referred to, has since been abandoned.

(7) *Ambl. 228*. See 7 *Ves. Jun. 76*. This case of *Da Costa v. Depaz* serves strongly to exemplify the distinction before (p. 377, note) taken between the act of *worship* and the inculcation of *doctrine*. In that case an institution for teaching the Jewish law was held bad; but Synagogues are protected; and, in the late case of *Lazarus v. Simmonds* (at *Nisi Prius*, May 6, 1818,) I am informed that Mr. Justice (now Lord Chief Justice) *Abbott* would not hear of any argument to the contrary.

(8) If the notion of the denial of the Trinity being an offence indictable at common law were abandoned, it would then be difficult to say upon what ground it can be considered as an offence at all, unless nonconformity (notwithstanding the opinion of Lord *Mansfield* and the other judges in *Evans's* case) be itself an offence; and, if that be so, why are the courts to interfere for the protection of any class of Dissenters, or of any dissenting establishment? But, that the Courts do so interfere, and are compellable so to interfere, in the case of Dissenters not impugning the Trinity, is established by the cases referred to at the beginning of this argument. Besides, there seem to be other reasons for questioning whether the application here made to the case in point from other cases in which the Court refuses its interference on the ground of the illegality of acts which are nevertheless not indictable will bear a close investigation. As, for example, the trading with an alien enemy—for the illegality of that act depends on positive prohibition, which cannot be predicated of the case before us.

(9) 53 *Geo.* 3, c. 160, s. 3, repealing the acts of the 1st parl. of *Cha.* 2d, c. 21, and 1st parl. of *K. Will.* sess. 5, c. 11. By the first of which, entitled—

"An Act against the crime of Blasphemy," after reciting "that there hath been no law in this kingdom against the horrible crime of blasphemy," it is ordained, "That whosoever hereafter, not being distracted in his wits, shall rail upon, or curse, God, or any of the persons of the blessed Trinity—or whosoever hereafter shall deny God, or any one of the persons of the blessed Trinity, and obstinately continue therein,—shall be processed, and, being found guilty, shall be punished with death."

And by the second of the said acts, entitled—

"Act against Blasphemy," the former act is confirmed, and it is further ordained, "That whoever hereafter shall, in their writing or discourse, deny, impugn or quarrel, argue or reason against the Being of God, or any of the persons of the Blessed Trinity, or the authority of the Holy Scriptures of the Old and New Testament, or the providence of God, in the government of the world, shall for the first fault be punished with imprisonment, ay, and while they give publick satisfaction in sackcloth to the congregation within which the scandal was committed. And for the second fault, the delinquent shall be fined in a year's valued rent of his real estate, and the twentieth part of his free personal estate, &c., besides his being imprisoned, ay, and while he make a fair satisfaction *ut supra*. And for the third fault, he shall be punished with death, as an obstinate blasphemer." The act goes on to commit the execution thereof, for the first fault, to all magistrates, &c., for the second fault, to all sheriffs, &c., and for the third fault, it commits the execution of the said act "to the Lords of his Majesty's Justiciary."

There is no instance of capital judgment on either of these statutes, except that of *Aikenhead* (before noticed); and only two of prosecutions—those of *Kinninmouth* and *Borthwick*,—in the first of which the prosecution was dropped, and in the other the pannel fled the country. (See *Hume on Crimes*, vol. 2, c. 518.)

(10) 57 *Geo.* 3, c. 70, repealing the excepting clause of the *Irish* stat. 6 *Geo.* 1, c. 5, and extending to *Ireland* the provisions of 19 *G.* 3, c. 44, and 53 *G.* 3, c. 160.

\* *Evans v. The Chamberlain of London*. (Appendix to *Furneaux's Letters*. 2 *Burn's Eccl. Law*, 207. And *Harrison v. Evans* (in error), 6 *Bro. P. C.* 181; [3 *Bro. P. C.* 465, 2d ed.].)

"There never was a single instance, from the Saxon times to our own, in which a man was ever punished for *erroneous opinions* concerning rites and modes of worship, but upon some positive law. The Common Law of *England*, which is only common reason or usage, knows of no prosecution for mere opinions. For *atheism*, *blasphemy*, and *reviling the Christian religion*, there have been instances of persons being prosecuted and punished upon the Common Law, but bare nonconformity is no sin by the Common Law." *Per* L. C. J. *Mansfield*, 2 *Burn*, 218. And see Mr. J. *Foster's* opinion on the same case, *ib.* 209.

[421] WITHER v. The DEAN and CHAPTER of WINCHESTER, and LAMPARD. July 22, 1817.

[See *Duke of Marlborough v. St. John*, 1852, 5 De G. & Sm. 179 ; *Ross v. Adcock*, 1868, L. R. 3 C. P. 669 ; *Sowerby v. Fryer*, 1869, L. R. 8 Eq. 422.]

Lease from Dean and Chapter, with covenant not to make sale of or take any timber-trees growing or to grow on a certain part of the premises save for the necessary building, or repairing, &c., of their cathedral church, or of the church buildings thereto belonging. Bill by lessee to restrain the Dean and Chapter from selling or cutting except for the purposes aforesaid. Injunction obtained on filing the bill dissolved on the coming in of the answer, stating that the whole of the timber was wanted for the purpose of repairs ; the covenant not extending to deprive them of the right which they might have exercised independent of it ; and Deans and Chapters, like other ecclesiastical persons, not being liable to be restrained in cases of waste, either by prohibition or injunction, except in the ecclesiastical court, or at the suit of the crown. It seems that the right to cut timber for the purpose or repairs extends to selling timber and applying the produce.

The Bill stated, that by Indenture (25th Nov. 1814) the Defendants, the Dean and Chapter of *Winchester*, demised to the Plaintiff, for twenty-one years, the mansion-house, &c., of *Manydown*, county of *Southampton*, "and all demesne lands and premises then or at any time occupied therewith, and all profits and advantages thereof, in as beneficial a manner as at any time theretofore the same had been used or occupied," together with certain other premises ; with a reservation to the lessors, and their successors (among other things), "of all timber-trees then growing or to grow thereon, with free ingress, egress, and regress, to cut and carry away the same." The indenture contained a covenant on the part of the Plaintiff not to cut any of the coppices except at seasonable times, nor to grub up, except certain parts of the said coppices therein mentioned. There was also a covenant on the part of the Defendants that the Plaintiff, his executors, &c., should and lawfully might, yearly during the term, cut and take sufficient house-bote for the maintenance, continuance, and new building of the houses then being on the premises, with sufficient firewood, hay-bote, plough-bote, cart-bote, and fold-bote, to be employed on the premises, without sale of timber, [422] waste or destruction. Also that the Defendants should not, during the term, make any sale or grant of, or take, any timber-trees growing or to grow on certain parts of the demised premises therein specified (called "The *Upper Park*, *Lower Park*, and *Morwell Rows*), save for the necessary building, repairing, upholding, and amending of the cathedral church of *Winchester*, or the church buildings thereto belonging, and in such case leaving upon the premises from time to time sufficient timber for the repair of the buildings thereon, for fences, &c., and for the timber-botes aforesaid."

The bill further stated that, at the time of the execution of this indenture, the Plaintiff was in possession of the demised premises ; that there were then large quantities of timber and other trees on that part of the premises called *The Upper* and *Lower Park* and *Morwell Rows*, within a near view of the house in which the Plaintiff resided, and very ornamental thereto ; that none of those trees were then wanted for the purposes specified in the exception above noticed, but that, nevertheless, the Defendants (the Dean and Chapter) in the month of *January* last, gave orders to their woodward to enter and cut down divers of the trees so growing in the *Lower Park*, in consequence of which the Plaintiff applied by letter to the other Defendant (who was the solicitor and agent to the Dean and Chapter), stating the injury which (as he apprehended) would be sustained by him in the execution of those orders, and the expenses he had been at in improvements on the premises, which would thus be rendered ineffectual, referring to the clause of the indenture, as introduced for his special protection against such injury ; and threatening to proceed for an injunction in case the Defendants should not desist ; to which he received for answer, that the woodward having reported to the Dean and Chapter certain trees in the [423] *Lower Park* as proper to be cut, they had given directions accordingly, but were ready to sell them standing to the Plaintiff, if he wished to preserve them, upon a fair valuation.

The Bill charged that this offer on the part of the Defendants, by their agent, was evidence that the trees in question were not wanted for the purposes of repairs, &c. It stated that the Plaintiff, conceiving they had no right to cut except for such purposes as aforesaid, declined the offer and informed them of his intention to institute the present proceedings. And it accordingly prayed "an injunction to restrain the Defendants (the Dean and Chapter), their woodwards, servants, agents and workmen, during the continuance of the term aforesaid, from making any sale or grant, or taking or cutting any of the timber or other trees then growing or to grow on the premises therein specified except for the purposes aforesaid."

The Injunction was moved for and obtained upon affidavit.

The Defendants (the Dean and Chapter) afterwards put in their answer, whereby they stated, that, at the time of the execution of the indenture in the bill mentioned, the Plaintiff was in possession under a lease from the Dean and Chapter to his (the Plaintiff's father), which lease contained the same covenants, with respect to the timber and coppice wood, as were contained in the indenture in question; and that other leases of the same premises with the like covenants had, from time to time, for a great many years past, been granted by the Dean and Chapter to the Plaintiff's ancestors. The answer then referred to various breaches of covenant said to have been committed by and on the part of the [424] Plaintiff; and it further stated that timber was at that time wanted for repairs of the cathedral, and of other church buildings, to so considerable an amount that the whole of the timber then growing on the premises would be insufficient for the purpose of supplying them. It further stated that alterations had been made in the premises by the Plaintiff, since the date of the indenture, by throwing an adjoining coppice into, so as to make it form a part of, the premises described in the indenture by the name of the *Lower Park*; and the Defendants therefore, disclaiming any intention of cutting timber on that part of the premises to which the covenant extended, insisted upon their right to cut, for the purpose of repairs, upon the premises so lately taken into the *Lower Park*, as not being included in the covenant. They represented that they (the Defendants) were in the habit of selling the timber on other estates belonging to them in distant parts of the country, and applying the produce to the purpose of repairs; and insisted that they were not, by the covenants in the indenture, restrained from so disposing of the timber in question. That the improvements stated in the bill to have been made by the Plaintiff were made without the consent of the Defendants, and also, in some respects, in breach of his covenants.

A motion was now made, on behalf of the Defendants (the Dean and Chapter) to dissolve the injunction.

*Leach, Bell, and Dowdeswell*, in support of the motion, insisted on the right of the Defendants to cut for the purposes of repairs, according to the representation made by their answer, and that such right extended to ornamental timber, although, out of complaisance to their tenants, they had not usually exercised it with regard to ornamental timber. But the offer contained in *Lam-[425]-pard's* letter to the Plaintiff, viz. to sell the trees standing at a valuation, was a mere matter of courtesy, and did not amount to any evidence that the trees were not in fact wanted for repairs, since the money which would be paid for them might have been so applied. That it would be attended with great inconvenience and loss to the Defendants if it should be held that they were bound to apply the identical timber, and not the produce—the premises in question being at the distance of eighteen miles from the cathedral, and the principle of course extending to all the estates belonging to the Defendants, situated at whatever distance, and they referred to a case, lately decided at the Rolls, of *Exeter College* (the *Attorney-General v. Geary, Rolls, June 20*. See 3 Mer. 513), and what is said by Lord Hardwicke in *Knight v. Mosely* (Ambl. 176).

Sir *Samuel Romilly* and *Shadwell*, contra, in support of the injunction. Two questions have been made—first, whether the timber protected by this injunction does in fact lie within the premises excepted by the covenant in the indenture, and secondly, whether, supposing it not to be so included, these Defendants have a right to cut except for the purpose of applying the identical timber towards the repairs of the cathedral and buildings. As to the first question, the affidavit filed in support of this injunction is positive and conclusive, and the answer very vague and unsatisfactory. Besides, in all cases of doubtful covenant, the Court will adopt that construction which is most favourable to the covenantee. On the second point;

in *Knight v. Mosely* the question did not arise; and the case referred to, of *Ezeler College*, is no authority for the present, depending, as it did, on its own [426] peculiar circumstances, so that the general question remains unaffected by its decision. This question, also, it must be observed, is wholly independent of what may or may not be the true construction of the covenant; as it affects the general rights of ecclesiastical corporations with respect to the cutting of timber on their estates, as to which it may be generally stated that ecclesiastical persons have no such right except for the purpose of necessary repairs; and that the Statute (13 *Eliz.* c. 10) which restrains alienation by such persons on the ground of dilapidation, although it refers in express words only to the ruin and decay of buildings, is by a parity of reason to be extended to timber or any thing else which constitutes part of the inheritance. (See 2 Burn's *Eccl. Law*, 152, and the authorities there referred to.)

*Leach* in reply. A Lessee cannot assert any right in derogation of his lessor's title. In this case, admitting that the Dean and Chapter were bound specifically to apply the timber cut to the purposes of repairs, that would not give their tenant a right to restrain them from cutting, unless they are so restrained by the express terms of their covenant. And see *Jefferson v. the Bishop of Durham* (1 Bos. & Pull. 105), and *Knight v. Mosely* (Ambl. 176. *Bradly v. Stracy* (or *Strachy v. Francis*), 3 Barnard, 399; 2 Atk. 217. *Hoskins v. Featherstone*, 2 Bro. C. C. 552). But the exception in the covenant is for the purposes of repairs generally, and the injunction at all events is too extensive in terms, comprehending equally the act of cutting, and of selling when cut.

The *Lord Chancellor* [Eldon]. If the Dean and Chapter want the whole of the timber on the premises in question, for the purposes of repairs, there can be no doubt, independently of the covenant, that they would be justified in insisting that the whole shall be so applied. Unless the interests of Deans and Chapters are capable of being distinguished from those of other ecclesiastical bodies in some respect which I am unable to discern, they have this limited right to the timber without any special provision. I concur in the remark of Lord C. J. *Eyre* in *Jefferson v. the Bishop of Durham* (1 Bos. & Pull. 120, 129), on the good effect which is likely to result from the discussion of such questions. And it was by that case settled, that as only the patron can prevent a Rector or Vicar, so a Bishop cannot be prevented otherwise than by prohibition, or by injunction at the suit of the Crown, by its *Attorney-General*, from exercising the right in question. (1) The case of *Mosely v. Knight* (Ambl. 176) decides that the patron has the same right against a Rector, which the Crown, or the Metropolitan, may exercise in the case of a Bishop. There, too, Lord *Hardwicke* expressly declares (if his words are rightly reported), that parsons may not only fell timber or dig stone to repair, but that they have been indulged in selling such timber or stone, where the money has been applied in repairs. Whether it might be proper, in this case, for the Court to interfere by injunction, if an application were made by a party having a right to apply to the Court for such purpose, it is not for me now to determine; and I shall only observe this singularity in the case, that, supposing the representation made by the Defendants to be correct, that the whole of the timber is necessary to be cut down for the purpose of repairs, there would be no timber left for the like purposes hereafter.

Now it is impossible to say that a tenant holding under a particular agreement is not, with respect to the right of the ecclesiastical person (his landlord) to cut for the purpose of repairs, an uninterested stranger except so far as he may have derived any right or interest under or by virtue of his agreement. He can therefore have no title to interpose by any restrictions on the right of his landlord except what his agreement gives him. In the present case, the covenant must be construed with reference to the actual situation of the parties at the time it was entered into. It has indeed been made a point of some controversy whether an ecclesiastical person is bound specifically to apply the timber he has cut for the purpose of repairs towards the actual repairs for which it was wanted. If the case referred to be correctly reported, it was Lord *Hardwicke's* clear opinion that ecclesiastical persons are not so restricted, and I shall only add that, if it were otherwise, the obligation imposed upon them would tend greatly to defeat the general intention of law, that the possessions of the Church shall constitute a fund for the maintenance of the Church, if ecclesiastical bodies are compelled in every instance to apply the identical timber by removing it from the most distant parts of the country in which it may

happen that their property lies. The true meaning of the covenant could not be to alter the situation of [429] the parties as to the right intended to be reserved by it; and there is nothing in the terms to justify such a construction. In every former lease, as well as the present, the Defendants have expressly reserved to themselves the same right of cutting.

I am therefore of opinion that the Plaintiff in this case has no equity which this Court has a right to administer, or which authorises me to maintain the injunction. I shall only add, as matter of general observation, which may be applicable in the present instance, that, if there should ever happen, by cutting timber for repairs, not to be enough left for the purposes of repairs in future, that would necessarily be a matter of very bad and serious consequence.

[Injunction dissolved.]

Reg. Lib. B. 1816, fo. 1360.

(1) "The Crown has its officers, whose duty it is to watch over its interests. The Metropolitan may proceed against the Bishop for dilapidation. The officers of the Crown and the Metropolitan, may exercise their discretion, &c. However, I do not found my opinion on the exercise of a discretionary power residing in the Court, but that neither on principle nor on precedent are we warranted in granting this prohibition at the instance of a stranger." *Heath, J., in Jefferson v. Bp. of Durham*, 1 B. & P. 131.

LEWIS v. LOXHAM. April 28, 1817.

Bill by purchaser for specific performance, ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying. Order to dismiss, *without costs*, it being against the principles of the Court to order the Defendant to pay the Plaintiff his costs.

On a Bill by purchaser for specific performance, it was referred to the Master to enquire whether a good title could be made. The Master reported that a good title might be made with the concurrence of certain persons mentioned in his report—among others, of one *Susanna Gordon* (see 1 Mer. 179). An order was afterwards made, on petition, that it should be referred back to the [430] Master to review his report, so far as he had therein certified the necessity of *Susanna Gordon's* concurrence, and to state the grounds on which he judged such concurrence necessary. The master made his second report, setting forth the facts upon which he had proceeded in forming his judgment. To this Report exceptions were taken; and the cause now coming on upon the exceptions, and for further directions, it was agreed that the exceptions must be over-ruled, and the bill dismissed; but it was nevertheless contended, on the part of the Plaintiff, that the Defendant ought to pay the Plaintiff his costs.

Sir *S. Romilly* for the Plaintiff.

*Benyon*, for the Defendant, objected to this as contrary to the principles of the Court; and said, the constant course was to dismiss the bill without costs upon such an occasion.

Sir *S. Romilly* desired it might stand over to search for precedents; but he did not afterwards produce any, and the order was made accordingly to dismiss the bill without costs. (1)

(1) This I had *ex relatione*.

Upon reference to Reg. Lib. 1816, B. fo. 1059, however, it appears that the Defendant was ordered to pay to the Plaintiff his costs of the second reference, and of the report made thereon, but not of the former proceedings.

In *Springfield v. Ollett*, before the *Vice Chancellor*, 19th June 1817, I am informed that his Honor doubted, and seemed to think that a Bill might be dismissed, and the Defendant at the same time made to pay the costs. But the point was not decided.

[431] GEARY and OTHERS v. BEAUMONT and OTHERS. *Rolls. July 17, 1817.*

Specific legacy to an executor, who afterwards becomes bankrupt and commits a *devastavit*. The subject of the specific bequest being sold by his assignees, Held, the produce in their hands not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the will, but that such parties are only entitled to prove to the amount of the *devastavit*.

*James Taylor* by his will gave (among other things) to the Defendant *Beaumont*, his executors, &c., his leasehold house in *Norfolk Place*, for the residue of his term therein, and appointed him his executor.

The usual decree for an account was made at the hearing; but, before the Master made his report, the Defendant became bankrupt, whereupon a supplemental bill was filed against his assignees; and by a decree made on the hearing of the supplemental cause it was ordered that the former decree should be prosecuted, and the Plaintiffs (the residuary legatees) to be at liberty to go in under the commission; and the Master was thereby directed to take an account of money received by the Defendants (the assignees) in respect of the purchase-money of the leasehold estate sold by them (the assignees), and to enquire whether the same was properly sold, and under what circumstances.

In pursuance of these decrees, the Master made his report, certifying a balance due from the Defendant *Beaumont's* estate to the estate of the testator; and, with regard to the inquiries directed as to the leasehold estate sold by the Defendants (the assignees), the Master found that the Defendant *Beaumont* was, previous to his bankruptcy, a collector of taxes, and, having made default, an extent had issued, under which certain parts of his property had been taken, but the extent was not yet satisfied; and the Defendants (the assignees) being aware of the deficiency, and apprehending that the leasehold house in *Norfolk Place* (which was the same that was given by the testator's will to the Defendant *Beaumont*) would also be taken and levied under the extent, did, for the purpose of preventing the loss and expense which would thereby accrue to the estate of their bankrupt, engaged to make good the deficiency, which had been since done partly by the sale of the house in question; and under these circumstances the Master was of opinion that the house in question (being the same with reference to which the inquiries had been directed) was properly sold by the assignees under the assignment, for the sum of £340, which sum he found that they (the assignees) had received for the purchase-money thereof.

The cause now coming on for further directions, the only question was, whether, the leasehold estate in question being a specific bequest to the Defendant (the bankrupt executor) under the will of his testator, the produce of that estate, when sold by his assignees, was liable to be specifically applied to make good the *devastavit* committed by him; or whether the assignees were entitled to the produce as part of the general estate of the bankrupt, leaving the parties claiming in respect of the residue to their proof under the commission.

*Hart, Cooke, and Dowdeswell*, for the Residuary Legatees.

*Bell and Perkins* for the Assignees. The case of *Jeffs v. Wood* (2 P. Wms. 128) was cited in argument, not as a case in point, but as containing principles which were generally applicable to the subject.

[433] The Master of the *Rolls*, when the cause first came on, desired that the point (which, it seems, unexpectedly arose) might be a little more looked into. He said, that, undoubtedly, at first sight it appeared a strong proposition, that an executor, being a debtor to the estate, could take any part of it. It should seem that an executor, by assenting to his own legacy, cannot alter the case as affecting himself and it was not pretended that the assignees can stand in a different situation.

On a subsequent day the cause was again mentioned, when I was not present; but I am informed that the Counsel who argued it not producing any authorities, *His Honor* said, he was of opinion that this specific bequest could not be applied to satisfy the *devastavit*; for that, when no debts are due from the testator, the Court has nothing to do with the specific legacies, and must confine its administration to the effects not specifically bequeathed. That this was not the case of an executor applying to the Court for its assistance in the administration, but that of a hostile



application against the executor. And he therefore held that the assignees were entitled to the produce of the leasehold estate in question.

"Declare, That the £340 received by Defendants (assignees) on account of the sale of the leasehold house, No 5, *Norfolk Place*, ought not to be applied in making good assets of the Testator possessed by Defendant (Bankrupt).

"Order, Defendants (assignees) to pay into the Bank (with the privity of the Accountant General, &c.), [434] any dividends which shall from time to time become payable in respect of the debt to be proved by Plaintiffs under the commission; the amount thereof to be verified by affidavit."

Reg. Lib. 1816, A. fo. 2007.

MARY ESSINGTON, Widow, *Plaintiff*, and VASHON and OTHERS, *Defendants*. *Rolls*, July 17, 1817.

Under a bequest of "all debts due and owing to the testator at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator after the date of his will, and lent by him to the obligor, was held to pass; the day stipulated for the re-investment being passed at the time of his death; therefore not comprehended in the residuary devise enumerating (among other things) "his government stocks and funds."

Sir *William Essington*, by Will dated *June 26*, 1813, gave his household goods, &c., "and all his ready money, and debts due and owing to him at the time of his death," with other things, to the Plaintiff (his wife) absolutely; and, after giving some pecuniary legacies, he devised and bequeathed all his messuages, lands, &c., "and all his government stocks and funds," with other things, and all other his real and personal estate whatsoever not therein before given (subject to payment of his debts and funeral expenses), unto and to the use of the Defendants, *Vashon* and *Smith*, their heirs, &c., upon trust to permit the Plaintiff to receive the rents, interest, &c., during her life, and after her decease, and after payment of certain other legacies given upon that event, he directed that his said trustees should stand possessed of £600 upon trust for such persons, &c., as the Plaintiff should by deed or will appoint, and in default of appointment to fall into the residue; and, subject thereto, to stand possessed of such residue upon the trusts therein mentioned.

After making his will the Testator lent to Earl *M.* the sum of £1000 upon the security of a mortgage and bond, dated the 20th of *December* 1813. And in [435] *January* 1816, he lent the said Earl the further sum of £3096, 6s., by selling out £3500 Navy 5 *per cents.*, which belonged to him at the time of making his will, taking as a security for this further loan the Earl's bond conditioned for replacing the stock so sold out on or before the 10th of *July* following, and making good to the testator, or his executors, &c., the dividends which would otherwise have accrued due in the interim.

The Testator died on the 12th of *July* 1816; and the Bill, filed by his widow, prayed a declaration that the Plaintiff was entitled to the absolute benefit of the said bonds and mortgage, and that all necessary directions might be given for collecting the debts which were due to the Testator at the time of his death — the bonds to be delivered up, or otherwise secured for the Plaintiff's benefit.

The question was, whether the Plaintiff was or was not entitled to the benefit of these securities, and the sums secured thereby, under the bequest to her of "all debts due and owing to the Testator at the time of his death"; and it was contended, on the part of the Defendants, particularly as to the latter sum of £3096, 6s. that the condition of the bond being merely a contract to replace a specific sum of stock, from its nature of fluctuating value, the same could not be at all considered as comprehended under the term "Debts," but should rather be taken as Government stock, which it was intended to be, the day on which it was to have been replaced being already passed before the death of the Testator.

The *Master of the Rolls* [Sir *Wm. Grant*] said, that the question depended upon what was the actual description of the property at the time of the Testator's death, the bequest [436] of debts being prospective. That, the day being then passed on which the stock was to be transferred according to the condition of the bond, this was, at

that time no other than a debt due to the Testator ; and the circumstance, that the debtor might still transfer the stock, could not alter or affect the rights of the parties.

"Declare, Plaintiff entitled to the benefit of the bond and mortgage for securing £1000, and of the bond for securing the said stock, and the interest, dividends, and produce thereof. Defendants (Trustees) to proceed to get in what was due thereon, and to pay the same to the Plaintiff."

Reg. Lib. 1816, A. fo. 1474.

KEENE and OTHERS v. RILEY and OTHERS. Aug. — 1817.

Motion by simple contract creditors of one who had been a trader, but ceased to be so, and was not a trader at the time of his death, for a receiver, upon affidavit before answer, refused ; not being within the statute 47 G. 3, sess. 2, c. 74.

The Plaintiffs moved for a receiver, upon certificate of Bill filed, and affidavits.

The affidavits stated, that the Plaintiffs were simple contract creditors of the late Mr. *Riley*, who, for some time previously, and down to the time of his death, was a trader ; that one of the Defendants was his executrix, and the others his devisees and heir ; and that the executrix and devisees were wasting the real and personal estates, &c.

The Defendants, by affidavits in answer, positively swore, that the Testator, although he had formerly been a trader, had ceased to be such for a considerable time, and was not a trader at the time of his death.

[437] *Parker*, in support of the motion.

*Beames*, contra, contended, that, as the Testator had not by his will charged his real estate with the payment of his debts, this Court had no jurisdiction to appoint a receiver ; the testator not being a trader at the time of his death, as to bring the case within the late Act, 47 G. 3, sess. 2, c. 74, sect 1.

The Lord Chancellor [Eldon] upon hearing the clause read, said that was his opinion.

No order made.<sup>7</sup> (Communicated by Mr. *Beames*.)

FORBES and WIFE v. BALL and OTHERS. Rolls. Aug 11, 1817.

[See *Davies v. Thoms*, 1849, 3 De. G. & Sm. 350.]

"I give to A. C. £500, and it is my will and desire that A. C. may dispose of the same amongst her relations, as she by will may think proper." Held, a trust for the relations of A. C. and the £500 well bequeathed by the will of A. C. to her sister, and her sister's children, though made without reference to the will of the first testator. Construction of words in a residuary clause, as having reference to a contingency which had not taken place, and therefore no restriction on a preceding absolute bequest.

*Dennis Cotterel* by his will (among other things), gave as follows :—" I give to my dear wife, *Ann Cotterel*, the sum of £500 ; and it is my will and desire that my said wife, *Ann Cotterel*, may dispose of the same amongst her relations, as she by will may think proper." And, as to the residue of his estate, he bequeathed the interest and dividends to his said wife during her life, for her own proper use and benefit, and appointed her sole executrix and residuary legatee ; with a proviso in [438] the will, that, after her death, the residue of his said estate thereinbefore bequeathed to her for her life, should come to and be equally divided between the Defendant, *John Cotterel* (his son), and the Plaintiff, *Elizabeth Forbes* (his daughter), share and share alike ; but, if either of them, his said son or daughter, should die before that event should take place, leaving issue him or her surviving, then the part or share of him or her so dying should go to and be divided among his or her children, share and share alike ; but, if either of them, his said son or daughter, should die without leaving issue him or her surviving, then the survivor should enjoy the interest and dividends during his or her life ; and, after his or her decease without leaving issue as

aforesaid, the whole should go to and be divided amongst his (the Testator's) nearest relations.

*Ann Cotterel* (the Testator's widow and executrix) proved the will, and possessed herself of his personal estate, and shortly afterwards died, having made her will, by which she gave and bequeathed to her sister (the Defendant *Jane Ball*) and the Defendant *Pawson*, "the sum of £500, in trust to lay out the same in their names, in the public funds, upon trust to apply and retain the dividends to her said sister, for her own use, for her life, for and towards the maintenance of her children; and, after her death, to pay and divide the said funds unto her children (who were also made Defendants equally among them;)" and she made her said sister her residuary legatee, and appointed her, together with *Pawson*, executrix and executor of her will.

The Bill was filed by *Forbes* and his wife, claiming, in right of the wife, to be entitled, together with the Defendant *John Cotterel*, to the absolute interest in the [439] residuary estate of the Testator, in equal moieties. By the decree made on the hearing, it was referred to the Master to take an account of the Testator's personal estate received by or come to the hands of *Ann Cotterel* during her life, or of the Defendants *Jane Ball* and *Pawson* (her executors), or either of them since his death, with the usual directions. The Master by his Report found (among other things) that *Ann Cotterel* purchased £1000 bank stock with part of the Testator's property which had been received by her, and that the Defendants (her executors) since her death had sold the same, and invested £500, part of the produce, in the purchase of certain other stock, to answer the legacy of £500 given by the will of the Testator to the said *Ann Cotterel*, with power to dispose of the same amongst her relations as she by will might think proper.

The cause now coming on for further directions, the principal question raised by the pleadings was, whether the will of *Ann Cotterel* was to be taken as a due execution of the power of appointment given her by her husband's will of the £500 thereby bequeathed to her as aforesaid; or whether the same fell into the residue of his estate by reason of the non-execution of the power:—And, as to this question, the Plaintiffs insisted that *Ann Cotterel* never executed, or intended to execute, such power of appointment, and therefore the £500 fell into, and then formed part of, the residuary estate of the Testator. The Defendants on the contrary insisted that the power was well executed by the will of *Ann Cotterel*; or, if not, that it was a trust for her relations subject only to her life-interest, and, if so, in default of the appointment, the Defendant *Mrs. Ball*, as her next of kin, would be entitled absolutely. And they cited *Harding v. Glyn* (1 Atk. 469), *Brown v. Higgs* (4 Ves. 708; 5 Ves. 495; 8 Ves. 561, &c.), *Cruwys v. Col-[440]-man* (9 Ves. 319), *Birch v. Wade* (3 V. & B. 198. See also, *Wright v. Atkyns*, 17 Ves. 255. *Parsons v. Baker*, 18 Ves. 476. *Prevost v. Clarke*, 2 Madd. 458. *Mahon v. Savage*, 1 Scho. & Lef. 111), &c. Upon this point, the Court was of opinion that the words in the Testator's will raised a trust for the wife's relations, subject to her appointment; and that the same was well executed by her will in favour of her sister and her sister's children; and decreed accordingly.

The other question was, whether the Plaintiffs, in right of the Plaintiff *Elizabeth*, were entitled, together with the Defendant *John Cotterel*, absolutely, or for life only, to the residuary estate of the Testator; it being contended, against the claim of the Plaintiffs, that, although the first gift was absolute, yet the subsequent words restricted it to a life-interest. But, as to this, the Court was of opinion that the subsequent words only referred to a contingency, which had not taken place, namely, the death of the legatees, or one of them, before the death of *Ann Cotterel*, and decreed accordingly.

*Agar* and *Horne* for the Plaintiffs.

*Cooke* and *Roupell* for the Defendants *Jane Ball* and her children.

"Declare, the sum of £500 bequeathed by the will of the Testator *Denis Cotterel* was well bequeathed by the will of *Ann Cotterel* to *Jane Ball* and *Thomas Pawson* upon the trusts therein mentioned. And declare, The Plaintiff *Elizabeth Forbes* entitled to a [441] moiety of the clear residue of the Testator's estate absolutely, and the Defendant *John Cotterel* absolutely entitled to the other moiety."

Reg. Lib. A. 1816, fo. 1930 b.

KENNEDY v. LEE. Aug. 29, Nov. 12, 17, 1817.

[See *Thomas v. Blackman*, 1844, 1 Coll. 313; *Churton v. Douglas*, 1859, Johns. 188; *Chinnock v. Marchioness of Ely*, 1865, 4 De G. J. & S. 645; *Rossiter v. Miller*, 1878, 3 App. Cas. 1138.]

In order to form a contract by letter, of which the Court will decree a specific performance, nothing more is necessary than that the amount and nature of the consideration to be paid on one side, and received on the other, should be ascertained, together with a reasonable description of the subject matter of the contract. It is the clearly established doctrine that the Court will carry into execution an agreement so constituted. It is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence.

The Bill stated that, in and for several years before the year 1816, the Plaintiff and Defendant jointly carried on the trade or business of nursery gardeners and seedsmen, as partners, and in the course of the said trade or business purchased with their partnership monies, or otherwise acquired, for the benefit of their partnership, divers freehold, copyhold, and leasehold messuages, gardens, lands and tenements, and became possessed of a large stock in trade, and large sums of money became due to them as partners, and large sums of money out of the partnership property were expended in building walls, hot-houses, green-houses, and other buildings and improvements on the premises; and that they were entitled to the said partnership effects, and interested in the losses and profits of the said business, in equal shares. That the accounts of the partnership were usually taken and settled about *Midsummer* in every year. That, in the month of *April* 1816, the Plaintiff gave to the Defendant a verbal notice of his (Plaintiff's) intention to dissolve the partnership at *Midsummer* then next ensuing, and the Defendant verbally accepted such notice, whereupon some [442] discussion took place between the Plaintiff's solicitor and the Defendant, as to the mode of dissolving the partnership, and, in the month of *October* 1816, the Defendant delivered to the Plaintiff a valuation made by him (the Defendant) of the messuages, &c., and effects belonging to the partnership, whereby the partnership property, exclusive of the bonds and book debts, appeared to be under the value of £16,000; and at the same time the Plaintiff caused an estimate of the same partnership property to be delivered to the Defendant on his behalf, by which last-mentioned estimate the same property appeared to be of the value of £32,000 or thereabouts. That the Defendant proposed to give to the Plaintiff the sum of £8000 for the Plaintiff's moiety, and the Plaintiff thereupon wrote and sent to the Defendant a letter, dated 21st *October* 1816, as follows:—"I did not wish to part with my concern in the nursery altogether, until I had seen my son *Lewis*. As I received a portion of the property in hereditary succession, I considered I ought to consult the rightful successor to the business, although the whole right may rest with me in the disposal of it. We yesterday morning canvassed the matter, and he has no objection to the sale of it, but from the low estimation you seem to form of the concern, which certainly has attained its apex in this line of business, from the very large sums and sacrifices which have been expended and made to promote this end. Now, although the business of the last year did not realize as much as the antecedent ones, yet, upon a calculation of the amounts for the last twelve years, the average of receipt has been upwards of £1500 *per annum* each, and, upon an average of six years last, £1800 *per annum*, besides the rent of houses, taxes, coals, &c., which have been paid from the joint stock, making the sum in the last six years equal to £2000 *per annum*, [443] each, besides the very great accumulations to the book-debts, and the large sums added to the aggrandizement of the nursery. Now, the £2000 *per annum* alone, at 5 *per cent.*, is £40,000; but, put it as acquired by business, and consequently attention and labour required, say 10 *per cent.* clear, this makes the value of such a business so producing, worth at least £20,000 upon the lowest average."—"I must own, I wish you to have it in preference. As to taking any securities for part of the money, I have no sort of objection, and that the book-debts may be either

divided or collected by either of us, as we may choose, or taken at a sum certain. If you will have the goodness to put your ideas upon paper to me, I shall be obliged ; as, although unwillingly, yet I come prepared to say, that if you are willing, and think so poorly of the affair, I will certainly, against my inclination, still continue in business, by offering you in cash any sum in reason you shall propose for its value, as my son thinks we perhaps may be able to manage it together." That, in reply, the Defendant wrote and sent to the Plaintiff a letter bearing date the 23d of October 1816, as follows : " Dear Sir,—As you think the just value of the nursery is £20,000, and add that you and your son can carry it on without much difficulty, I will readily sell you my inheritance of it for £10,000 ; and, that no opposition may stand in the way of your wishes, I will also sell you *Butterwick* at its fair value. I will also sell you my garden for what it has cost me, the best cultivated spot in *England* for its size, and the most productive." The Bill then proceeded to state, that *Butterwick* and the garden mentioned in the Defendant's letter were the sole property of the Defendant, and that the Plaintiff did not desire to purchase them, but accepted the Defendant's offer to sell his share in the partnership property at the price of £10,000, and accordingly, on receipt of his letter, wrote to the Defendant as follows, October 26, 1816 : " Dear Sir,—Allow me to ask you in what time and manner you would propose to have the whole £10,000 paid, as offered in your last letter." In reply to which, the Defendant wrote and sent to the Plaintiff another letter, as follows : " Dear Sir,—You know I have a large family, I therefore cannot be idle. As I mean to carry on business, I shall want the cash, either to go into partnership, or to raise a nursery by myself. There is no doing this without money. In regard to the book-debts, they may be divided as collected half-yearly, or annually, or as fixed upon. The bonds may be divided." And that thereupon the Plaintiff wrote again to the Defendant as follows : " 28th October 1816. Dear Sir,—I agree to give you £10,000 as you mention, for your moiety of all your partnership premises, stock, business, and concern, excepting our bonds and book-debts, comprising therefore our copyhold called *Swansfield*, our freehold at *Feltham*, our leasehold at *Stanwell*, our various leaseholds and nurseries in the parish of *Hammersmith* and *Fulham*, with all the erections, buildings, and all green-houses and plants and improvements made thereon, and all our stock in trade, instruments and utensils, and all other our partnership property, except the bonds and book-debts as above mentioned. I am prepared to pay the sum as soon as the proper conveyances and deeds can be made out, and I would therefore beg you to let me have the title-deeds and papers concerning the premises, that my Solicitor may prepare the necessary papers without delay. I will divide the bonds, and arrange the book-debts with you, as you mentioned." Another letter of the Defendant's without date, but supposed to be of the same date with the preceding letter of the Plaintiff's, was also in evidence between the parties, although not stated in the Bill nor referred to by the answer, viz. " Sir,—I propose the following conditions, which I mean to lay before my friends, with your proposal, before I put my name to any thing, as I have not consulted any one yet. The partnership to cease *Midsummer* 1817. The stock of *Butterwick* to be taken by Mr. Lee, according to Mr. Kennedy's valuation given in. Mr. Lee to remain in his house until he can conveniently remove after *Midsummer*, &c. When I have consulted my friends, you shall hear further." The bill then insisting that by the aforesaid letters a binding contract had been made between the Plaintiff and Defendant for the Plaintiff to purchase, and for the Defendant to sell, his moiety of the partnership property, exclusive of bonds and book-debts, at the price of £10,000, prayed that the Defendant might be decreed specifically to perform the said contract, and to convey and assign to the Plaintiff all the partnership property, exclusive of the bond-debts, and book-debts due thereto, the Plaintiff being thereupon ready and willing to pay the said sum of £10,000 to the Defendant, and that the bond-debts and book-debts might either be collected, and the produce thereof divided between the Plaintiff and Defendant, or that the same might be divided, and one moiety thereof assigned to the Plaintiff, and the other moiety to the Defendant ; and, in case the Court should be of opinion that the contract ought not to be performed, then that the partnership might be dissolved, and the accounts thereof taken, and the property sold and divided between the Plaintiff and Defendant ; and that in the mean time the Defendant might be restrained from carrying on the

business of the partnership, and from acting as the partner of the Plaintiff, and that some proper person or persons might be appointed to manage and conduct the said business, and to collect and receive the debts due to the partnership.

[446] The Defendant by his answer denied that the Plaintiff ever gave him notice of his intention to dissolve the partnership at *Midsummer*, or that any thing passed between them relative to a dissolution (more than some hasty words dropped in the course of a dispute which took place in the month of *April* preceding, but which by no means amounted to such notice) until the 22d of *August* 1816, when the Plaintiff's solicitor wrote to the Defendant a letter, reminding him of the conversation which then passed between them, and pressing an immediate and final settlement. He said that, after receiving this letter, he had some further conversation with the Plaintiff on the subject, when the latter gave his reasons for wishing a dissolution. He admitted the valuations made on each side, and the correspondence, alleging that he never conceived himself to be bound thereby, but only considered the proposals made in the light of a treaty ; submitting, therefore, that no binding contract or agreement had been made between them ; that the Plaintiff had given to the Defendant no notice which amounted to a dissolution of the partnership, and resisting the appointment of a receiver and the injunction.

The questions in the cause were first brought before the Court upon a motion by the Plaintiff for a receiver and an injunction, according to the prayer of the bill. His Lordship, after hearing the Counsel on both sides, requested to be informed if the parties were willing that the cause should be considered as having come on to be heard on Bill and Answer ; and, the parties having intimated their consent that it should be so considered, the motion stood over till the last day of the Sittings after *Trinity* Term, when His Lordship, after stating and minutely commenting upon the terms of the correspondence between the parties, expressed his opinion on the case, as follows :

[447] The *Lord Chancellor* [Eldon]. The question is, whether this correspondence, closing thus with an offer, has formed a binding contract. Now, in order to form a contract by letter, I apprehend nothing more is necessary than this ; that, when one man makes an offer to another to sell for so much, and the other closes with the terms of his offer, there must be a fair understanding on the part of each, as to what is to be the purchase-money, and how it is to be paid, and also a reasonable description of the subject of the bargain. The Defendant, Mr. *Lee*, I am satisfied, was not aware of the precise effect of this correspondence ; but I am afraid, be that as it may, if the letters amount to a contract, so considered, that the Plaintiff has a right to have the contract specifically executed. After the letter of the 28th of *October*, Mr. *Lee* writes a letter, in which he says he will sign nothing until he has consulted his attorney or friend. Then the question is, whether this letter, being actually signed by *Lee*, can be taken to be a contract already entered into with Mr. *Kennedy* ? With regard to that, it appears to me, when *Lee* makes an offer of selling his share in the nursery for £10,000, and also *Butterwick* and the garden at the sum which they cost him, that £10,000 was the sum which was asked for the nursery, independent of any proposal for *Butterwick*. Whether he took *Butterwick* or not, it was the same thing ; but he might take it if he pleased, at the sum it had cost the Defendant. *Kennedy* (the Plaintiff) then writes to know, in what time and manner he would have the money paid, and he makes the offer of £10,000, if the time and manner of the stipulated payments should be convenient. *Lee* (the Defendant) writes him back that the time and manner would be as soon as the title deeds were made out. This then was an agreement on one side, and, if accepted by the other, was binding on both, although it should turn out to be a surprise on the one or the other. It is binding on *Lee*, unless *Kennedy*, [448] in his subsequent letter of the 28th of *October*, has gone beyond the fact in the description of the articles which are really comprised under the denomination of the nursery concern. If the description of the property is correct in what it points out as being the nursery concern, it appears to me that this is a binding agreement between these parties ; but, if it goes beyond that, it must so far be considered as a new proposition, and must be treated as such ; and then it would be exceedingly difficult to say it was binding. In other words, if the detail of the subject in the last letter truly describes it as the nursery concern, I think the bargain is completed ; but, if that is not an accurate view of the property, I am not prepared to say the contract is complete.

I do not mean to conclude you, however, by what I now say. I think it a hard case on Mr. Lee; but you may understand that this is my judgment upon it, unless the parties wish to have it re-argued at the next seal. I cannot grant a receiver of this property; because, if this be a binding contract, whom should I appoint to receive it? and, if it be not a binding contract, I have no right to appoint a receiver.

In consequence of the intimation at the close of the preceding observations, the case was now argued afresh before the *Lord Chancellor*.

*Leach and Horne* for the Defendant.

*Sir Samuel Romilly, Bell, and Shadwell*, for the Plaintiff.

On behalf of the former, it was urged that the Plaintiff's letter, of the 28th of October 1816, was manifestly not a simple acceptance of the Defendant's offer contained in his letters of the 23d and 26th of that month, because the Plaintiff there expresses his agreement to give £10,000 for the Defendant's moiety of the partnership [449] premises, stock, "business and concern," by which last word it was contended that the good-will of the business must be meant, which the Defendant had never offered, and had never for a moment intended to part with. And this, it was said, was manifest from the whole tenor of the correspondence, in which the Defendant invariably spoke of his continuing in business; that the good-will of such a business was alone of very considerable value; and that no price had been specifically set upon it in either of the estimates. That it was according to frequent practice for one partner to sell to another the partnership stock and effects, &c., without including the good-will, which was always considered as a distinct property, and capable of separate assignment; and that, in this case, the insertion of it in the Plaintiff's letter must be viewed as a surprise on the Defendant, of which a Court of Equity would not allow any advantage to be taken. or, if otherwise meant, as forming the basis of a new treaty, of which the letter in question was only the commencement. But, if it were to depend on the original offer, and its acceptance, they still contended that the offer itself, viz. "to sell the inheritance of the nursery for £10,000," did not contain any expression of those matters, which in His Lordship's opinion it was necessary to have expressed, in order to form a binding contract; saying nothing as to time, manner, possession of the property, or dissolution of the partnership; mentioning nothing but price; and leaving every thing else to future arrangement. Besides which, it was again urged that this offer, properly construed, was an offer to sell the share of the nursery at £10,000, and *Butterwick* also, at a price to be ascertained; and that an acceptance as to one part only could not be considered as forming any contract, since there was no offer to sell the one without the other.

[450] With respect to cases in which the Court, though it would not set aside an agreement which had been actually carried into execution, would either decree an agreement which had not been created to be delivered up, or would interfere neither in the one way nor in the other, but leave the parties to law, *The Marquis of Townsend v. Stangroom* (6 Ves. 328. See *Willan v. Willan*, 16 Ves. 83. *Sugd. Vend. and Purch. passim*) was cited.

The *Lord Chancellor*. Whether it might be better, or not, that this Court had never entertained such suits for the specific performance of agreements which are left to be made out by the terms of a correspondence between the parties, as the present, it cannot, however, be disputed that it has been long since settled, as the doctrine of the Court, that such agreements, when clearly made out, will be established; and that, if a correspondence is of such a nature as, according to the rules of sound legal interpretation, would amount to an agreement, the agreement so constituted will be carried into effect in the same manner as if it had been regularly drawn up in the form of articles of agreement, and signed by the parties as such—that, in fact, the Court will, in all such cases, regard, not the form of the agreement, but the substance, whether or not, in point of fact, such an agreement has been entered into; in the same manner as, where the agreement contains a proviso, in the nature of a penalty, in case of breach of the agreement, a specific performance will nevertheless be denied, as if no such proviso had been inserted. (*Howard v. Hopkins*, 2 Atk. 371. And see *Sugd. Vend. and Purch.* 183 (4th ed.).

[451] It must be understood, however, that the party seeking the specific performance of such an agreement, is bound to find in the correspondence, not merely a treaty—still less, a proposal—for an agreement; but a treaty, with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of

acceptance, which makes it no longer the act of one party, but of both. It follows that he is bound to point out to the Court, upon the face of the correspondence, a clear description of the subject-matter, relative to which the contract was in fact made and entered into. I do not mean (because the cases which have been decided would not bear me out in going so far), that I am to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto* arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument—the only difference between them being, that a letter, or a correspondence, is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.

It must also be understood, that, in a case where there has been, on one hand, a general proposal, and on the other an acceptance of that proposal, expressly leaving some particulars essential to the subject-matter of the agreement to be afterwards settled, there is no evidence before the Court of such a contract as the Court can enforce upon the ground of the cardinal points having been agreed to between the parties.

[His Lordship then again went through the several facts of the case, as connected with the correspondence, [452] and proceeded to consider the terms of the correspondence itself.]

Where two persons are jointly interested in trade, and one by purchase becomes sole owner of the partnership property, the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit, essentially connected with the sole ownership. In the case of the trade of a nursery-man, for instance, the mere knowledge of the fact that he is sole owner of the property, and in the sole and exclusive management of the concern, gives him an advantage which the other partner, supposing him to carry on the same trade, with other property not the partnership property, would not possess. In that sense, therefore, the good-will of a trade follows from, and is connected with, the fact of sole ownership. There is another way in which the good-will of a trade may be rendered still more valuable; as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account. Now it is evident that, in neither sense, was the good-will of this trade at all considered as among the subjects of the valuation to be made by either party. It was not so considered by the Plaintiff when he wrote his letter of the 21st of *October*. The words "concern" and "inheritance" are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. And, when the Plaintiff offers to take the business himself, he could not have forgotten that the [453] Defendant's own estate of *Butterwick* lay contiguous to the partnership property, and therefore his introducing no stipulation with reference to the fact of its contiguity is a clear intimation that, when he wrote this letter, he had no intention, in offering to take the partnership property, to purchase with it the good-will, in the sense of restricting the Defendant from carrying on trade in its vicinity. In that sense, at least, therefore, the good-will of the trade was not the subject of contract, or treaty even, between the parties.

Then comes the Defendant's letter of the 23d, which shews that the Defendant had then so far departed from his original determination as to make an offer to the Plaintiff of his estate of *Butterwick* and the garden, besides taking his share of the partnership property. He considers the Plaintiff by his letter of the 21st as having made him an offer to purchase his share of the partnership property for £10,000, and he accepts that offer, and at the same time tenders to the Plaintiff the purchase of *Butterwick* and the garden upon certain terms therein referred to, if he will have them. This acceptance and this offer are not necessarily connected. On the contrary, I cannot look at this letter, with reference to the offer of *Butterwick*, as any thing more than a new and distinct proposal on the part of the Defendant, which the Plaintiff might, or might not, close with, but which, in either event, could have no bearing upon the cardinal points of the agreement, which must now be considered as settled. Where one man writes to another a letter containing an offer, which the



other accepts, that acceptance gives to the person making the offer, an immediate right to say to the other, As soon as I can shew that I have the means of carrying my offer into execution, I am entitled to claim the benefit of your acceptance in the completion of the agreement. [454] If then the bargain had been struck on the 23d of October by an immediate answer from the Plaintiff, no question could possibly have arisen about what was intended as the subject-matter of the contract between the parties, with reference to the good-will, since it is plain that nothing was understood or agreed to be sold but the good-will necessarily arising from the mere fact of accidental ownership. However, instead of a direct immediate acceptance on the part of the Plaintiff, there passes some further correspondence as to the time and manner of payment, after which comes the Plaintiff's concluding letter of the 28th of October; and, upon that letter, the true question is, whether it amounts to a final acceptance of the Defendant's offer, regard being had to what had passed in the intermediate time. And, if by the words "business and concern," the Plaintiff can be fairly taken as having meant any thing more than the property which was the original subject of valuation between the parties,—that is, than the specific articles constituting the property of the partnership, together with that sort of good-will which arises from, and is inseparably attached to, the sole ownership, I am of opinion that he must be considered as having introduced a new term into the subject-matter of the agreement, and therefore not to be entitled to a specific performance of any part of that agreement. But, upon the whole correspondence, and the facts of the case, taken together, I cannot but think that this letter is a virtual acceptance of the agreement made by the Defendant to close with the Plaintiff's original offer, and that, if more was meant, it is not so expressed as to vitiate the agreement, or to constitute the terms of a new and additional proposal. I have always understood the law of the Court to be, with reference to this sort of contract, that, if a person communicates his acceptance of an offer within a reasonable time after the offer being [455] made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute. I apprehend, therefore, that it is not competent to the Defendant to say, I made my proposal on the 23d—you propose terms of arrangement on the 26th, and do not finally agree to my proposal before the 28th; therefore, there is no binding agreement between us—I will not now carry into effect my proposal such as you have agreed to accept it. It is not in the Defendant's power, after this, to add terms in modification of that agreement.

Upon the whole, my opinion is this—that the terms of the contract, and its subject-matter, are sufficiently stated; but that the Plaintiff has no right, according to the contract, to claim any good-will in the trade in addition to the partnership property which is the subject of it, except what is the necessary effect of his acquiring the sole ownership in the property—certainly not such as to preclude the Defendant from carrying on the same trade, where, and when, and with whom he pleases.

[456] BISCOE v. WILKS. Nov. 13, 17, 18, 1817.

Specific performance decreed, with costs, in a case, where the Defendant, objecting to title, had been served with notice of a prior decision in a different cause in favour of the same title, against a similar objection.

This was a Bill for a specific performance, filed by the same parties as were Plaintiffs in the case of *Biscoe v. Perkins* (reported, 1 Ves. & Bea. 485), against *Wilks*, as the purchaser of other lots of the same estate, and at the same sale at which *Perkins* had purchased the lots which were the subject-matter of the specific performance sought and decreed in the former cause. The present Bill charged the filing of the Bill in *Biscoe v. Perkins*; that *Perkins* (the Defendant in that suit), by his answer, alleged that the Plaintiffs could not make a good title, for the reasons stated in the Report above referred to; and that that cause came on to be argued before the Lord Chancellor, when His Lordship, notwithstanding the arguments of the counsel for the Defendant, decreed a specific performance. That an accurate note of His Lordship's judgment having been taken by a short-hand writer, employed on behalf

of the Plaintiffs, a copy thereof was afterwards served on the Defendant *Wilks*, who, nevertheless, refused, and still persisted in refusing, to complete his agreement.

*Wilks*, by his answer, admitted that he had refused, and said that he did so refuse by reason that he was advised the Plaintiffs were unable to make a good title. He did not know whether the objection stated in the answer had, or had not, been insisted on by the counsel for the Defendant *Perkins* at the trial of the former cause, nor whether the note of the *Lord Chancellor's* judgment which had been delivered to him was, or was not, accurate. He then stated the grounds of the objection taken by him to the title, which were the same as those of the objection taken in *Biscoe v. Perkins*; and he insisted that, there-[457]-fore, he ought not to be compelled to complete his contract.

This cause came on to be heard before the *Lord Chancellor*, when His Lordship decreed the agreement to be specifically performed; but, upon the question of costs, it was suggested to the Court that the same question had occurred in another cause, which was then before the House of Lords, on appeal, the name of which was not stated. His Lordship therefore ordered the question of costs to be reserved, that the counsel for the Defendant might be at liberty to ascertain and state to the Court what were the circumstances of the case referred to.

17 Nov. This day the principal case was again mentioned, and nothing was said on the part of the Defendant; when His Lordship was pleased to order that, if no case was produced the next day, the Defendant should pay the costs of the suit.

18 Nov. No such case being produced as that referred to, the order was this day made accordingly.

*Leach and Newland* for the Plaintiffs.

*Sir S. Romilly, Trower, and Glyn*, for the Defendant.

Reg. Lib. A. 1817, fo. 649.

[458] Between WILLIAM SIMS, *Plaintiff*, and MATILDA RIDGE, (Widow and Administratrix of J. H. RIDGE, deceased), J. COCKS, J. S. COCKS, and GEORGE RIDGE, *Defendants*. And between the said GEORGE RIDGE, *Plaintiff*, and the said MATILDA RIDGE, *Defendant*. Nov. 22, 1817.

In case of unreasonable delay in prosecuting a decree in a suit by next of kin against an administratrix, the Court will give leave to a creditor to prosecute a decree which has been so neglected.

This was a motion, on the part of the Plaintiff in the first cause, that he might be at liberty to go before the Master to whom the second cause stood referred, and to prosecute the said second cause as if he were a party thereto; and to examine the Defendant, *Matilda Ridge*, and such other persons as he might be advised, upon interrogatories in the said second suit; and that the said Defendant might be ordered forthwith to pay into Court in the second cause, to an account to be entitled, "The Account of *J. H. Ridge*, the Intestate," the amount of the money received by her from the sale of the intestate's effects, and all other monies received by her on account thereof, to be verified by affidavit; and that the costs of the Plaintiff in the first-mentioned cause, and of the present application, might be taxed, as between solicitor and client, and paid by the Defendant out of the intestate's estate.

By the affidavit of the Plaintiff *Sims's* solicitor, it appeared that, on the 14th of November 1816, an action was commenced in the Common Pleas, at the suit of the Plaintiff, against the Defendant, *Matilda Sims*, as widow and administratrix, upon the joint and several bond of the intestate and others, for £4900: that the Defendant, the administratrix, appeared to that action, and (as the [459] Deponent believes) for the purpose of defeating it, confessed a judgment at the suit of the two Defendants *Cocks* and the Defendant *George Ridge*, for £140,000 (which judgment appeared to be signed on the 19th of November 1816); and, on the 26th of the same month, filed a special plea of such judgment. That, in consequence of such plea, the Deponent (the Plaintiff's solicitor) on the 28th of the same month informed the solicitor for the administratrix, that his client would not be satisfied until the intestate's affairs had been properly investigated, and that his only remedy was to file a creditor's bill against the administratrix, and, on the 2d of December, he made the same communication to the solicitor for the other Defendants. That neither of these solicitors

intimated to the Deponent any intention of filing a Bill, and, consequently, the Deponent, on the 16th of *December*, instituted the first-mentioned suit, and, on the 19th, gave the solicitors for all the Defendants information of its being instituted, and of the subject of it. That neither of the Defendants appeared to the Bill for a considerable time after it was filed ; but, on the 27th of *January* 1817, the Deponent was surprised to see an advertisement for creditors of the intestate to come in and prove their debts before the Master, pursuant to a decree in a cause of *Ridge v. Ridge*, which was the first notice he had had of the existence of the second of the above-mentioned causes ; and, if he had known of it, he should not have proceeded in the suit which he had instituted. It appeared that the Bill in this second cause was filed on the 13th of *December* by *George Ridge* (one of the Defendants in the first cause), as one of the intestate's next of kin, claiming a share of the surplus. That, on the 21st of *December*, the administratrix put in her answer, without oath, and not setting out any account ; and that the decree was made by consent, on the 23d of the same month. That the Deponent was afterwards informed, [460] by *George Ridge's* solicitor, that the cause of *Ridge v. Ridge* had the same object with that of *Sims v. Ridge* ; that the accounts should be passed, and the suit prosecuted, with as little delay as possible ; and that, if the Plaintiff *Sims* would prove his debt, his costs should be paid out of the intestate's estate, as he had had no notice of the decree. That the Plaintiff *Sims* consented thereto, and thereupon the sum of £4900, for principal money and interest on his debt, and £8, 6s. 10d. for his taxed costs at law, were allowed him before the Master. That, on the 11th of *November* 1817, the Deponent made enquiry at the Master's office if the examination of the administratrix, in the cause of *Ridge v. Ridge*, had been carried in, and was informed of the contrary ; and that it appeared no warrant had been taken out, since the first seal, before the present term, to compel her to pass her accounts as administratrix.

This statement was met by an affidavit on the part of *George Ridge* (Defendant in the first, and Plaintiff in the second cause), explaining the nature of the debt (a *bona fide* debt from the intestate to the house of *Cocks and Ridge*, bankers), to secure which debt the bond was given, on which judgment had been entered up as aforesaid. It stated that judgment had been so entered up thereon, with the consent of the administratrix, to avoid litigation, an action having been previously commenced on the bond, and all the Defendants being ignorant of the action commenced by the Plaintiff ; and that, afterwards, when the Plaintiff's solicitor enquired concerning the debt, and was informed of its nature, he expressed himself satisfied, and intimated no intention of instituting any proceedings to investigate the intestate's accounts. That the affairs of the intestate being much embarrassed at the time of his death, and it being represented to *George Ridge* (who was the father, and one of [461] the next of kin of the intestate), that many claims on his estate were connected with usurious and illegal transactions, which it would be well to investigate by means of a suit in Equity, the said *George Ridge* gave directions for such suit to be commenced, and which was commenced accordingly on the 13th, and the decree made on the 23d of *December*, as above stated, which decree was duly passed and entered as soon as the same could be procured to be passed by the register, and interrogatories for the examination of the Defendant administratrix left in the Master's office on the 23d, and allowed by him on the 31st of *January* following. That, in consequence of the advertisement for creditors, debts to a considerable amount had been proved before the Master, and, among others, the debt due to *Cocks and Ridge* as aforesaid ; and other claims, to the amount of many thousands, had been made on the estate, which were then in a course of administration ; besides which there were debts due to persons beyond the seas, who would be excluded the benefit of the decree, unless sufficient time were allowed them to come in and establish their claims. That warrants were taken out on the 18th and 21st of *July*, returnable on the 21st and 25th respectively, for the administratrix to bring in her examination ; and the Master had himself thought fit, under the circumstances, to allow her time till the 1st of *November* for that purpose. That, since the expiration of that time, the Deponent had often applied to the Defendant, the administratrix's solicitor, to put in the examination, and he had promised to do so, stating, however, that the monies in the hands of the administratrix were to an inconsiderable amount, and that the assets of the intestate consisted almost wholly of a debt due from a person resident in the *East Indies*, which they were taking proper steps to recover.

The affidavit proceeded to state that the suit of *Ridge v. Ridge* was [462] instituted for no other purpose than that of procuring an account of the intestate's personal estate and the administration thereof, in a due course, under the indemnity of the Court; that no improper or unnecessary delay had taken place in the conduct of it; and the Deponent had from time to time acquainted the Plaintiff *Sims's* solicitor, with the state of proceedings, on which he never intimated any dissatisfaction, or complained of any delay, till the 11th of *November* 1817, when notice was given of the present application.

Sir *S. Romilly* and *Roots*, in support of the motion, referred to the case of *Powell v. Wallworth* (2 Madd. 183) before the *Vice Chancellor*, where leave was given to a creditor to prosecute a suit, the decree in which had been made some time before, and had never been prosecuted.

Sir *Arthur Piggoit* and *Dowdeswell*, contra, for *George Ridge* (one of the Defendants in the first, and Plaintiff in the second cause).

There is no instance of the Court taking out of the hands of the next of kin a suit instituted by him, to put it into the hands of a creditor. The suit so commenced must necessarily involve accounts of all debts and demands on the estate; and the Court will take care that the purposes of justice shall not be defeated by it. It is said the estate is insolvent, and therefore there is no interest in the next of kin to prosecute the suit; but no proof is offered of this, nor of any unnecessary delay in the conduct of the suit. The case cited does not bear out the application now made, and no other authority has been mentioned.

[463] *Agar*, for the Defendant, the administratrix. The motion, as against *Mrs. Ridge*, must certainly be refused. The Master thought fit to give her till the last seal to put in her examination, and no time has since elapsed to justify such an application.

Sir *S. Romilly* in reply. I certainly do not recollect any instance of this sort of application being granted; but it is surely even more consistent with reason to allow a creditor to prosecute a suit commenced by the next of kin (where there has been delay in the prosecution) than to prosecute a creditor's suit. In many instances, it may be for the interest of the next of kin to delay proceedings, but that cannot be the case with a creditor's suit. The present case is very peculiar. Here the next of kin suing is also a principal creditor, and he *chuses* to file the bill in the character of next of kin, and not of creditor. I admit that it depends on the question, whether there has, or has not, been any improper delay; but here, how can they account for the delay between the settling of the interrogatories and taking out the warrants for the widow's examination? If any excuse for delay is afforded by the circumstance of the great debt coming from *India*, that, at least, affords ground for the appointment of a receiver, which ought to have been applied for.

The *Lord Chancellor* [Eldon]. It is admitted, that if the suit, which this is an application for leave to prosecute, had been a suit commenced by creditors on behalf of themselves and all other creditors of the intestate, the application would not have been very unusual. Undoubtedly, the practice ought to be so; because one creditor may very well be the friend of the party or his representative, and inclined [464] unjustly to favour the estate; and the Court will go further, for the purpose of prompting to diligence, even to the extent of giving costs to the party making the application. I remember when, where a decree had been obtained by a residuary legatee, a creditor was not allowed to come in under such decree; and it was determined that he should be admitted to do so, upon principles fully as much applying to the case of the next of kin suing an administratrix, as of a residuary legatee suing an executor. Supposing, therefore, there should be no authority at all to be produced in favour of this application by a creditor, where the suit has been instituted by the next of kin, I should yet have no hesitation in saying that he ought to be allowed to prosecute the suit, if there is sufficient proof of want of reasonable diligence. Formerly, by bringing an action, a man might have recovered a debt due to him from the estate of the deceased. But if, according to the present practice, he may be prevented by the institution of an amicable suit, it is obvious what will be the case with all creditors, unless leave is given them to prosecute, in the event of improper delay.

[In the present case, His Lordship made no immediate order, but was pleased

to direct that the motion should stand over until the second seal after Term, when the Plaintiff was to be at liberty to state to the Court how the examination had in the mean time been proceeded with.]

It appears from the register's book, that an order was afterwards made (it should seem by consent), that the Defendant do, within four days after personal notice thereof to her clerk in Court, put in her examination [465] to the interrogatories allowed by the Master; or, in default, a serjeant-at-arms should apprehend her, and bring her to the bar to answer her contempt; whereupon such further order should be made as should be just.

Reg. Lib. B. 1817, fol. 617. (Nov. 25, 1818.)

DIPPER v. DURANT. Nov. 28, 1817.

Amendment of Bill, after exceptions allowed, and not answered, does not prejudice an injunction previously obtained. Therefore, a motion of course for leave to amend, and that Defendant may answer amendments and exceptions together.

This was a Bill for an injunction to stay proceedings at law. The common injunction had been obtained; and the Defendant had since put in an answer, to which exceptions were taken.

*Treslove*, for the Plaintiff, now moved, as of course, for leave to amend, without prejudice to the injunction, and that the Defendant might answer the amendments and exceptions together. The register had expressed a doubt whether this was a motion of course; but *Treslove* said he apprehended that it had been expressly decided so to be by his Lordship.

The *Lord Chancellor* [Eldon] said that it was of course, so long as the Defendant had not put in a further answer; (1) and made the order accordingly.

Reg. Lib. A. 1817, fo. 120.

In the order, nothing is said as to the injunction being saved; which agrees with the case before the *Vice Chancellor* referred to in note (1).

(1) See *Adney v. Flood*, 1 Madd. 449, where the *Vice Chancellor* says, the words "without prejudice to the injunction" were unnecessary; for in this case the amendment would not affect the injunction. It was there moved specially upon notice.

[466] BURKETT and WIFE (and OTHERS), *Plaintiffs*, and RANDALL (and OTHERS), *Defendants*. *Rolls*. Dec. 2, 1817.

(By Original Bill and Bill of Revivor.)—Bill by Devisees praying a conveyance upon the ground of an alleged equitable title in the testator originating in an agreement, which was denied by the Answer, but supported by evidence of ownership, as the receipt of rents and profits, &c. Issue directed to try whether the testator was at his death beneficially entitled.

The Bill stated that *John Soan* (Defendant to the original Bill), being seised in fee of the premises in question, subject to a lease for twenty-one years commencing at Christmas 1787, agreed to sell the same, subject to such lease, to his brother *Thomas Soan*, for £500. That, in pursuance of such agreement, he delivered up the title deeds, and received the purchase-money, but no conveyance had ever been made. That *Thomas* thereupon entered into receipt of the rents and profits, and on the 4th of July 1797, he (*Thomas*), as owner of the premises, granted a lease for ten years, and on the 26th of May 1800, a further lease for forty years, to the then tenant under the lease of 1787, on the surrender of his original lease; and that both the new leases were subsequently assigned to *Leaver* (one of the Plaintiffs), who was in possession under the same. That, in 1810, *Thomas* died, having by

his will given to his brother *John* the rents and profits of these premises (among others) for his life; and the residue of all his property, real and personal, in trust for the Plaintiff *Harriet Burkett*, and having appointed *Smith* and *Hibbert* (Plaintiffs) and their heirs, &c., trustees and executors, who proved the will. The Bill further stated that in *Hilary* term 1812, the Defendant *John Soan* commenced an action of ejectment against the Plaintiff *Leaver*; the term for which the original lease of 1787 was granted having expired in 1808, and no claim being then set up, nor any call made on *Thomas Soan* during his life-time to account for the subsequent rents and profits. The Bill prayed that the Defendant [467] might be decreed to make to the Plaintiffs (*Smith* and *Hibbert*) devisees in trust of *Thomas Soan* deceased, a proper conveyance, subject to the life interest of the Defendant under his will; a reference to the Master to settle such conveyance, and an injunction to stay proceedings in the ejectment.

The Defendant *John Soan* having died, the suit was revived against his representatives, who, by their answer, stated that the title deeds were delivered by the said Defendant to his brother *Thomas* only in order to make him a qualification for a sporting licence. They denied the alleged agreement, and also denied that the Defendant had received any consideration. They insisted that, if any leases had been made by *Thomas* (about which they knew nothing) they were fraudulent and void; and although they admitted that *Thomas* had been in receipt of the rents and profits, they said that he received the same only as agent for, and duly accounted for the same with, the Defendant; or, if he did not always duly account, that it was only by the permission of the Defendant that he was allowed to retain the same. And they further added that by his will the said Defendant had given these premises (among others) to the then Defendants (his representatives) expressly on trust for sale.

The Answer was replied to, and the Plaintiffs went into evidence in support of the allegations in their Bill; which evidence was altogether circumstantial as to acts of ownership, &c., particularly as to *Thomas* having himself redeemed the land-tax.

The cause now coming on to be heard, Sir *S. Romilly*, *Hart* and *Roupell*, for the Plaintiffs, pressed for an issue.

[468] *Cooke* and *Fisher*, for the principal Defendants, opposed this application, insisting that there was no sufficient ground for directing an issue; besides that, how was a court of law to determine, whether the Plaintiff had an equitable interest? That the true question, whether the Plaintiff had made out a case to entitle him to a specific performance, was for this Court to determine; and, if not, the Bill must be dismissed.

Sir *S. Romilly*, in reply. The Bill is not for a specific performance, but to have a conveyance of the legal estate from parties who are mere trustees, upon the ground of an alleged equitable title; and the single question is whether, if the evidence is not sufficient to induce the Court to decree a conveyance, there is not at least enough to send it to a court of law to determine in whom the right to have the legal estate in the premises is vested? and he referred to a case of *Richmond v. Hughes*, before the Lord Chancellor, where such an issue as was now sought had been directed.

The Master of the Rolls [Sir Wm. Grant] thought it was quite impossible to say that this was a case in which the Bill ought to be dismissed, and at the same time held that the question upon the evidence was what this Court could not determine. It was therefore proper that an issue should be directed.

An issue was directed accordingly, "Whether the Testator *Thomas Soan* was, at his death, beneficially entitled to the premises in question."

Reg. Lib. A. 1817, fo. 1050 b.

[469] EVANS v. RICHARDSON. Dec. 6, 1817.

[See *Ogden v. Peele*, 1826, 8 Dowl. & Ry. 11.]

Agreement between a citizen of the United States and an *American* and *English* subject for the exportation of goods from *England* to *America* on their joint account in time of war, "provided a peace should not be likely to take place at the time of shipping the goods." On a Bill for an account, as a set-off against a separate demand, for which the Defendant had brought an action against the Plaintiff, an injunction which had been obtained on the filing of the Bill was dissolved, on the ground of its being an illegal contract; although the goods shipped in pursuance of the contract did not sail till after a peace was made, and although the Defendant had not relied on the illegality of the contract as a ground of defence; the Court itself setting up the objection.

The Plaintiff and Defendant were citizens of the United States of *America*: the Plaintiff a native of *America* usually resident there; the Defendant a *Scotchman*, usually resident in *England*.

In Oct. 1814, during the war between *England* and the United States, the Plaintiff and Defendant, being then in *America*, entered into a mercantile contract by letter for the exportation of goods from *England* to *America* on their joint account, and the goods were to be shipped by the Defendant, "provided a peace was not likely to take place between the respective governments soon after his arrival in *England*."

When the Defendant arrived in *England*, there were strong reports of peace, but no certain intelligence. The Defendant therefore shipped the goods. About the time the goods were shipped, preliminaries of peace were signed, and, before the ship actually sailed, it was publicly known that peace had taken place. Disputes having afterwards arisen between the Plaintiff and the Defendant, the Defendant brought an action against the Plaintiff upon a separate demand, and soon afterwards the Plaintiff filed his Bill, claiming a right to set off his share of the profits of the joint transaction against what was due from him on the separate demand, and praying an account of the profits of the joint transaction which [470] had been received by the Defendant; and an injunction to restrain proceedings in the action.

The injunction was obtained for want of answer. An Answer was afterwards put in,—stating a correspondence, from which it was inferred that the contract had been abandoned.

An order *Nisi* to dissolve the injunction having been obtained, Sir *S. Romilly* and *Pepys*, for the Plaintiff, now shewed cause against the injunction being dissolved; contending that the correspondence stated in the Answer did not amount to an abandonment of the contract on the part of their client.

*Leach* and *Bickersteth* for the Defendant were stopped by the *Lord Chancellor* [Eldon], who said, This is a contract, entered into between an *American* citizen and a person being both an *American* and an *English* subject, for a trading to *America* during time of war.

For the Plaintiff. The correspondence in which it originated was in time of war: but no actual trading took place till after a peace had been made.

The *Lord Chancellor*. The bargain was made for a trading to be carried on in fraud of the laws of the country.

For the Plaintiff. The Defendant has made no such objection.

The *Lord Chancellor*. It is of no consequence who makes the objection. If [471] the party has not, the Court will set it up. The Plaintiff's letter, upon which the contract is founded, expressly says, "The vessel to be chartered provided peace is not likely to take place." The first thing you have to do is to shew your contract, and, to do this, you produce a letter, in which you yourselves say, that if peace takes place, you will have nothing to do with the subject of it. Whatever the Defendant may think proper, I am satisfied that the Court ought to raise the objection. The contract subsisting between the parties, was a contract to defeat the laws of the country.

For the Plaintiff. At the time the goods were shipped,—at all events before the ship sailed,—there was peace.

The *Lord Chancellor*. But no new contract had been entered into.

For the Defendant. Your Lordship then will dissolve the injunction ?

Sir *Sam. Romilly* for the Plaintiff. No—The Court refuses to interfere, and will therefore leave the parties as they are.

The *Lord Chancellor*. Let the injunction be dissolved.—I leave both parties to their remedy at law.

Reg. Lib. 1817, A. fo. 353.

[472] WILLIAM WILLIAMS, Esquire, *Plaintiff*, and G. T. STEWARD, Esquire, and OTHERS (Commissioners of Taxes, and for the Redemption of the Land-Tax), and GEORGE ISTD, Esquire, *Defendants*. Nov. 24, 25, Dec. 6, 1817.

Construction of the Acts for redemption and sale of the land-tax, with reference to the nature of the biddings intended to be made, and contract to be entered into, under the provisions of 42 G. 3, c. 116, §154. No express direction, nor any thing to be inferred as to general policy or intention, whether such biddings, subsequent to the first bidding, are to be public or secret, nor as to the particular form. Commissioners under the act merely ministerial. No remedy against them, therefore, in this Court ; but only by, either *mandamus* in the Court of K. B. (as to which doubtful), or suit in Exchequer, in such cases as are not especially provided for by the Act. A. having bid 60 per cent. above the *first* offer (publicly made according to the directions of the act), and B. having subsequently bid one per cent. "above the offer of any other person," *quære* if B.'s offer be valid and binding as the *highest* offer, within the words and meaning of the act. And it seems that it is so. But if B.'s offer is invalid, A.'s is still not "the highest offer" within the meaning of the Act. Still less is B. to be taken as a trustee for A. in such case. And upon these grounds, a bill by A. against the commissioners, and against B., to have his contract established, being demurred to by the commissioners, the demurrer was allowed.

The Bill stated that, by an act passed in the 42d year of the King (42 Geo. 3, c. 116, amended by 46 G. 3, c. 133 ; 53 G. 3, c. 123 ; 54 G. 3, c. 173), entitled "An Act for consolidating the provisions of the several acts passed for the redemption and sale of the land-tax into one act, and for making further provision for the redemption and sale thereof, and removing doubts respecting the right of persons claiming to vote at elections for knights of the shire, and other members to serve in parliament in respect of messuages, lands, or tenements, the land-tax upon which shall have been redeemed or [473] purchased," and by virtue of other acts of parliament made for that purpose, any persons are empowered to purchase or redeem the land-tax charged on any lands in *Great Britain* as fee farm rents, according to certain modes, and in the manner, and by the means, and according to the several provisions therein, and particularly in the 154th section of the said act, mentioned.(1)

[474] That the Defendants, *Steward* and others, were in *March* 1814, and continued to be at the time of filing [475] the Bill, commissioners under the acts aforesaid and thereby empowered to contract with any persons for the sale and purchase, or redemption of the land-tax, and to execute proper conveyances ; and that, in *March* 1814, the Defendant *Steward* bid for the land-tax charged on all lands and premises in the borough of *Weymouth* and *Melcombe Regis*, and fourteen days' notice of such bidding was fixed on the church-doors of the respective parishes, according to the directions of the statute. That various other offers for the purchase of the said land-tax were made to the commissioners, and, among others, the Plaintiff caused an offer or bidding in writing to be made to the commissioners for the same, which offer was charged to be made according to the directions of the act, and was the highest offer or bidding made as aforesaid, and, as such, ought to have been accepted by the commissioners ; and was to the following effect :

"List of the houses, lands, &c., in *Melcombe Regis*, the land-tax of which Mr. G. T. *Steward* has offered to purchase as fee-farm rents, and on which I make an additional offer. Should there be any error in the descriptions or the sums charged, I trust I shall not be thereby prejudiced ; my offer being for the same premises as Mr. G. T. *Steward*." Then followed a list, containing the names of the proprietors and [476] occupiers, and of the premises charged with the tax, and the sums not exonerated, to which was annexed the offer, as follows : "I do hereby give



"notice, that I am desirous of entering into contracts for the purchase of the land-tax contained in the annexed list, as fee-farm rents, for each and every of which, separately and distinctly, I offer to pay to the receiver-general for the county of Dorset, or his deputy, such a sum of money as shall exceed the price or offer first offered or made by Mr. G. T. Steward, by £60 per cent., to be paid by one instalment on or before the 21st of April next, or so soon as the contract may be completed. — Wm. Williams."

That two persons of the name of *Weston* having respectively offered to become purchasers of the land-tax of certain premises in the same parishes, the Plaintiff also made distinct offers in writing to purchase the land-tax of these premises at a like advance of £60 per cent. in the same manner as with respect to the offer made by *Steward*; and that on the 7th of June 1814, he received a letter from the secretary to the commissioners, written by their direction, informing him that they had received a higher offer for the purchase of the several sums contained in all the said lists, and had entered into contracts for the sale thereof to the person who made the highest offer for the same.

The Bill then stated, that it was alleged by the commissioners, that the Defendant *Isted* was the person alluded to in the above letter, and that *Isted's* offer was an offer of "one per cent. above the offer of any other person," without reference to any specific offer, bidding, or sum of money whatever.

The Bill also stated certain minutes and resolutions, made by the commissioners, on the 24th of March 1814, at a board for the affairs of taxes, among which was the following:—"That no notice of the terms offered by any other person, or persons, than the notice required by the act, of the first offer made, is required by the act to be given to any of the parties who have offered a higher price; and that the board will not communicate, to any of the parties offering such higher price, the price offered by any other of the parties."

The Bill then proceeded to state a correspondence which passed between the Plaintiff and the secretary to the commissioners on their behalf, on the subject of the said offer and purchase, in the course of which the Plaintiff protested against the acceptance of *Isted's* offer, and insisted upon his right to the contract; and the commissioners, notwithstanding, rejected the Plaintiff's offer, and accepted that of *Isted*, and entered into one or more contract or contracts with him on the footing of such offer; *Isted* insisting that, by virtue thereof, he was well entitled to have the land-tax so contracted for conveyed to him, and to hold the same as fee-farm rents under the Act, and the commissioners threatening to convey the same to him accordingly; whereas the Plaintiff contended, that an offer, or bidding, to purchase, within the intent and meaning of the Act, must, and ought to be, the offer of a certain sum, and not an offer, the amount of which cannot be ascertained but by reference to probable offers, which may be made by other persons; that the said offer of *Isted* was irregular and unjust in itself, with respect to the public, and not within the true intent and meaning of the Act, and ought to be considered as illegal and void; and that the commissioners, in accepting the same, had acted under a mistake of the true intent and meaning of the Act, and under an erroneous construction thereof.

Upon these grounds, the Bill prayed a discovery from the Defendants (the commissioners) of all such offers and biddings, and of all letters, &c., relative thereto, in their possession; and that the Defendant *Isted* might set forth by what contract, or deed executed, &c., he claimed to hold the land-tax so alleged to be purchased by him, and the date, &c., and might produce the same. And it then proceeded as follows, viz. "that, under the circumstances aforesaid, your Orator may be declared entitled to the benefit of his said offers or biddings so made to the said Defendants (the commissioners) as aforesaid, for the purchase of the land-tax aforesaid; and that the said Defendants (the commissioners) may be directed to enter into proper contracts with your Orator, and execute to your Orator proper conveyances of such land-tax contained in his said offer as aforesaid, your Orator offering to perform the said offer on his part, according to the directions of the said recited Act of Parliament. And that in the mean time the said Defendants (the commissioners) may be restrained, by the order and injunction of this Court, from contracting with or conveying in any manner to the Defendant, *George Isted*, or any other person except your Orator, any part of the said land-tax. And, if it shall appear that the said

"commissioners have accepted the said offer or bidding of the Defendant *Isted*, and have entered into any contract with him, or executed to him any deed or instrument conveying such land-tax, or any part thereof, upon the ground, or in pursuance of his said offer or bidding, then that it may be declared that the said Defendants (the commissioners) have acted under a mistake of the meaning, and under an erroneous con-[479]-struction of the said Act of Parliament, and that the said offer or bidding of the Defendant *Isted* may be declared to have been irregular and illegal, and not valid, under the terms and provisions of the said Act, and ought not to have been acted upon by the said commissioners, in preference to your Orator's said offer or bidding. And that the said contract or conveyance to the said *George Isted* may be declared to have been granted by mistake, and improperly, and that the same may be set aside, or, if the Court shall be of opinion that the same cannot be set aside, then that the said *George Isted* may be declared a trustee of the land-tax so conveyed to him for your Orator, and may be decreed to convey the same to your Orator, and deliver over to your Orator all and every such deed or conveyance thereof so executed by the said commissioners, your Orator offering to pay such just and proper charges and expences as the Court shall think the said Defendant (*Isted*) is entitled to have repaid to him in respect of the said matters; and, in the mean time, that the said Defendant (*Isted*) may be restrained (by injunction) from selling or conveying, &c., to any person except your Orator, and that all the Defendants may be decreed to join in executing all proper contracts and conveyances, as may be necessary under the said Acts, or otherwise, for conveying and assuring the said land-tax to your Orator, according to the terms of your Orator's said original offer or bidding, and as this honourable Court shall direct."

All the Defendants appeared to the Bill, and the Defendants (the commissioners) put in a general demurrer, which was argued before His Honor the *Vice-Chancellor*, on the 21st of *July* 1815, when His Honor was pleased to allow the same.

[480] From the order of the *Vice-Chancellor* allowing this demurrer, the Plaintiff appealed; and the appeal came on now to be heard.

The *Solicitor-General*, and *Bell*, in support of the demurrer, and of the judgment appealed from. This Bill cannot be sustained; *first*, as it is a Bill, in nature of a *mandamus*, to compel the commissioners to enter into a contract; and, *secondly*, because, if a contract should be said to have been in fact made, this Court is unable to compel the performance of it; and this, upon two grounds; first, because the commissioners are officers, or agents, of the Crown, and, secondly, because, supposing a Bill would lie, the Court of Exchequer would be the only Court of competent jurisdiction. Lastly, considering the case on the merits disclosed by the Bill itself, there is no equity, inasmuch as the Bill states *Isted* to have made a higher offer than that made by the Plaintiff.

*First*, if there is any remedy, it must be by *mandamus*. The Bill is not to compel the commissioners to perform a contract already entered into, but to compel them to enter into a contract. If the commissioners have acted corruptly or fraudulently, they may be made amenable by a criminal prosecution, but no civil suit will lie against them.

*Secondly*, But, supposing this to be a Bill for the specific performance of a contract, and that the Plaintiff was in fact the highest bidder, it becomes a very important question, whether this Court can entertain such a suit against these commissioners, they being officers of the Crown. The ground of the jurisdiction of a Court of Equity, in matters of contract, is, that the Plaintiff [481] can have no adequate remedy at law. But it was formerly considered as the settled practice, that a party must first establish his right at law, in order to entitle him to equitable relief. Thus, it is laid down by Sir *Thomas Clarke*, M. R., as reported by *Ambler* (in the case of *Dodsley v. Kinnersley*, Amb. 406; and see *Harnett v. Yeilding*, 2 Scho. & Lef. 549, 553), that it was the practice, before the time of Lord *Somers*, to send the party to a Court of Law, and, if he should recover in damages, then a Court of Equity would entertain his suit. [See Sel. Ca. Cha. 67, 69.] There are cases, undoubtedly, where the Court will maintain the Bill, notwithstanding some formal objection which would preclude the party at law, as the lapse of time, &c. But the true distinction is, that the subject-matter must be such as would enable the party to recover in damages; but where the subject-matter is otherwise, a Court of Equity cannot interfere. So then, in this case, there can be no relief in equity, because an agent of government, making contracts on behalf

of the public, is not liable to be sued in respect of those contracts. *Macbeath v. Haldimand* (1 T. R.), *Unwin v. Wolseley* (1 T. R. 174. See *Thurgar v. Morley*, 1 Mer. p. 22). Nothing also is more clear than that a Bill cannot be maintained against a mere agent, without bringing the Principal before the Court. Here, the *Attorney-General* is not a party; and on this ground, also, a demurrer would have held, although we are precluded from relying upon it in the present instance, the demurrer being a general demurrer for want of equity, and not for defect of parties. And yet if, as in the present case, improper parties are made Defendants, as agents, and the Principal is not before the Court, even though the Bill might have been sustainable against the Principal, yet a demurrer for want of equity will hold.

[482] *Thirdly*, if such a suit can at all be entertained, the Court of Exchequer, and not the Court of Chancery, must be the proper *Forum*. It may be objected, that this would be the ground of a plea, not of a demurrer. But, according to Lord *Redesdale*, (2) "where it appears on the face of the Bill that some other Court of Equity has the proper jurisdiction, the Defendant may demur to the jurisdiction of the Court of Chancery." That the Exchequer is the only court of competent jurisdiction in matters of revenue is certain. 4 Inst. 112. *Brown v. Trant* (2 Vern. 426).

But, *lastly*, there is no ground for the allegation that the offer made by *Isted* is inconsistent with the provisions of the statute, or such as the commissioners ought to have rejected. It is not pretended that, if the offer had been to give one *per cent.* beyond the offer made by the Plaintiff, that would be good, as being sufficiently reduced to certainty: and the offer actually made by the Plaintiff, and which he insists upon as the highest valid offer, was precisely of the same nature. Then why is not the present offer equally specific? It is an offer to give one *per cent.* beyond, what?—beyond the highest offer yet made—the offer actually affixed to the church-door. It may be objected that, if another person had made a similar offer, the two offers would have amounted to nothing, and the commissioners could have accepted of neither. So if, at an auction, two persons, at the same time, bid the same sum, the two biddings amount to nothing. But it is enough to say that, in the present instance, no such case has arisen.

[483] [The *Lord Chancellor*. It was never doubted, in sales of that description, which, in the North of *England*, are denominated candlestick biddings, where the several bidders do not know what the others have offered, that a bidding of one *per cent.* more than any other person has offered, would be binding on the person who makes it.]

*For the Defendant*. But, besides, here is a contract with third persons (and those third persons the public), who are not represented in this Court. Then, if they would make *Isted* a trustee for them, they must adopt all his acts. The ground on which they proceed against him is, that the contract is not valid. Then they must place him in the same situation as if the contract had not been made;—but how can they do this with reference to the public, for whose benefit the contract was made? If there is any power in any court over the commissioners, as servants of the public, it must reside in the Court of Exchequer, and in that court only.

When the case was before the *Vice-Chancellor*, it was compared to *Speer v. Crawler* (17 Ves. 216); where the *Lord Chancellor* overruled a demurrer to a Bill against commissioners under an inclosing Act by the lord of the manor adjoining that where the lands to be inclosed were situate; to which suit the lord of the last-mentioned manor, who was also tenant to the Plaintiff of his (the Plaintiff's) manor, was likewise made a Defendant; but that decision does not apply to this case, being grounded expressly on the peculiar relation between the parties; whereas the present case must be considered as if, in [484] that cited, the commissioners only, and not *Taylor* also, had been before the Court.

The relief here prayed is more than this Court can give, and yet is inadequate to the purpose of doing complete justice between the parties interested: and if any Court of Equity can interfere in the matter, it must be one having power to go much further than this Court can do upon any supposition.

Sir *S. Romilly*, *Trower*, and *Phillimore*, for the Appellant (the Plaintiff). *First*, as to the merits of the case, independently of all objections in point of form. This is a question of very great importance to the public; and the facts must be taken to be, as stated by the Bill, and as allowed by the demurrer, without dispute. Now, the offer made by *Isted*, as it is represented by the Bill, is an offer of "one *per cent.* above

the offer of *any other person*," not expressing whether it is meant to refer only to such offers as had already been made, or to extend to and include all offers which might be made at any subsequent period within the fourteen days. It is now settled, that, if a Plaintiff is entitled to any part of the relief prayed by his Bill, it is not necessary to shew that he is entitled to all the relief prayed by it. *Isted* had notice of the Plaintiff's prior equitable title. He has not joined in the demurrer. So far, therefore, the equity of the Bill is not disputed by him, and, till he disputes it, he must be considered as a trustee for the Plaintiff. He has, indeed, a right to have the commissioners brought before the Court, in order to ascertain whether *he* has any relief against them—and this is the ground upon which the present Bill was filed. But, to proceed to consider the case upon the arguments that have been used in favour of *Isted's* as a legal offer. The [485] question is, not whether it was a certain offer—whether it might, or might not, be frustrated by another similar offer being made—but whether it is, or is not, according to the provisions of the legislature—whether it is that sort of offer which the legislature requires, according to a true construction of the Act referred to. The intention of the Act, in prescribing the mode of bidding enjoined by it, was, that every man might have the opportunity of judging what he himself could afford to give, and what other persons were likely to give; and it was thought that, by several persons making their sealed offers, without communication to each other, the public would probably obtain the most that could be gotten. If so, this offer of *Isted* is quite contrary to the spirit and intention of the legislature. It cannot be an offer within the Act, which meant to provide for placing all bidders upon an equal footing in making their offers; and, when it is considered how many similar contracts are entered into by officers appointed by and on behalf of the public, it is impossible to be blind to the consequences of such a devise being suffered to succeed. The case of a bargain between man and man is very different; yet, in the sales alluded to as commonly practised in the North of *England*, it may very well be questioned, whether such a sort of bidding would not be rejected, as being altogether different from that to which the parties were invited. In this case, the sale contemplated by the legislature was something of a nature quite distinct from a sale by auction, to which, however, it would be converted, were this to prevail. The words of this offer are sufficiently extensive to include all offers to be made hereafter;—but can it be contended that every subsequent offer would in fact be nugatory to the person making it, and only tend to enhance the value of the preceding offer? This would be to destroy all manner of compe[486]-tition. If such sealed biddings are to be allowed, it would be for any man to fix upon whatever township or borough he may think proper to purchase, and secure it to himself, at an advance of one *per cent.* above the highest bidder, defeating the talents, industry, and calculations of all competitors, or turning them to his own account merely. If the case is at all to be discussed on its merits, surely this reasoning must be conclusive.

The next question is, whether any appeal from the decision of the commissioners can be admitted, except in cases expressly provided for by the Act. The office of the commissioners is merely ministerial; and can it be asserted that, because they are Commissioners of the Crown, there can be no relief against them in such a case as this, in a Court of Equity?—that, if they have acted in a manner, however gross, corrupt, and fraudulent, there can be no remedy but in a criminal court, which can afford no redress or compensation to the party injured? Suppose their conduct was attended with great loss and injury to the public, could the public have no redress but by fine and imprisonment? It is surely impossible to argue that, in such a case, a Court of Equity could not entertain jurisdiction. It is said, that a Bill for specific performance never can be maintained but where an action might be supported for damages. But that is not truly stated. There are many cases in which such a Bill would lie, and no action could arise—as where (supposing it a contract between individuals) A. contracts with B., and afterwards B. contracts with C.—no action can be maintained between A. and C., but a Bill would lie by the one against the other, to carry into execution, or to set aside the subsequent contract. What is imputed to these commissioners is, that they have accepted an offer, which was, in point of fact, not a legal offer.

[487] Another objection is, that the commissioners, in this case, are acting on behalf of the Crown. But it is not true that they are therefore not liable to be sued. Suppose an estate, vested by Act of Parliament in trustees for sale—is it necessary that a Bill filed against those trustees should bring the *cestui que trusts* before the

Court?—and is not this exactly the same case? In this case the legislature has vested the property of the public in certain individuals, for the purpose of sale. Is it not, by analogy, sufficient to bring them alone before the Court to execute their own contracts? This is consonant to every day's experience.

On the head of jurisdiction, it has been assumed, both here and before the *Vice Chancellor* (without adducing any authority), that the Court of Exchequer is the only court of competent jurisdiction. No doubt, generally speaking, the Exchequer is the proper court in cases of revenue. But where nothing is sought but *equitable* relief, it seems rather difficult to contend that this Court is excluded from giving relief, merely because the Exchequer is the court of revenue. In the case of the Prince of Wales, now depending in the House of Lords, many records were looked into and examined, and all they were found to prove is, that the Exchequer *has* jurisdiction,—not that no other court has jurisdiction. In *Brown v. Trant* (2 Vern. 426), which is very shortly stated, it appears that the question was merely of revenue, and nothing is said about equitable jurisdiction. All the possessions of the Crown are, in some sense, revenue.

As to what is alleged of a defect of parties, the present question is, whether a case is not made by the Bill [488] against those parties who are already before the Court. It is *their* demurrer which is to be argued—and that is a demurrer for want of equity, not for defect of parties.

[The *Lord Chancellor*. This is a perplexing Act of Parliament—setting out with repealing all former provisions, and substituting for them a mode said to be “hereafter prescribed,” and afterwards prescribing none at all. The question is, what is the meaning of the Act? Is it that the first offer shall be public, and all the others secret, till the end of the fourteen days?—or that all the successive offers are to be made public by being affixed on the church-door, as well as the first. Again, if the legislature intended publicity to be given to all the offers, but not the same mode of publicity with reference to the subsequent offers as with reference to the first, what mode of publicity did the legislature intend? But the Act says nothing about publicity. It directs that all offers are to be sent in *sealed*. Is inspection of the sealed offers to be allowed not till after the expiration of the fourteen days? If so, how am I, in making an offer within the fourteen days, to know the amount of the last bidding? The mode called candlestick bidding admits an offer of so much more than was last bid. I understand the *Vice Chancellor's* judgment to have proceeded on the Court having no jurisdiction, regard being had to the powers of the commissioners under the Act.]

The *Solicitor General* [Sir Robert Gifford], in reply. To follow the order adopted by the adverse party, in considering the questions which have been made in this case,

[489] *First*, Has the Act of Parliament prescribed any certain mode of making an offer? The only thing prescribed is that the first offer, which is for that purpose to be made public, be the *minimum*, upon which every other person is to be at liberty to make advances to whatever amount they please. It is the imperative duty of the commissioners to take care that the public shall have the advantage of the highest offer. Therefore, whether they are right or wrong in the decision they have come to in the present case, there can be no doubt that they have acted properly in abiding by the highest offer, supposing that there is any question about it. Else, it might have been said on the other side, you have taken upon yourselves a very serious responsibility in rejecting the offer made by *Isted*. They therefore took the opinion of the law-officers of the Crown, and acted according to that opinion. The utmost that can be imputed to them is a mistake of judgment on a question of difficulty. Nor can any blame attach to them in not having communicated to the Plaintiff the offers made subsequent to his own. They were themselves to judge of those offers, and ought not to have disclosed more than was strictly necessary to satisfy the Plaintiff that his was not the highest offer.

Let us next consider the object of the Act of Parliament. It directs that the first offer made shall be publicly fixed on the church-door, as the basis of all subsequent offers, but says nothing about the subsequent offers, and is absolutely silent as to the mode in which they are to be made. Whether, therefore, it was intended that they were to be public or private, the Plaintiff can have nothing to say on that subject; for his own offer was a private offer. The main argument, however, was, that it is

contrary to public policy to receive such an offer as *Isted's*, and that it would defeat the object of [490] the Act, by which it was intended that every bidder should have the opportunity of forming a deliberate opinion as to value, &c., from the amount of offers already made. But why is this intention imputed to the Act? The legislature could never mean to deprive the public of any fair advantage that might be derived from competition. What is there unfair in this mode of competition? The Plaintiff bids sixty *per cent.* above the first offer. *Isted*, without knowing the amount of his bidding, allows the question of value to be determined by the offers made, and then says, "I will give one *per cent.* more than the value, as determined by the highest offer." It is an object to him of so much importance, that he will give, not the utmost real value, but more than the utmost real value, to acquire it. Why is the public to be deprived of this benefit? The Act meant nothing but to procure for the public the greatest possible price that should be offered.

Then comes the second question, whether there has, or has not, been an actual contract? The Act of Parliament, in words, indeed, states it only as the certificate of a contract, but it is throughout treated, in effect, as the contract itself. The commissioners are empowered "to contract and agree with the person offering the highest price." The offer alone does not constitute the contract. Another Act is required to give it that effect; and that Act is the granting the certificate. The contract, and the certificate of contract, are therefore only different terms used with reference to the same thing—and that is, the actual contract. Therefore, this is, in effect, a Bill to compel the commissioners to enter into a contract, not to perform a contract already entered into. And this (if a sufficient case could be made for it, which the Court is not called upon to decide) would be their duty, which [491] they might be compelled to execute by a *mandamus*, but not in the present course of proceeding.

But, thirdly, supposing this were a Bill for the performance of a contract already entered into, whether the Court can compel these commissioners, not as trustees—for it is a fallacy so to consider them,—but as agents for the Crown, to perform such a contract? The property which is the subject of it was in the Crown, and never divested out of the Crown till the completion of the contract, if the contract indeed is completed. What is the difference between these commissioners and other mere officers of government? It may safely be laid down as a general proposition, notwithstanding many exceptions, that an agreement, in order to call for a specific performance by the decree of this Court, must be such an agreement as might have been made the subject of an action at law. The case which has been put does not meet it. If A. contracts with B. and B. with C., true, A. cannot have an action against C., but he has his action against B. The *subject-matter* of the contract is therefore the ground of an action. So far from oversetting, the case so put is absolutely an illustration of the doctrine contended for. Then, since, according to *Macbeath v. Haldimand*, and the other cases cited, an action could not have been maintained in this case, so neither can a Bill be supported.

Then, have these commissioners the power to decide without any appeal? That depends upon the Act of Parliament, which says nothing of an appeal in such cases as the present, although it makes very peculiar provisions for appeals in certain other cases which are thereby specified. (See sect. 190, *et seq.* to 197.) Now the very circumstance of an [492] appeal being given in these specified cases marks an intention to exclude it in this, which is not specified. In the present case, no fraud is imputed to the commissioners, but only an error of judgment.

Lastly, that all matters touching the revenue are peculiarly appropriate to the Court of Exchequer, is a principle clearly laid down by the Lord Keeper in the case cited from *Vernon*. And that the present is a case of revenue is evident, for what the Bill seeks is to deprive the Crown of the benefit of the excess of *Isted's* offer above *Williams's*. This comes directly within the distinction of *Row v. Dawson* (1 Ves. Sen. 331), commented upon by the Master of the Rolls in *Priddy v. Rose* (3 Mer. 86). And it was upon the same principle that Your Lordship proceeded in a late case where the Commissioners of the Transport Board were made parties. (*Thurgar v. Morley*, 3 Mer. 20.)

The Lord Chancellor [Eldon]. This is a case of great public importance, and which requires considerable attention, in order to come to a right decision. The Bill is very skilfully drawn, so as to avoid putting the Court in such a situation

as, upon a demurrer being filed, to take matters for granted which are not strictly matters of fact. Thus, as to the contract with *Isted*—after stating only that the commissioners *allege* such a contract to have been made, it charges that the fact is so. So, it represents the Plaintiff as being the highest legal bidder; and, if it said no more, the demurrer must be taken as, in point of law, admitting that fact. But then the Bill proceeds to state other circumstances raising a question of law, whether the Plaintiff's is, in fact, the highest legal bidding?—And thus the admission, which would otherwise follow, is rendered unnecessary.

[493] With regard to the Act of Parliament—as I understand it, the act repeals (so far as it does not expressly save) all the provisions of previous acts. There was formerly an annual act, because the tax itself was only annually granted. While it remained annual, it was vested in, and made payable to, the Crown, and, though called a land-tax, it was primarily chargeable on personal estate, and the deficiency only made raiseable out of land. But when the act passed to render the land-tax perpetual, it became expedient to declare that certain other taxes, which had, up to that period, been perpetual, should be made annual, for the sake of keeping up the security which had been before afforded to public liberty; and then all the provisions of the former annual acts, except so far as they are expressly saved, were repealed.

Now, as to what constitutes the contract under this act, it seems to me, that you must either admit that the highest offer in itself constitutes the contract, or that the grant of the certificate is that which is meant by the term "contract." Now it is to be observed, that the clause of the Act referred to (42 G. 3, c. 116, s. 154; see 1 Mer. 473, note) prescribes two different modes in which the purchase is to be effected, in cases where the amount of land-tax proposed to be purchased does, and does not, exceed £25.

[His Lordship then read, and commented on, the provisions of that section of the Act.]

As to the question with reference to the publicity intended, or not intended, to be given to the proceedings here specified, it appears to me that, not only publicity is meant to be given, but the very species of [494] publicity meant pointed out, in reference to the first offer. And, on the subject of the offer which is to have the preference, what I collect from the whole clause, as to its meaning, is, that the person who, within fourteen days after the first offer affixed to the church-door, shall make the *highest offer*, is the person entitled to call on the commissioners to contract with him for the purchase.

Now it is stated in the Bill, as a fact, that the first offer, or proposition, was made by *Steward*—notice of which offer (amended, or not, as the commissioners might have judged proper) was duly affixed to the church-door according to the directions of the Act. Whether it was fancy, or any particular cause or inducement, which prompted him, it is no matter; but the fact appears to be, that, within the fourteen days prescribed by the Act, the Plaintiff (*Williams*) caused a communication to be made to the commissioners that he was ready to give 60 *per cent.* more than the amount of *Steward's* proposition for the purchase of the land-tax for which the offer was made. In what manner this communication was made to the commissioners does not appear by the Bill, which only *charges* that it was made according to the directions of the Act. However, other offers were made for other premises in the same parish; and upon all these offers the Plaintiff made a similar proposition to the commissioners of an advance of 60 *per cent.* Then came *Isted's* offer, which (for the present) I must take, as represented by the Bill, to have been an offer to give "one *per cent.* above the offer of any other person," however high or low it might be. Now, it is argued that the offer so made by *Isted* does not displace the offer made by the Plaintiff, first, because *Isted's* offer mentions no specific sum above which the advance is proposed to be made, and next, because *Isted's* offer was not a public offer. As to the last pro-[495]-position, it is very difficult for me to see the grounds upon which it is meant to be contended. The Act not only provides publicity, but it describes the very species of publicity to be given to the first offer; and, beyond that, it is silent, containing nothing from which an inference can be drawn as to its meaning with respect to subsequent offers. If the Act did (as I cannot find that it does) require the same species of publicity to be given to all subsequent offers, as to the first, the objection

which is on this ground made to *Isted's* offer would equally apply to that made by the Plaintiff. If it requires publicity, without reference to the particular species of publicity, still it is not stated by the Bill that the Plaintiff's offer was, in any shape, publicly made, and the same objection would apply for want of its being so stated. It has been argued that publicity of bidding is to be inferred from the necessity of it in order to carry into effect the general intention of the legislature in passing the Act. But, although it may perhaps be said that the clause in question would have been better worded if it had contained expressions decisive of the question, it does not appear to me, either that the necessity is so obvious, or that the clause does, in fact, contain any expressions indicative of such a meaning.

Then it is said, this offer of *Isted's* is not a specific bidding within the intention of the legislature. But I cannot bring my mind to that conclusion. The intention of the legislature was that the highest offer made within the fourteen days should be entitled to the contract; and it is impossible to say that, if 60 *per cent.* above the first offer was the highest offer made before *Isted's*, the offer of one *per cent.* above the highest, is not a still higher offer.

But it is said, the legislature meant that the sale [496] should be so conducted as to give the parties intending to bid the benefit of the judgment and experience of others. If the legislature so meant, the legislature ought to have so provided; and, if it is intended to say that the legislature ought to have provided otherwise than it has provided, that proposition is as least intelligible. But the legislature has not so provided. The mode complained of is not, in point of law, objectionable. To say that it is different from the mode of sale by a public auction is nothing. The Act provides different modes of selling in different cases. In some it has actually prescribed the mode of sale by public auction—in others (as in the present), not. At present, however, I shall say no more on this part of the subject.

On the other points which have been submitted to the Court, much learning has been displayed in argument, and there is much necessary to be considered. On these points, therefore, I shall say nothing, till I have attentively examined the grounds of the *Vice-Chancellor's* judgment. On the question of jurisdiction, supposing that the Plaintiff could make good his case on the merits, I should be sorry to have it understood that, if this Court is incompetent to compel a discovery, some other Court may not be competent for that purpose. Also, with reference to the question, whether this is a good demurrer of the commissioners alone, considering that the Bill is against the commissioners and *Isted* jointly, I wish to defer pronouncing any opinion.

*Dec. 6.* The Lord Chancellor [Eldon]. This case comes before me upon a Bill filed by *Williams* against *Steward*, and three others, commissioners under the Act of 42 Geo. 3, for the redemption and sale [497] of the land-tax, and against another person named *Isted*, the prayer of which Bill I shall read in the precise words, because I think it difficult to be reconciled with the different provisions of the statute.

[His Lordship here read the prayer of the Bill, which see before, p. 478.]

Now I find it very difficult, under the provisions of this act, to declare that *Isted* is no purchaser, and altogether inconsistent with it to declare him a trustee for the Plaintiff; and the Bill, when it goes on to pray that he may, as such trustee, be decreed to convey to or for the benefit of the Plaintiff, is still more at variance with the terms of the act; for, if I understand the act rightly, it appears to me, that, in execution of the powers vested in them by the act, the commissioners have no conveyance to make; but it is so contrived as, without a conveyance, to vest the property in the purchaser from the moment of the registry and certificate being made, either absolutely, in case of redemption, by exoneration of the premises in his hands from the land-tax with which it stood charged previous to the redemption, or, in case of purchase, by entitling him to demand and receive a fee-farm rent equal in amount to the land-tax purchased. Now, if the Plaintiff can make out that *Isted* is a trustee for him, then it undoubtedly follows that *Isted* is bound to make a conveyance to the Plaintiff as his *cestuy que trust*. But no power to make a conveyance is lodged in the commissioners; and the Bill creates this difficulty. It insists that the contract with *Isted* is illegal and void, yet at the same time represents him as a trustee for the Plaintiff by virtue of the contract—two propositions, certainly very difficult to be maintained together.



Before I come to consider the provisions of the act, [498] it is necessary to observe, that the land-tax, till redeemed, belongs to the Crown, as charged upon and payable out of lands and hereditaments, only in aid, and to make up the deficiency, of personal property—that is, it so belongs to the Crown, for the benefit of the public. This, then, is a demand against the commissioners under the act, as servants of the Crown, on behalf of the public; and one question is, whether the Bill can be supported against them in that capacity; the other being, whether, in respect of *Isted's* purchase, his was an offer made according to the terms and provisions of the act, so as to be valid and binding upon the commissioners. These two considerations appear to me to embrace all that is now in dispute between the parties.

I have considered the act most attentively, and it is my opinion that no man can say, after a diligent perusal of its enactments, that there do not arise a great many difficulties, in various parts of it, as to its true construction. The act sets out by noticing many former acts, from the 38th to the 41st of the King, inclusive, and expressly repeals all the provisions of those former acts, save in such cases as are hereinafter mentioned; which excepted cases do not extend to any contract, sale, &c., which should be entered into at any time subsequent to the 24th of *June* 1802, but every such subsequent contract, &c., is to be made according to the provisions of the new act. Certain commissioners are then authorised, and various descriptions of persons, bodies politic and corporate, &c., empowered, to contract according to those provisions, the terms of which are afterwards expressed to be contained in certain schedules annexed to the act; and it is very remarkable, on referring to these schedules, that we find in none of them any form of contract whatever, unless the certificate to be granted by the commissioners in the several cases contemplated by the act, is to be [499] considered as in itself including such form of contract. I should say rather, that there is only one special case in which the form of contract is *expressed* to be given—and that is in schedule (G) purporting to be a "Form of contract for sale of Crown lands belonging to the Duchy of Lancaster." As to all other cases whatever, the contract must be considered as completed, either by the highest bidding, or by the commissioners' certificate declaring that they have contracted. There is also a distinction between the nature of the consideration to be paid for the redemption or purchase of land-tax not amounting to £25 *per ann.*, and that to be paid where the land-tax exceeds such amount—In the one case, it is provided that it may be either in stock or in money; in the other case it must be in stock only. (See sects. 22, 23, and sect. 154.)

Now, with regard to the 154th section of the act, the construction of which is undoubtedly attended with many difficulties,—persons desirous of purchasing are thereby directed to produce a statement or schedule of the land-tax proposed to be purchased, and of the lands, &c., whereon charged, to the commissioners of land-tax or supply, &c., who "*shall*, thereupon, ascertain the amount," &c., and who "*shall* grant a certificate thereof in the form of schedule (A). This, then, I apprehend, the said commissioners, &c., are compellable to do by *mandamus*, although certainly this Court has no authority to compel them. The persons applying are then to produce the certificate so granted to the commissioners under the act, who are "*authorised and required*" to examine and amend the same (if necessary), and cause notice in writing to be fixed on the church door, of the *offer*—(and this is the first time that the word "*offer*" is used) made to purchase such land-tax "*at least* [500] fourteen days before any *contract* shall be entered into by them for the sale thereof." Here, although the words leave it very much to conjecture as to the form of the *offer* intended, yet they have very accurately laid down in what manner the property, which is the subject of it, shall be described. Certainly it is of necessity that this first offer should be public, or to be made public; for the commissioners are expressly directed to publish it, by causing notice of the offer (which must mean, of the terms of the offer) to be fixed at the church door, fourteen days, at least, before any contract entered into. But, with respect to a second, third, or any subsequent, offer, I profess I have been unable to find a word of enactment either in what form or manner such offer is to be made, or whether public, or to be made public. If, therefore, those offers are to be kept secret, or if they are to be public, or made public, the reason, in either case, must be to be found in the general spirit and tenor of the act, or in the public policy and propriety of the thing.

Then follows the direction that, if no other offer or offers shall be made, within

the fourteen days, exceeding the price first offered by one *per cent.* at least, it shall in such case *be lawful* for the commissioners to contract with the person or persons first offering, "according to the directions of the act"—which latter words we can understand in this place, as relative to the offer made, because the manner of making the offer, although not the form of the offer, is specified in the directions preceding—but (it goes on to say) if any other person or persons shall, within the aforesaid period, offer to purchase at a higher price by one *per cent.* above the first offer, it shall, in such case, be lawful to the commissioners, "and they are thereby required," to contract with the person or persons who shall, within such period, [501] offer the highest price, &c. These words, taken strictly, would imply what certainly cannot be taken to be their meaning judicially; for, literally rendered, they would exclude the person or persons first offering from making any advance upon their first offer so affixed to the church door as before mentioned; whereas, in a judicial sense, they cannot be considered as intending any thing but that, by the notice being affixed to the church door, the sale is (to use a vulgar phrase) set a-going, and those who have bid a first time may go on and increase that bidding from time to time, still, however, leaving the manner of making such subsequent offers altogether undefined—such offers to be made, therefore (so far as appears from the words of the act), either with, or without, notice of the amount of all preceding offers (except the first); and the commissioners to give the preference to that which they shall ascertain to be really the best offer, made within the period specified.

Then come the directions about granting the certificate—the form of certificate—its production to the cashier of the Bank, or the receiver-general of the place or district (as the case may be),—the granting a like certificate by such cashier or receiver upon payment of the purchase-money—and the registry of contract in the manner directed by the act—(which registry may, I think, be enforced by *mandamus*, although certainly not by any authority of this Court)—upon which registry the premises are to be either immediately exonerated, in favour of the party redeeming, or charged with a fee-farm rent equal in amount to the land-tax purchased, in favour of the party purchasing—and that without any other conveyance, or form of transfer;—the mode thus prescribed being in itself to operate as an effectual conveyance by authority of the act, and the exoneration being thereby perfected, or the fee-farm [502] rent vested, as absolutely as could be done by any formal and actual instrument of conveyance or transfer. No form of conveyance is prescribed by the act—no conveyance whatever can be made under the act but that which the act itself *ipso facto* operates—the parties purchasing or redeeming must do so in one of the modes prescribed by the act, and in no other—and that mode, and no other, will (as the case may be) absolutely and entirely complete the transaction.

I shall only further allude to the several clauses in the act by which appeals, and other proceedings under the act, are, in some cases, directed to be made in the Court of Exchequer, in others, in that of Chancery; for the purpose of observing that, although the case now before the Court is not one of those to which any of these clauses have reference, yet it would be very long indeed before I could be persuaded to entertain an opinion, that, because only particular cases, and particular modes of appeal in such cases, are pointed out by the act, therefore the legislature has virtually taken away the jurisdiction of other courts of justice in other cases to which these provisions of the act do not apply.

I shall now proceed to the contents of the Bill, which, in the nature of the relief prayed by it, appears to me, I repeat, to have greatly mistaken the spirit and operation of the act. It is a Bill both for discovery and relief; and, if it makes out a case, which would entitle the party to discovery only, and not to relief, a demurrer would hold; for, whatever might have been the doctrine on this subject when I first came into the Court of Chancery, it has long been perfectly established, in consequence of Lord *Thurlow's* decision, that the discovery is only ancillary to the relief, and that, where there is [503] no right to the relief, that which is only prayed as ancillary to it must partake of the same consequence.

The Bill states the act as empowering persons to purchase according to the provisions of the 154th section; the appointment of the Defendants as commissioners under the act; in whom, as in a body, the power of contracting is represented as being lodged by the act. The Bill then states the offer or bidding made by *Steward*, who (it is true) is one of these commissioners; but it takes no notice of the provision

of the legislature (enabling any two of the commissioners to do any act, &c., which all the commissioners are empowered to do. (42 G. 3, c. 116, s. 8, as to contracts for redemption; but see 53 G. 3, c. 123, s. 1, and 54 G. 3, c. 173, s. 4.) The consequence, however, of holding that the offer made by *Steward* was not an offer made according to the terms of the act, would be that all offers subsequently made must fall together with it. If the case is really so strong as it is represented to be by those who insist that a person in the situation of a commissioner could not bid, then the whole of the biddings which proceeded upon that first open bidding are bad also. The sale was not properly set a-going in the first instance, and every thing that followed was consequently invalid and void.—Then the Bill states that the Plaintiff himself made the highest offer “according to the directions of the act.” Now it is certainly true that whatever the Bill represents as *fact* must be generally taken to be true by the demurrer; but not what the Bill states as inference from matter of law;—as here, it must be taken to be true that the Plaintiff considered himself, as he represents himself to be, the highest bidder, “according to the directions of the act.” But he may have mistaken the directions of the act; and it is for the [504] Court to consider what it is that the act has really directed on the subject of biddings, subsequent to the first offer. I again repeat, that I cannot find out what those directions are. I can find nothing in the act but what I have already stated with respect to its provisions; and I must therefore take the Plaintiff, in this place, to mean only, that he was the highest bidder, “according to the general spirit and intention of the legislature in passing the act.” Now, if the Bill had stopped there, without saying what was the offer subsequently made by *Isted*, I should have been obliged so to consider it; but, when the Bill goes on to state the terms of *Isted’s* offer, the question necessarily arises, whether *Isted’s* was, or was not, a legal offer? for if a legal offer, it follows that the Plaintiff’s was not the highest; and thus the Bill contradicts itself. Unless we can shew that *Isted’s* offer was *not* an offer made according to the terms of the act, the Bill in fact makes two different cases, which are inconsistent with each other.

Now, upon what has been said, and much that has been ably said, as to the spirit and intention of the act, I do not find any thing that is to my mind very convincing. I can find nothing to support the proposition that the policy of the act requires the proceedings under it to be either public or private. There is nothing to be collected from any part of the act, at least in the terms of it, that such is its policy. The general policy undoubtedly was, to get the highest price for the land-tax intended to be sold or redeemed, for the public advantage. It is said, that a sale under the act is not to be in the nature of an auction, but that it is to be conducted privately, so as to give all persons intending to purchase the full benefit of the judgment of others, and time to consider dispassionately what the real value of the property is. How far these objects may be consistent with [505] each other, or with the general policy, it is not for me to determine, because I find nothing with reference to any particular objects of the legislature. All I can say is, that, if it was the intention of the legislature that the public should have the benefit of our respective biddings, I do not see how I could act more for the benefit of the public than by making precisely such an offer as that which *Isted* has made. Here, after the first offer made by *Steward*, the Plaintiff comes at once with, what has been properly called, his *fancy price* for the bargain—his offer of 60 *per cent.* above *Steward’s* offer; and that is followed by *Isted’s* of one *per cent.* above all other offers. Now, if *Isted’s* offer were displaced, still it would not follow that, nor be the same as if it had never been made; nor would the Plaintiff, by displacing it, put himself in the situation of purchaser, because he does not thereby become in fact the highest bidder. Another has bid higher than he; and, though his bidding may be set aside as being irregular, the terms of the act are not complied with, the Plaintiff’s bidding not being thereby made the *highest bidding*. But was *Isted’s* bidding really irregular, as contrary to the provisions of the act? Suppose we admit that it was the intention that subsequent biddings should be secret biddings, might not a person intending to become a purchaser at any time say, the property is worth to him so much more than to any body else, that he will give one *per cent.* more than any body else for the property? I cannot find any thing in the act upon which I can undertake to say, that *Isted* would not be bound by the offer he has made; and, though it is not otherwise necessary for me now to declare it, yet I have stated what is, in fact, my opinion

upon this part of the case, in order that it may be known what is that opinion, before the parties go any further.

The questions are, first. Whether the Bill can be sup[506]-ported, considering it as a Bill against the commissioners alone? Secondly, can it be supported by reason of *Isted* being made a Defendant together with the commissioners?

As to the first question, there is no estate vested by the act in the commissioners, nor any interest in the property which is the subject of it. They are merely the servants of the Crown for the purposes of the act, nor are they alone able to complete those purposes; for the acts which they are called upon by it to perform are to be followed by other acts, to be performed by others, who are equally servants of the Crown with themselves. They neither have, nor can assume to themselves, any personal responsibility. Therefore, what they may be called upon to do they cannot be called upon to do in this court, by virtue of any authority with which this Court is invested. If the Court of King's Bench would deal with it (which is what I do not venture to affirm) it must be by *mandamus*; or, if the Court of King's Bench would refuse to interfere (as I think most probably it would), then it must be in the Court of Exchequer, that the commissioners are to be so called upon.

As to the second question, upon the best consideration I can give the case, it does not appear to me that the Bill is at all the better for *Isted's* being made a party to it. It represents the contract entered into by *Isted* as altogether invalid. If so, he has unduly obtained the certificate of contract; and, if that has been registered, the registry too is invalid. In short, all his proceedings, from first to last, are invalid. Then the question comes back to this—if not a purchaser for himself, can he be considered as having purchased in trust for the Plaintiff? How, or upon what principle, can he be so considered? If his purchase, considered as made [507] for himself, is invalid, how can it be valid, if made for another? But if *his* purchase is invalid, still the Plaintiff's is not the highest bidding, and he therefore cannot be a purchaser by virtue of that bidding.

Therefore, upon the grounds I have now stated, it appears to me that this demurrer must be allowed.

(1) 42 Geo. 3, c. 116, § 154. The provisions of this long and complicated clause in the act, which are very imperfectly abridged in the marginal note annexed to it in *Pickering's* edition of the Statutes, are, in substance, as follows:

"Persons desirous of purchasing the land-tax charged upon any manors, &c., to make out and produce to any two of the commissioners of land-tax in *England*, or commissioners of supply, or chief magistrate, in *Scotland*, acting in and for, or of, the district within which the same shall be situate, a statement in writing of the land-tax proposed to be purchased, and of the manor, &c., whereon the same is charged.—The said commissioners, or chief magistrate, thereupon to ascertain the amount of such land-tax, and to grant to the person or persons applying a certificate thereof in the form prescribed in schedule (A.) to the act annexed; such certificate to contain the description of the manors, &c., and where situate, the names of proprietors, and, where separately assessed, to distinguish the amount of each separate assessment.—The person or persons applying to produce such certificate to the commissioners acting in execution of this act by virtue of His Majesty's warrant; and, where the land-tax proposed to be purchased shall not exceed £25, to give notice in writing to such commissioners whether the consideration is proposed to be in stock or money, and, if in money, whether to be paid at once or by instalments, and when.—The said commissioners under the act authorised and required to examine and amend such certificate, if necessary; and thereupon to cause notice in writing to be fixed on the church-door of the parish or place where the manors, &c., shall be situate, of the offer so made, at least fourteen days before any contract shall be entered into by them for the sale thereof.—In case no other offer made within the said fourteen days, exceeding the offer so made as aforesaid by at least one per cent., then it shall be lawful for the said commissioners to contract and agree with the person or persons first offering according to the directions of the act.—But, if any other person or persons shall, within the aforesaid period, offer to purchase at a price exceeding the first offer by one per cent. at the least, then it shall be lawful for the said commissioners, and they are required, to contract and agree for the sale to such person or persons who shall, within such period, offer the highest price for the purchase.—The

said commissioners to cause to be inserted, *in every such contract*, the description of the manors, &c., and other particulars thereinbefore directed to be inserted *in such certificates*.—Upon the production of such *contract* at the Bank (in cases where the consideration shall be *stock*), and upon *the transfer* to the commissioners for the reduction of the national debt, of the stock, or such proportion thereof as shall be agreed to be the first instalment; and (in cases where the consideration shall be *money*) upon production of such *contract* to the receiver-general of the county, &c.; and upon payment to him of such consideration; every such person or persons to be entitled to such *certificates* or *receipts* from the governor and company of the Bank, or from such receiver-general, &c., as by the act before directed in cases of the transfer or payment of the consideration for the redemption of any land-tax (*i.e.* according to the forms prescribed in schedules (E.) and (F.) to the act annexed. See s. 38).—Upon the registry of such *contract*, and also of the *certificate* of such commissioners of supply or chief magistrate, in the manner directed by the act (sect. 164), the manors, &c., to be wholly freed and exonerated from such land-tax and all further assessments thereof, &c., from the same periods as therein directed in cases of *redemption* of land-tax.—The respective purchasers, their heirs, &c., to be entitled to demand and receive, and to be taken as being in the actual seisin and possession of a *fee-farm rent* equal to the amount of the land-tax purchased, to be issuing out of the manors, &c., whereon such land-tax was charged; and to have priority of security on such manors, &c., in respect thereof.—Provided, &c., the sale of such land-tax not to affect the right of the King to arrears.”

(2) Mitf. p. 133, 134 (1st ed.). In note, *ibid.*, it is said, the Court of Exchequer, as a Court of Equity, does not seem to give to any person the privilege of being sued there.

WILKS v. DAVIS. Dec. 8, 1817.

[See *Vickers v. Vickers*, 1867, L. R. 4 Eq. 529.]

Specific performance cannot be decreed of an agreement to sell at a price to be fixed by arbitrators (already appointed to settle other matters in dispute between the parties), where the Defendant (the vendor) had refused to execute the arbitration-bond, and it was therefore uncertain that any award would ever be made.

The Bill stated that the Plaintiff was tenant to the Defendant of the premises in question, under a lease, which expired at *Lady Day* 1815, when, some difficulties having arisen respecting repairs and dilapidations, the same were referred to arbitration, but no award was made, and it was afterwards agreed between them, that the Plaintiff should become the purchaser of the premises, and that it should be referred to the same arbitrators to settle the price of the purchase. The agreement was contained in a correspondence, set forth in the Bill, and alleged to have taken place between the parties and their respective solicitors; and it was further stated that, in consequence and upon the faith thereof, the Plaintiff continued to occupy the premises, and caused the draft of an arbitration bond to be prepared by his solicitors, and sent to the Defendant's solicitors for their perusal on behalf of their client; who refused to execute the same, and, in violation of the agreement, had caused a distress to be levied on the premises for rent alleged to be due from the Plaintiff as tenant thereof. The Bill prayed a specific performance of the agreement, and a reference of title; and, if it should appear that the Defendant could make a good title, then that he might be decreed to convey to the [508] Plaintiff, upon being paid such price as the arbitrators should fix; and for an injunction, in the mean time, to restrain the Defendant from all proceedings on the distress, or otherwise, on account of rent alleged to be due.

The Defendant by his answer denied the agreement, and insisted on the statute of frauds.

On an application to the *Vice Chancellor* to dissolve the injunction, which had been obtained on the filing of the Bill, the single question which was brought before the Court being, whether the correspondence in the Bill stated did or did not amount to an agreement in writing within the statute, His Honour was of opinion that it did constitute such an agreement, and ordered the injunction to be continued accordingly.

The question was now brought before His Lordship by way of appeal from His Honour's judgment.

*Leach* and *Barber*, in support of the motion to dissolve the injunction, cited *Cooth v. Jackson* (6 Ves. 34), *Milnes v. Gery* (14 Ves. 400), and *Blundell v. Brettargh* (17 Ves. 232), that, where there has been a reference to arbitration, if the award is not made in time and manner stipulated, the Court has in no instance substituted itself for the arbitrators, and made the award. And, in *Milnes v. Gery*, a Bill for the specific performance of an agreement to sell according to a valuation to be fixed by arbitrators, praying that the Court would appoint a person to make a valuation, or that the valuation might be ascertained in such other manner as the Court should direct, was dismissed.

[509] Sir *S. Romilly* and *Wakefield* for the Plaintiff.

The *Lord Chancellor* [Eldon]. It has been determined in the cases referred to, that, if one party agrees to sell, and another to purchase, at a price to be settled by arbitrators named by the parties, if no award has been made, the Court cannot decree respecting it. On the other hand, there are cases which determine that, if the parties are agreed as to a valuation, but have not appointed any persons to make the valuation, the Court will itself interfere, so as to ascertain the value, in order to direct a specific performance. But the case now before the Court is different from either; the Court being here called upon, not to ascertain the value, but to decree a specific performance, by the Defendant conveying, at such price as certain arbitrators named shall hereafter fix; no arbitration bond having been executed, and it not being certain that any award will ever be made. The strong inclination of my opinion is, that such a Bill cannot be maintained, although no direct authority has been produced, either in favour of it, or on the other side. The inconvenience of such a case is such, that I do not see how the Court can in any manner interpose. This view of the case was not presented to His Honour, the *Vice Chancellor*; and the order pronounced cannot, therefore, be considered as affording any evidence of his opinion on the matter.

The case was not afterwards mentioned to the Court, and the injunction was dissolved accordingly. Reg. Lib. B. fo. 194.

[510] JOHN THARP, Esq., and OTHERS, *Plaintiffs*, and JOHN THARP, an Infant (since of age), Lady SUSAN DOUGLAS, and OTHERS, *Defendants*. Nov. 8, 1817.

A Defendant made a party to a suit only in respect of an annuity to which she is entitled under a will, not allowed to attend at the passing the accounts of the general estate in the Master's office, or to be paid the costs of past attendances, as next of kin to the party beneficially interested in the residue of the estate, who had since become lunatic; where there is no direction in the decree for such purpose.

This was a Petition by Lady *Susan Douglas*, one of the Defendants in the cause, that she might be at liberty to attend, by her solicitors, the passing the accounts in the Petition mentioned, and all such other accounts as should be brought in before the Master, and might be allowed her costs already incurred, and to be incurred in respect thereof, together with the costs of the present application.

The suit was instituted in 1804, for the purpose of taking the accounts of a great *West India* estate against executors and trustees (also consignees of the property) named in the will of the testator, *John Tharp*, deceased, under which the Defendant, *John Tharp*, who was an infant at the time of the suit being instituted, was principally interested, the Petitioner (who was his mother) being made a Defendant merely as an annuitant under the will. The Defendant, *John Tharp*, came of age in May 1815. In June following, he married Lady *H. C. Hay*. In January 1816, he was proved lunatic under a commission; and by an order made in the lunacy (9th November 1816), the Plaintiff, *John Tharp*, was appointed committee of the estate, and Lady *H. C. Tharp* (the wife) committee of the person, of the lunatic; the Master being directed to inquire into the state of the lunatic's fortune, with a view to a proper allowance, and due notice of attending the Master thereupon to be given to such person or persons as would be entitled to a distributive share or shares of his fortune in case of intestacy.

[511] There was no issue of the marriage ; and the Petitioner, representing by her petition a gross case of delay and negligence in passing the accounts in the cause, claimed (as next of kin of the lunatic, together with her three infant daughters, his sisters of the half blood), to be entitled to examine the accounts, and to attend the passing the same in the Master's office. The petitioner further stated that she had accordingly instructed her solicitors to take copies of the accounts and attend at the passing the same, as well as at all other proceedings in the cause respecting the estates in question ;—that the Petitioner had good reason to believe that their attention and exertions had been very instrumental and efficient in procuring the said accounts to be brought forward and proceeded in, but that considerable costs had been incurred in consequence, and on their (the said solicitors) carrying in their bill of costs on passing the last account of the receiver, an objection was taken before the Master by the solicitors for the Defendants (the trustees and consignees of the estate) to the allowance of any costs, and *generally* to the right of the Petitioner to attend, she being made a party to the suit only as such annuitant as aforesaid ; and the Master had accordingly declined to make such allowance.

*Leach and Bell* in support of the petition.

Sir S. Romilly, Hart, and Horne, contra.

The Lord Chancellor [Eldon] wished to see the decree made in the cause, and the matter of the Petition stood over, to be further looked into accordingly ; His Lordship observing that, if the decree did not provide for the Petitioner's going in before the Master, he did not see how the Master could permit her to attend at the passing of the accounts in his office, without at the same time intimating (as he was understood to have [512] done in this case) that it must be at her own costs. That, as to past costs, there was consequently no pretence for allowing them, supposing the decree to be silent on the subject ; and, as to making any order allowing her to attend at the passing the accounts in future, he did not see how such an order could be made, without establishing a principle which would let in all annuitants, and persons having an interest in the estate, to an extent which, in many instances, might sweat down the entire property. That, in lunacy, notice is given to the next of kin, and they are allowed to go in, not by virtue of any right under which they can claim to be entitled, in respect of their contingent possibilities, so much as for the protection of the Court, and to assist the Court in watching over the interests of the lunatic. That in a cause, on the contrary, although the old rule that all persons having any charge upon, or interest in, the estate, however numerous, must be made parties, had of late years been dispensed with for purposes of convenience, yet it might often be provident to make a single annuitant a party for the purpose of taking the accounts so far as may be requisite. But it is not therefore necessary to burthen an infant's estate by allowing the attendance of an annuitant at the passing of accounts, to which he is a stranger in point of interest. And, it being still insisted that the Petitioner should be allowed her costs in respect of past attendances, His Lordship said it did not follow, that, because the Master had permitted those attendances, when he need not have permitted them, the estate must therefore bear the burthen of them.

I do not hear that the subject of the petition was mentioned afterwards.

[513] The ATTORNEY-GENERAL, at the Relation of the RECTOR and SCHOLARS of EXETER COLLEGE, OXFORD, *Plaintiffs*, and Sir WILLIAM GEARY, Bart., and OTHERS, *Defendants*. *Rolls*. June 30, 1817.

*By Information and Bill.*

Grant to trustees and their heirs, of lands in *Surry* and *Hertford*, in trust, out of the rents and profits, to raise and pay certain annual sums for the benefit of the Rector and Scholars of *Exeter College*, and as to the residue, after taxes, *charges of repairs*, &c., deducted, to be yearly paid to and among the vicars, for the time being, of four several parishes, for the augmentation of their respective livings ; they, the said vicars, to collect the rents and account with the trustees, to view the estates, and take care that the same be kept in good repair by the tenants ; with a declaration, that it should not be lawful for the trustees, during 40 years, to cut timber, except such as should be wanted for the necessary repairs of mills, &c., and other appurtenances belonging to the estates, and except such young

slabs and tillers in the woods in *Hertford*, as should be necessary for selling the underwood ; and, after the expiration of the 40 years, then that the trustees should have power to cut as they should think fit, and pay the produce to the said Rector, &c., of *Exeter College*, as a fund for the augmentation of the library. Held, that, by the construction of the deed, the estates were given as one fund for the benefit of two distinct institutions,—the whole to be managed for the benefit of both, in a due course of provident ownership ; that the trustees were not restrained after the expiration of the 40 years, from cutting for the purposes of repairs ; not from cutting timber on one part of the estates for repairs on another part ; nor from selling timber when cut, and applying the produce in necessary repairs, so long only as they cut no more timber on the whole property than the repairs on the whole property required ; and that the power of cutting young slabs and tillers still continued, with the qualification annexed to it.—(This case is referred to, 3 Mer. 425.)

By indenture, dated the 25th *June* 1715, between *Hugh Shortridge*, D.D., of the one part, and certain persons therein named, on the other part ; it was witnessed, that the said *Hugh Shortridge*, for settling the manors, &c., after mentioned, upon the trusts thereafter expressed, granted to the several persons (parties [514] thereto of the second part) and their heirs, divers manors, &c., in the counties of *Surry* and *Hertford*, to hold, &c., to the use of the grantor for life, and, after his decease, to the use of the said trustees, their heirs and assigns, upon trust, out of the rents and profits to raise and pay £200 *per annum* as follows ; viz. to the *Bursars* of *Exeter College*, for the time being, £100 *per annum* for the use of the college for ever, to be applied as therein directed ; and the remaining £100 *per annum* to certain persons therein named, for twenty years, to be placed out at interest as received, and be laid out (principal and interest), as there should be opportunity, in the purchase of four advowsons, which should be for the benefit of, and settled on, the *Rector* and *Scholars* of *Exeter College*, and their successors for ever, who should [515] hold and enjoy the same according to the usual course of other benefices belonging to the college ; and, after the expiration of the twenty years, then to pay the same to the *Rector* of the said college for the time being, for the use of the *Rector* and *Fellows* ; and out of the remainder of the rents and profits, to raise and pay £20 *per annum* to certain persons therein named for their lives, and, after the decease of the survivor, to the *Rector* of the said college for the time being, to be applied as therein mentioned : And all the residue of the said rents and profits, “ after all taxes, charges of repairs, “ and other necessary expenses relating to the said premises, or in performance of “ the said trust, were paid and allowed,” to be from time to time yearly paid to and among the vicars of *Great Bookham*, *Leatherhead*, *Effingham*, and *Shalford*, for the time being, equally, share and share alike, the better to augment the yearly income of their respective vicarages, subject to the provisos and appointments therein after mentioned ; the said vicars alternately to collect and receive the rents and profits, and give receipts, and thereout pay the several sums by the deed appointed, and account for the same with the trustees (who were thereby authorised to call the said vicars to account on *Midsummer-day* yearly). And the said vicars were also yearly, in the alternate course thereby prescribed, to view the premises, and take effectual care that the same were kept in good repair by the tenants ; and, if any repairs should be wanting which the tenants should not be obliged to do, then to give to the trustees a full account thereof in writing, that immediate care might be taken for amending and making good the same ; the charges of the said vicars in and about the said matters to be allowed them out of the rents and profits.—And it was thereby further declared, “ that it should not be lawful for the trustees, at “ any time during the space of forty years next after the death of the grantor, to fell, “ cut down, grub, or dig [516] up any of the timber, or timber-like trees, then grow- “ ing, or that during the time aforesaid should grow, on the premises, or any part “ thereof ; but only such and so much timber as should be wanted for the necessary “ repairing of the mills, farm-houses, and other appurtenances belonging to the “ estates : and also except such young slabs or tillers of oak growing or to grow in “ the woods in the said county of *Hertford*, as should be necessary, from time to “ time, for better selling the underwood thereon, each fall, and no more ; but, from “ and after the expiration of the said forty years, then that it should be lawful for



"the Trustees and the survivor, &c., and they and he should have full power and authority, from time to time for ever afterwards, when they should think fit, to fell, cut down, grub up, sell, and carry away all or any part of the timber that should be growing on the premises, or any part thereof; and all such monies that should arise, or that the said timber should from time to time be sold for, should, from time to time, and for ever, be paid unto the said Rector and Fellows for the time being, to be by them laid out in buying books to augment the public library of the College, and to be placed and for ever kept therein: " with a power for the Trustees to lease the estate (except certain woods and underwoods in the parishes of *Digwell*, *Wellwyn*, and *Dartworth*, in the said county of *Hertford*, which should be kept in hand for the better preservation of the timber), for any term of years not exceeding twenty-one years in possession, &c.

In 1720, the grantor died; and, after his death, the Trustees entered, and by themselves, and their successors duly appointed, had remained ever since seised of the estates in question.

[517] The information, filed against the then Trustees, and against the Vicars of the four respective parishes named in the deed, prayed a declaration that the Trustees for the time being, or the Vicars for the time being of the said respective parishes, had not then, nor at any time since the expiration of the forty years, had any right or power, under the trust deed, to cut timber, either for the purpose of repairs, or for sale and application of the money arising from sale to such purpose; or for the repairing, or keeping in repair, any houses, mills, &c., in any other county or parish than that in which the timber actually grew or was produced; or to cut down any slabs or tillers growing in the said woods, except such as (according to the custom of the country, and the true meaning of the trust deed) ought to be so felled or cut down as underwood, and as were absolutely necessary for selling such underwood: and an injunction accordingly.

It appeared that the Trustees, and not the Vicars, being considered as having, by the terms of the deed, the power to direct and regulate the cutting of timber, the Vicars had accordingly been in the habit of applying to the Trustees, from time to time, when timber was wanted for repairs, and of receiving and acting upon their directions.

The cause now coming on to be heard, *Hart*, *Bell*, and *Courtenay*, for the Relators, stated the questions to be, First, whether, after the expiration of the forty years from the death of the grantor, it was competent for the Trustees to permit any timber to be cut for repairs? Secondly, if it were so, then, whether the supply of timber in aid of repairs was not a tenant-right, confined to the specific land on which the timber was grown? Thirdly, whether the Defendants, the Trustees and Vicars, or either, had a right under the deed to sell timber, and apply the produce in purchase of other timber for repairs?

In support of the proposition, that after the expiration of the aforesaid period, the College became entitled to all produce arising from the sales of timber, they represented that, by the deed, the expenses of repairs were expressly provided to be paid out of the rents and profits of the estates, other than the timber, the tenants themselves being directed to assume the obligation of repairing; or, at all events, that the deed gave to the Trustees, &c., no right (after the forty years) to cut any more of the timber than was actually wanted from time to time, and was in its kind fit for the repairs of the houses, mills, buildings, and fences, on those parts of the estates on which such timber was grown; that, at any rate, they were accountable for the value of so much of the timber cut on other parts of the estates as was not adapted and actually applied to the purposes of repairs, or as exceeded what was necessary for repairs on those parts of the estates on which such timber was grown respectively; that they had no right to apply any part of the money produced by sales of timber, in any repairs whatever; at all events, not in rebuilding houses, barns, &c., which had been destroyed by fire, and which ought to have been kept insured.

They said that the College was the first and most important object of the testator's bounty—the Vicars not being in the situation of mere voluntary objects of such bounty, but being purchasers of the benefits intended them by the deed by the services which it was expected they should render; that all inference of intention should therefore be in favour of the College; but here it was not necessary to supply an intention by inference [519] or conjecture, the grantor having sufficiently marked

and expressed his meaning ; that the power given to the Trustees during the forty years was an exception out of the general benefit intended the College, and a suspension during that time of the rights of the College ; and that a positive permission to cut during the forty years, so far from affording any inference in favour of its continuance, did, in true construction, operate as a virtual prohibition of cutting for any subsequent period.

Sir *S. Romilly*, *Wetherell*, and *Lomax*, for the Defendants, insisted that they were strictly authorised, by the terms of the deed, to cut and sell, from time to time, for the purposes of repairs. That, for this purpose, the whole of the trust estates were to be considered as one estate, and the timber on all parts of the property equally applicable to the repairs of every part of that property ; and that a different construction would involve manifest absurdity. The rearing and preserving of a good stock of timber was a main object of the grantor's care ; which appeared, as well from the restriction during the forty years, as from his (the grantor's) directions, that the woods, or certain parts of the property should, " for the better preservation " of the timber thereon, be for ever kept in hand. But, much as he wished the timber to be preserved, and, even though he had, with that object, forbidden the sale of timber (for the use of the College), during forty years, yet, even during that same period, he permitted the felling of timber for repairs, which shewed that he considered such application of the timber as at all times indispensable. After the expiration of the forty years, he also permitted the sale of timber for the use of the College. This was obviously an enlarging clause, and could not, according to any rules of interpretation, be taken as imposing any restriction on the permission previously given, to sell for the purpose of repairs. The clauses in the deed, on which the Plaintiffs principally relied, had reference as well to the forty years during which the restriction was to operate, as to after times. " Charges of repairs " most clearly, therefore, mean such charges as there might be exclusive of timber.

As to the second point, the grantor had said expressly, that, during the forty years, timber grown on the estates in *Hertfordshire* should be applied in the repair of mills ; but it appeared that there were no mills on any of the estates in *Hertfordshire*, whence it followed that he must have intended the produce of one county to be applicable to repairs in another. And then, as to the *third*, if timber on farm *A.* was applicable to repairs on farm *B.* it would involve the greatest inconvenience to hold that the application must be confined to the identical timber ; as, suppose a difficulty of carriage between the estates,—suppose none but oak to be grown on the one, and ash or elm the only timber required for the repairs of the other,—could it be said not to be within the intention and spirit of the grant to sell timber on farm *A.* (perhaps, in *Herts*), and purchase that which is wanted for repairs on farm *B.* (in *Surry*), in its vicinity ? Always remembering that this is not a question of waste by tenant for life ; that the produce of the timber cut is not to be put by the Defendants into their pockets ; but to be employed, in some shape or other, on the estates, and strictly accounted for.

The *Master of the Rolls* [Sir Wm. Grant]. These trust estates are given, as one fund, for the benefit of two equally permanent institutions ; and the whole ought to be managed for the benefit of both, in such a way as a provident owner would manage his property.

[521] The grantor, meaning to allow the woods on the property to come to maturity, restrains his Trustees from cutting any timber during the space of forty years, except for the purpose of repairs. This is not a special permission to cut for repairs during the forty years ; but no restraint is ever imposed on such cutting. When the restriction that was imposed is taken off, it is difficult to contend that, as a consequence of its removal, another restriction that had not been imposed, is to attach. From the affirmative, that, after the forty years, the Trustees may cut for sale, how is the negative to be inferred, that they must not cut for repairs ? If even during the time that the grantor was most anxious for the preservation of the timber, it might be cut for repairs, it should seem that *a fortiori* might it be so applied after that period had expired. The words, " after charges for repairs," must have had their operation as well during the forty years as afterwards. Now, during the forty years, it is admitted that timber was to be cut for repairs. Therefore, those words must mean other repairs besides those for which timber should be wanted,

and can afford no argument for holding that, after the forty years, timber was not to be cut for any kind of repairs.

Then, if the Trustees can cut timber for repairs, in what way can they be said to abuse that part of their trust? The propositions of the relators on this part of the case, seem to rest on some analogy which it is supposed to bear to other cases, with which it appears to me to have nothing in common. The jealousy lest persons, having particular interests in an estate, may, under pretence of cutting timber for repairs, benefit themselves at the expense of the inheritance, has been the occasion of subjecting them to very strict rules with respect to the manner in which the power is to be exercised. But the grantor, who was the absolute owner of these estates, was subject to no such rules. The Trustees, who have in them the whole inheritance, are, at law, as little subject to them. On what principle is a court of equity to say, that they shall be bound by them? The grantor has not imposed any such restrictions. He speaks of the timber growing on the premises,—that is, on the estates generally,—as applicable to the repairing of the mills, farm-houses, and other appurtenances belonging to “the estates.” If the Trustees cut no more timber on the whole property, than the repairs on the whole property require, I do not see what ground the relators have to complain. To say that timber growing on one part of the estate should not be employed in making repairs on another part of it, would be perfectly arbitrary. And if the timber be at a great distance from the place where the repairs are wanted, why should the Trustees be prohibited from selling the timber, and making the repairs with the produce? This may frequently be an act of provident administration; and no benefit could accrue to the relators from compelling the Trustees to transport the identical timber to the spot where the repairs are wanted. The Trustees must exercise their discretion fairly, and in such a manner as not to be injurious to the College. But I think they have a discretion in this particular, and are not like tenants for life or years, who are by law tied down to the observance of a precise rule. I cannot, therefore, make the declarations that are prayed for with respect to the timber. (See *Wither v. The Dean, &c., of Winchester*, 3 Mer. 421.)

As to the young slabs and tillers, I think that, as the power of cutting them still continues, the qualification annexed to it is still in force, viz. that no more of them [523] shall be cut than may be necessary for better selling the underwood each fall.

“Declare, That the Trustees for the time being, of the trust estates in question, or the four Vicars for the time being of the four parishes of *Great Bookham*, *Leatherhead*, *Effingham*, and *Shalford*, in the county of *Surry*, have now, and have since the expiration of the term of forty years from the death of *Hugh Shortridge*, in the pleadings mentioned, had right and power to fell and cut down timber trees standing or growing on any part of the said trust estates, for the purpose of repairing, or keeping in repair, any of the houses, mills, buildings, or fences, on any part of the said trust estates, and also for sale, for the purpose of applying the money arising therefrom, in the purchase of timber of the same species or denomination with the timber so sold, to be applied in repairing, and keeping in repair, any houses, mills, buildings, or fences, on the said trust estates, in any other county or parish than that in which such timber actually grew or was produced.”

Reg. Lib. A. 1816, fo. 2067.

[524] The ATTORNEY-GENERAL, at the Relation of W. F. SPICER, Esq. Plaintiff, against EDWARD CROSS, and the MAYOR, BAILIFFS, and COMMONALTY of the City of EXETER, Defendants. *Rolls.* Dec. 10–17, 1817.

Lease of a Charity Estate sought to be set aside: first, as being a lease granted for a long term of years determinable on lives, at a small rent, on the payment of a fine; and secondly, on the ground of undervalue: Held not to be disturbed; the Corporation, who were Trustees of the Charity, having been always in the habit of letting their estates according to the same mode, it being also supported by the custom of the country in which the estates are situate; and the evidence not bearing out the charge of undervalue.

In *Michaelmas Term* 1811, an information was filed at the relation of Mr. *Spicer*, against the Defendants (the Mayor, Bailiffs, and Commonalty of the City of *Exeter*),

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for an account of the Charity Estates which were the subject of this cause, and of the rents and profits thereof received by the said Defendants, and for carrying into effect the purposes of the charity.

By the decree made at the hearing (22d of *March* 1813), it was, among other things, referred to the Master to enquire what were the estates subject to the charitable uses in the pleadings mentioned, and whether the estates had been properly let; and, if the Master should be of opinion that they had not been properly let, then that he should enquire whether it would be proper to take any, and (if any) what steps to set aside the leases so improperly made.

In pursuance of this decree, the Master made his separate report, dated the 11th of *February* 1815, whereby he found that by indenture of feoffment dated [525] the 20th of *August* 1689, duly executed by *Ignatius Jordaine* and *Thomas Crossinge* (two of the Aldermen of the city of *Exeter*), with livery of seisin thereon endorsed, after reciting that *Nicholas Spicer* the elder (late one of the Aldermen of the said city), by deed indented, bearing date the 3d of *March* 1609, did grant and enfeoff to them the said *Jordaine* and *Crossinge*, and six others (deceased), their heirs and assigns, the messuages, &c., therein mentioned, to the use of the said *Nicholas Spicer* and *Honor* his wife, and of the heirs of the body of *Nicholas Spicer*, and after their deceases, and for default of such issue, upon confidence and trust, and to and for such employments, payments, and disbursements of the issues and profits of the said premises as therein after expressed, that is to say, for the payment of an annual rent charge of £20 to *E. B.* during her life, and for the yearly payment of 20s. worth of bread to be distributed to the poor of the city at *Easter*, of 20s. towards the repairs of certain parish churches, of 40s. towards the better maintenance of candle-light in the dark nights between the Feasts of All-Saints and the Purification, to be set up in such convenient places of the said city, as to the Mayor and Aldermen of the said city should seem meet, and of 6s. 8d. to the Night Bellman of the said city, and during the life of the said *E. B.* for the disbursement and loans of the residue of the said issues and profits, to such of the freemen of the said city, as to the said Mayor and Aldermen, or the most part of them, should be thought most meet and reasonable, by £5 or £10 to each, for four years, or under that term, upon good security for the repayment thereof; and, after the decease of *E. B.*, for the disbursements, loans, and payments of the residue of the said issues and profits to such of the freemen, as well merchants as others, as to the said Mayor and Aldermen, or the most part of them, should seem meet, by £10, or under £21, for the like [526] term, upon good security for repayment at the end thereof; to the Mayor of the said city for the time being, 20s.; to the Recorder, 10s.; to the Receiver and Stewards, 12d. a-piece; to each of the Feoffees and of their heirs and assigns that were at the accounts, 12d.; to the Sword-bearer of the said city, 12d.; to the four Serjeants, 2s. 8d., to be divided among them; to the Town-clerk, 10s., for keeping the accounts; and to the Chamberlain, 3s. 4d., for his travel and pains in and about the seeing and procurement of the execution and performance of the said trust and confidence, and to the procurement of an account yearly, for ever, on the 20th of *December*, to be made of the disbursements. And after further reciting that the said *Nicholas Spicer*, by his will, reciting that he had conveyed the premises to the aforesaid purposes, declared that his said wife should every year during her life, upon *Good Friday*, out of the profits of the same lands, give and deal to so many poor people of *Exeter* as she should see good, the value of 20s. worth of bread; and to the poor people of the parish of *Halberton*, the like amount; and that, after the decease of his said wife, his said Feoffees, and those to whom they should make any future feoffments as therein mentioned, should perform the same; it was declared that the said *Jordaine* and *Crossinge* (the then only surviving Feoffees), did thereby grant, enfeoff, and confirm unto the Mayor, Bailiffs, and Commonalty of the said City, their successors and assigns, all the said premises, upon the uses and trusts in the said indenture and will contained.

The Master by his report further found, that, by an indenture bearing date the 2d of *June* 1772, the Defendants the Mayor, &c., of *Exeter*, in consideration of £630, demised to one *Edward Cross* a certain messuage, &c., called *Slow-lake* (comprising the principal part of [527] the Charity Estates), for 99 years, if the said *Edward Cross* (then aged 22), and *Betty* his wife (then aged 29), or either of them, should so long live; to commence immediately after the surrender or other sooner determination of a former lease of 1727, determinable on the life of a person then in existence, at

the yearly rent of £20 : and that, by another indenture dated the 24th of *November* 1801, the same Defendants, in consideration of £1050, demised to the said *Edward Cross* the same premises for the term of 99 years, if *John Cross* (then aged 26), and *Sarah Cross* (then aged 16), or either of them, should so long live ; to commence on the death of the said *Edward Cross*, or the surrender or other sooner determination of the lease of 1772, at the like yearly rent of £20.

The report then, after stating that similar leases had been from time to time granted, and were then in existence, of other smaller parts of the Charity Estates, went on to state that the Master found, from certain ancient leases produced before him, that *Nicholas Spicer* the Feoffor, in his life-time, granted leases of the Charity Estates for lives, at small rents ; and that since his death, the Feoffees of the said estates had from time to time granted leases thereof for lives, at small rents, reserving fines. That, from the affidavits produced before him, the Master found, that the evidence of value of the estates, at the different periods when the leases were granted, was contradictory, inasmuch as the evidence on the part of the Relator tended to show that in *June* 1772, when the first-mentioned lease of *Slow-lake* was granted, the same was of the yearly value of £200 ; and in *November* 1801, when the second-mentioned lease of the said farm was granted, the same was of the yearly value of £200 ; whereas the evidence on the part of the Defendants tended to show that the yearly value of the [528] said estate was, at the first of the above periods, £60 ; and, at the second period, £132, only : and that in the year 1801, *Thomas Gray*, a surveyor, by the direction of the Defendants, valued the said estate, and made a calculation of the fine for renewal, which he valued at less than £1050, the consideration actually paid for the same. That the last-mentioned surveyor had been used to survey and value lands for 50 years and upwards, and was well acquainted with the mode of granting leases on lives in the county of *Devon* ; (1) and that the same method had been constantly adopted by the great land-owners in the said county, and was still continued.

[529] The Master concluded his Report by stating his opinion that the estates, being in trust for charitable uses, had not been properly let ; and that the leases thereof ought not to have been granted for long terms at small rents, and upon payment of fines, in such manner as the said leases had been granted ; and, more particularly, that it was improper to grant the said reversionary lease of *Slow-lake* ; and that it would be proper to proceed against all proper parties for the purpose of setting aside the said lease.

To this Report, as to the leases being improper, and the institution of proceedings to set aside the same, an exception was taken, which, in *March* 1815, came on to be heard before His Honor the *Vice-Chancellor*, a petition having been also presented on the part of the Relator to the *Master of the Rolls*, to confirm the report.

*March* 1815. *Courtenay* and *Merivale* in support of the exception.

*Roupell*, contra, contended that the course which the Defendants had pursued had been improperly adopted ; and that the propriety of the Master's opinion might, and, in this case, would, be more conveniently discussed on the hearing of the petition to confirm the Report.

The *Vice-Chancellor* ordered the exception to stand over till after the hearing of the petition.

*Rolls*. *April* 11, 1815. In consequence of this, the exception was abandoned, and a counter-petition presented to the *Master* [530] of the *Rolls*, which came on to be heard, together with the original petition for confirming the report, on the 11th of *April*.

*Sir Samuel Romilly* and *Roupell* for the Master's report.

*Courtenay* and *Merivale*, contra.

*April* 11, 1815. The *Master of the Rolls* [*Sir Wm. Grant*] said, that it is very difficult to lay down any abstract proposition as to the propriety or impropriety of leasing charity estates in the manner here complained of ; and that such a mode of letting, generally objectionable, may, under circumstances, be the most beneficial that can be adopted. That, with respect to a charity, indeed, the reason against it is stronger than as to private estates, because the purposes of the charity may be suffered to languish for the want of funds during the intervals between the leases ; but that still, even as to charity estates, it is impossible to lay down any general rule. In the present case, the mode of letting the estates in question had commenced before

the lease was granted, which it would be the object of the proceedings recommended by the Master to set aside ; and, supposing the abstract principle to be established, it would be very difficult to determine, whether, in 1772, a different course could have been beneficially adopted. The predecessors of the then Corporation had so let the estates ; and the present question was not whether their predecessors had done right in so letting, but whether they (the then Corporation) had done right in continuing the practice which they found had been introduced before them ; and it is evident that, under the circumstances, to have commenced a different course, might have been to exercise a very disadvantageous option. His Honor [531] also adverted to the general practice of the country, and said, that, as the Corporation seemed to have acted for the best, according to what was then the general practice, it would be hard to say that the lease ought to be set aside without further inquiry. But it was nevertheless fitting that the question should be decided ; and there was at least so much doubt on the circumstances, as to make it desirable that the course recommended by the Master should be adopted ; therefore, without expressing any concurrence with the Master in the opinion he had stated, His Honor thought fit that the Report should be confirmed.

Ordered, " That the Master's Report be confirmed ; and that the Relator should " be at liberty to proceed against all proper parties, for setting aside the two several " leases granted by the Defendant, of the charity estate called *Slow-lake*."

Under this order the present suit was instituted. The bill stated the indenture of feoffment and will of the founder ; that the charity estates had ever since been retained by, and in the possession of, the Defendants, the Mayor, bailiffs, and commonalty of *Exeter*, and their tenants ; and that the said Defendants were then seised of the legal estate, and had received the rents, &c., for many years, and had made leases and grants from time to time, as suited their own convenience, but the charitable purposes for which the said estates were granted had long fallen into decay and disuse, and the rents, &c., had not been applied for a great many years to those purposes, but had been retained in the hands of the Defendants, or applied by [532] them to other purposes ; and, after setting forth a lease of the estate called *Slow-lake*, in the year 1631, for 99 years, determinable on four lives, at the yearly rent of £40, and a fine of £208 (which yearly rent was reduced to £20 in the year 1641, in consideration of £270), and that in the year 1772, there was only one of the lives existing, upon a lease made in 1727, which was an old life, and would probably soon have fallen, upon which event happening, the Defendants (the Mayor, &c.) might have been enabled to let the estate at a fair annual rent, according to the actual value, and under proper husbandry covenants ; and charging that they ought to have so done in the due execution of their trust ; proceeded to state the leases subsequently made, according to the Master's Report, charging that the same were improper leases, and were made and granted to, and obtained by, the Defendant *Cross* (the then tenant of the estate) for inadequate considerations, and for less than the fair and just value thereof ; that the Defendants (the Mayor, &c.) ought not, as the feoffees and trustees of the charity estates, in the due execution of their trust, to have made a grant or lease thereof for a long term of 99 years, or for lives, reserving a small rent only, and taking a money gift or fine, instead of requiring and receiving a full and fair annual rent, according to the value of the premises ; that the leases were improperly granted as leases in reversion ; and that the same were collusively granted to the Defendant *Cross*, and were, or ought, in a court of equity, to be considered as void leases, and to be set aside, and the lands relet, under the direction of the Court, on a farm lease for a short term of years, reserving the best annual rent for the same, and under proper husbandry covenants. The Bill further charged, that the Defendant *Cross* was a freeman or member of the Corporation, and that he procured the leases from favor, or otherwise, upon [533] some undue consideration ; that the leases were besides defective, in not containing the usual covenants for good husbandry and repair, and that the farm had been mismanaged, and the buildings thereon neglected, &c. : but these allegations were either denied by the answer, or refuted by the production of the leases, and not insisted upon in argument. The Bill prayed that the leases might be declared to be void, or that the same might be set aside, and the indentures of lease delivered up and cancelled ; and that the said farm and lands might be relet, in such manner, and upon such terms, as the Court should think proper, for the benefit of the charity ; and that all proper directions

might be given for the purposes aforesaid, and for the benefit of the charity in respect thereof.

The Defendants (the Mayor, &c.) by their answer admitted that they were possessed, and considered themselves as being so possessed, of the charity estates, upon the trusts, and for the charitable purposes, contained in the deed of feoffment and will of the founder. They stated that they and their predecessors (members of the Corporation for the time being) had, from time to time, ever since they were in possession, applied considerable parts of the rents, &c., to the charitable purposes aforesaid, but admitted that there was, in each and every or several of the years during which the rents, &c., were so applied, some residue or surplus, which they were always ready and willing, upon proper application being made to them, to lay out and apply according to the purposes of the charity; but that, no such application having been made to them, the said surplus had been retained by the Defendants, or by certain members of their body appointed by them as trustees, and applied to other purposes distinct from those of the charity. They said that they the said De-[534]fendants, and their predecessors, had from time to time let the charity estates in such manner as seemed to them likely to be most productive, and that the ordinary and accustomed practice, with respect to letting of lands in the county of *Devon*, had hitherto been to grant leases for 99 years, or other long terms, determinable on three lives, in consideration of fines, and reserving only a small rent, which mode of letting had been usually adopted, not only with respect to houses and buildings, but generally with respect to lands let for the purposes of husbandry only, and, upon the dropping of one or two of the lives named in such leases, it was usual to grant a fresh lease for another long term of years, in reversion, or upon the surrender of the then existing lease; and that such practice or custom must have been in the view of the donor, and approved by him, it appearing from documents then in the custody of the Defendants (and which were produced in evidence), that he did himself, in or about the year 1598, grant a lease of three lives of part of the said charity estates, upon receipt of a fine, at a rent of 4s. *per ann.*, and in the year 1610 a lease for three lives of other parts of the same estate, in consideration of a fine of £60, and a payment of 3s. 4d. only as a heriot, upon the dropping of the lives; admitting that, such practice or custom prevailing throughout the county, and in the neighbourhood in which the charity estates were situated, such lease as in the bill mentioned was, in the year 1772, made by their predecessors, under the circumstances therein stated. They also admitted the succeeding lease of 1801; denying the circumstances of undervalue, and the charges of collusion and other improper conduct, made by the bill.

The Defendant *Cross* went more particularly into the circumstances of value and situation, and al-[535]leged that the leases, under which he held, contained all usual covenants for repair, &c., but not husbandry covenants, such last-mentioned covenants not being usual in leases for lives. He further stated, that he had laid out considerable sums in repairs and improvements on the premises, by which the same were then of greater value than they were at the time when the lease of 1801 was granted to him; and he insisted that, in case the leases were set aside, he was entitled to be repaid, not only the sums so laid out and expended by him, but also the several sums paid by him to the mayor, &c., in consideration for the said leases, with interest for the same.

Witnesses were examined on both sides, and a good deal of contradictory evidence produced as to the value of the estate at the respective times of granting the leases of 1772 and 1801, and filing the original information, and the proportion of the several fines paid, and of the rent reserved, to such annual value, the same (according to the witnesses for the Plaintiff) being made to amount, in 1772, to £80; in 1801, to £180; and in 1814, to £230 (exclusive of outgoings):—while the witnesses for the Defendants differed in their opinions as to value, making it from £40 to £65, at the first; from £106 to £150 at the second; and from £100 to £130 at the third, of the above periods. The only evidence as to the custom of leasing was that of a surveyor, who stated that, within the last fifty years, the usual modes of letting in the county had been as follows: viz. 1st, for terms of years not exceeding twenty-one, at rack-rents, either by public auction or private contract; 2dly, by granting leases for 99 years, determinable on the death of the survivor of three lives, in consideration of fines paid, and of small reserved rents and heriots. That, generally, such leases

are renewed upon [536] the death of one or more of the lives named, and reversionary leases granted for one or more new life or lives, in consideration of further fines paid, and reserved rents and heriots. That the former mode of letting is adopted when the estates are held by the lord or land-owner in demesne, and the latter mode is only generally resorted to in cases where such lands have been heretofore usually so leased. That the mode of calculating the fines to be paid on such last-mentioned leases is as follows :—Taking first the gross annual value, then deducting the amount of the land-tax, church rates, poor's rates, reserved rent, and repairs, to ascertain the clear value thereof, and, by charging about 17 years' purchase of the clear value on a lease for three lives of the purchaser's nomination ; and that the number of years' purchase of leases for reversionary interests must, in all cases, depend upon the ages of the life or lives in existence at the time.

The cause now coming on to be heard, Sir *Samuel Romilly*, for the Plaintiff and Relator, referred to the cases of *Berkhampstead School* (2 Ves. & B. 134), and of the *Attorney-General v. Owen* (10 Ves. 555), the *Attorney-General v. Green*, (2) &c., and argued that the leases in question were such as this Court would under no circumstances whatever support ;—that it must be considered as being now the settled practice to admit no leases of farm-lands by the trustees of a charity to be valid, other than customary agricultural leases for 21 years, or shorter periods, and containing all the usual and proper covenants for [537] good and husbandlike management ; and that this was established with reference to charity estates, upon the evident principle that the purposes of annual distribution cannot be properly accomplished by a mode of letting which brings in occasional supplies of money at distant and uncertain periods.

*Bell* and *Merivale*, for the Defendants the Corporation of *Exeter*. *Parker*, for the Defendant *Cross*.

Neither the authorities referred to, nor the principles stated, can be held to govern a case like the present, where it does not appear that it was ever in the power of the Defendants, as trustees of the charity, to have made other leases of the estates than those which their predecessors had constantly been in the habit of making, and which were sanctioned by the example of the donor. In this respect the case is entirely new ; and it has never been laid down, or recognised as the settled practice of the Court, that such a lease of a charity estate is, under all circumstances, absolutely void, and not to be supported. In the case of *Berkhampstead School*, where it was referred to the Master to consider of a proper scheme for letting the estates in future, the Master, by his report (which was afterwards confirmed), approved of the plan which had previously been acted upon, viz. of letting by public auction, for thirty-one years, or lives determinable at that period, partly on fines, partly on rents, specified. (See 2 Ves. & B. 136.)

No such principle was, therefore, held at that time (1792) to have been established ; and where are the decisions by which the law of this Court has since been recognised as now stated ? In many cases the admission of such a principle would lead to great and obvious injustice. As, suppose the case of a school, the master [538] of which is entitled to the profits of the charity estates as a compensation for his services, and that the estates have been usually let according to the mode now complained of, the master for the time being receiving the fines as the lives drop in, in part of his emoluments. Is the existing master to be deprived of this which, though casual, he has contemplated as the means of his remuneration, and thus to be put, without his consent, on a footing different from his predecessors ? The purposes of this charity are not of that sort to require a regular distribution to the full annual value of the estates ; the reserved rent of £20 being fully adequate to all the specified objects of annual distribution, while the ulterior objects which, from the alteration of times and circumstances, have been rendered incapable of being performed according to the intention of the donor, might, even if they still existed in full force, be as well supplied by an occasional fund, as by a regular annual income. The answer to the want of covenants for good husbandry is, that they are not usual in leases of this description. They are not usual in prebendal leases and other analogous instances. The true principle is, not that the trustees of charity estates can, under no circumstances, properly lease according to the mode now complained of ; but that they are bound to make such leases as a careful and provident owner would be likely to make under circumstances similar to their own. The cases



are all of leases for long terms *absolute*, or otherwise at a great under-value ; and of under-value in this case there is no evidence, or none which can outweigh the clear and positive testimony of the witnesses on behalf of the Defendants, who are surveyors employed by the corporation to value the lands previous to the last lease in 1801, and again in 1814, appearing to be persons well acquainted with the value of lands, as well as with the custom of leasing in that part of the country, [539] having no apparent interest to undervalue them, and proceeding, in calculating the amount of the fines, on principles acknowledged to be correct, or, at all events, not contradicted on the other side.

Sir S. Romilly replied.

The *Master of the Rolls* [Sir Wm. Grant]. The leases, which it is the object of this information to set aside, are impeached on two grounds ; first, as being of an improper length ; secondly, as having been made for an inadequate consideration.

First, they are leases for three lives ; or, what comes to the same thing, for ninety-nine years, determinable on lives ; and this, it is said, is of itself sufficient to induce the Court to set them aside. But, to set them aside, it is necessary to assume that the Corporation has been guilty of a breach of trust in making, and that the lessee has made himself accessory to that breach of trust in accepting, such leases. Now, though the expediency of letting charity estates in this manner may be more or less questionable, according to the nature of the charity, and the circumstances and situation of the estate, I am not aware of any principle, or authority, on which it can be held, that such a lease is, on the very face of it, an abuse of trust. The legislature has, both in enabling and disabling statutes, considered leases for three lives as on a footing, with leases for 21 years absolute. So have many founders of charities, who prohibited the letting on leases for more than three lives or 21 years. It would be a strong thing to say, that, in such a case, a lease for three lives would be void. Supposing, however, that where charity estates had usually been let for 21 years, it would be considered as improper to substitute a letting for lives, it does not [540] follow that we can impute abuse to a mere adherence to the ancient and uniform mode of letting, especially when it is a mode usual in the district in which the estates are situated. In laying down prospective rules for the regulation of a charity, it may be very fit to consider which mode is best calculated to answer the particular purposes of such charity. In some cases, it may be expedient to take fines, in others to let at the best annual rent. In the *Attorney-General v. Price* (3 Atk. 110), Lord *Hardwicke* says, "As to letting the estates for the future, one consideration is, whether I shall let for 'the improved rent, or direct fines to be taken ;' and he then goes on to declare, that he will leave it to the Master, 'to inquire, whether letting on an improved rent, or leasing upon fines, be for the benefit of the charity, since a great deal depends upon the custom of the country.'" In order to set aside such a lease, already existing, it is not enough to say that the mode of letting is not the best that might be prescribed, because, on such a point, there may be a great difference of opinion among the most experienced : but you must shew, that the mode is *so positively bad*, that no persons, meaning fairly to discharge their trust, would have resorted to it. This may be said of a lease for a long term of years absolute, at a stationary rent ; because no man of a reasonable degree of providence would so let his own estate. But many land owners do still let their estates upon leases for lives ; and, formerly, the general usage in *Devonshire* was to let in that manner. As to the charge in the bill, that proper covenants have not been inserted in the lease, I see no evidence in support of it. The assertion, that there is no covenant to repair, turns out to be a mistake. No witness says, that there is [541] any covenant wanting, that is usually inserted in leases for lives.

As to the second point in this case, *viz.* the allegation that the states have been let for an insufficient consideration, I have always understood, that leases of charity estates might be set aside on the mere ground of under-value. But it must be an under-value satisfactorily proved, and considerable in amount. It is not enough to shew, that a little more might have been got for the estate, than has been actually reserved. Still less is it sufficient, to infer the under-letting from the value of the property at some subsequent period. In this case, the Corporation of *Exeter* took the precaution of having the lands surveyed and valued by an experienced sur-

veyor, upon whose estimate they set the fine. The imputed motive for partiality to the lessee is negatived. He is not a corporator, nor in any way connected with the corporation. But the witnesses differ as to the amount of the fines, which ought to have been reserved upon the leases made in 1772, and in 1801 respectively. As to the first, the Plaintiff's witnesses say that it ought to have been £90 more than it was. But, even if the difference had been more considerable, I should not be disposed to place much reliance upon an estimate made in 1816, of what lands were worth to be let in 1772.

The difference as to the fine in 1801 is more important. That which was actually paid was £1050. That which ought to have been paid was, according to one of the Plaintiff's witnesses, £1530 ; or, according to the others, £1620. The principle of their calculation is, that, regard being had to the ages of the persons whose lives were put into the lease, the fine ought to have amounted to nine years', or, at least, eight and a half years', purchase, on the value of the estate. To this [542] principle the Defendants do not seem to object. But the controversy is as to the value of the land at the time when the lease was made. This is stated, by the witnesses on the part of the information, to have been £180 per annum. And, if that really were its value in 1801, the fine would be less by £570, or at least by £480, than it ought to have been. But it does not appear that any one of those witnesses ever had occasion to survey the farm with a view to a correct estimate of its value ; but they are, in the year 1816, upon their loose recollection of the several circumstances that enter into the computation of value, to ascertain with precision what the farm was worth to be let in 1801. I cannot put that kind of evidence into any degree of competition with a survey made at the time, for the very purpose of ascertaining what the fine was that ought to be required on a new letting. The surveyor of the Corporation could have no motive for undervaluing the land, and so diminishing the fine to be received by his employer. Neither his skill, nor his integrity, is in any way impeached. He valued the farm at £116. The fine was somewhat more than nine years' purchase upon that value.

It seems to me, therefore, to be impossible to say, that it is satisfactorily made out, that the leases have been granted at an under-value. The information must consequently be dismissed, but without costs.

The Order was, " That the information do stand dismissed out of this Court without costs ; but the Relator is to be at liberty to apply to the Court in the cause, the *Attorney-General* against the Defendants the Mayor and Commonalty of the City of *Exeter*, as to his costs in this cause, and the Defendants, the Mayor, Bailiffs, and Commonalty of the City of [543] *Exeter*, are to be at liberty to retain their costs, charges, and expenses, out of the rents and profits of the charity estates in question in this cause."

Reg. Lib. A. 1817, fo. 441.

(1) The mode of letting in question is mentioned by *Risdon*, in his Survey of Devon, made about the commencement of the 17th century, as the mode then usually in practice throughout the country ; and is spoken of by him in terms of great commendation.

A curious instance, as to the prevailing opinion of those days in favour of leases of this description, was mentioned in argument, of the will of Sir *John Maynard*, Serjeant, who gave the Manor of *Clyst St. Lawrence*, in the county of *Devon*, to Trustees, for the use of *St. John's Hospital*, in the City of *Exeter*, for the purpose of educating boys in writing and arithmetic, and by which he particularly required, " That the Trustees do not forbear to make any new lease or leases when any of the tenements fall in hand, of purpose to have the mesne profits in their hands, though for the charitable uses, because that would in time tend to the destruction of the tenements and of tillage, and of good husbandry, as it is conceived."

The late editor of *Risdon* (edit. 1811), speaking of the causes which have tended to retard the progress of agricultural improvement in *Devonshire*, says, " Among the principal of these causes, we may probably reckon the *tenures*." He then refers to the passage in his author above alluded to, and adds, " Fortunately, this system of tenure is on the decline, though it has not yet been succeeded by a much better one," &c.

(2) 6 Ves. 452. See *Ex parte Griffiths*, 13 Ves. 565. *Attorney-General v.*

*Backhouse*, 17 Ves. 283. *Attorney-General v. Brook*, 18 Ves. 319, 496. *Attorney-General v. Wilson*, 18 Ves. 518. *Attorney-General v. Maywood*, 18 Ves. 315.

LOWTEN, Plaintiff, against The MAYOR and COMMONALTY of COLCHESTER, Defendants.  
Dec. 11-15, [1817].

Order for sequestration made upon the return to a single *distringas* issued under a decree for payment of costs. Such an order is only an order *nisi* in the first instance. Form of *distringas* regular; being to appear and answer contempt merely (not *ad comparendum et solvendum*), but the cause for which it issued being specified by indorsement. Return, "Issues 40s.," also regular.

An order was made in this cause (see 2 Mer. 399) for payment by the Defendants to the Plaintiff of £796, 13s. 8d., costs taxed. The Defendants had been served with a writ of execution of this order, but did not pay the sum; whereupon the Plaintiff sued out a *distringas* against the Defendants, which, in the body of it, was only to compel the Defendants to appear and answer a contempt alleged to have been committed by them, but an indorsement on the writ specified the particular cause for which it issued. The sheriff returned "Issues, 40 shillings."

Sir A. Piggott, Wetherell, and Spence, now moved for a sequestration against the Defendants, upon the return of the writ; and they cited (from the Register's book) [544] the case of *Harvey v. The East India Company*,<sup>(1)</sup> to shew that, where a Corporation is in contempt for not [545] obeying a decretal order, a sequestration may be obtained upon the first *Distringas*.

*Newland*, contra. Submitted that the utmost to which the Plaintiff could be at present entitled was an order *nisi*; and that only supposing the writ and the Sheriff's return to be strictly regular; but he objected to both on the ground of irregularity.

The Lord Chancellor [Eldon]. The only Order to which the parties can be entitled, in the first instance, is an Order *nisi*; and that they might have upon motion of course. If there is any irregularity in the form of the proceedings, the Defendants may avail themselves of it on showing cause against making the Order absolute.

Dec. 15. The Order *nisi* having been granted accordingly, *Newland*, for the Defendants, on this day showed cause against making the Order absolute; and (admitting that, upon the authority of *Harvey v. The East-India Company*, the Plaintiff need not sue out more than one *Distringas*, and also that the Sheriff's return, which he had before objected to on the ground that, as the whole sum might have been levied under the writ, it should [546] not have been confined to the 40s., was according to practice), he now contended that the writ itself was irregular in point of form, it being merely to compel the Defendants to appear and answer a contempt (which is the form observed in a *Distringas* issuing upon *mesne process*); whereas the present writ having issued under a Decretal Order, the form of the writ ought to be *ad comparendum et solvendum*.

The Lord Chancellor, however, thought that the form of the writ was strictly regular; and the Order for a sequestration was accordingly made absolute.<sup>(2)</sup>

(1) 2 Vern. 395. Note in Raithby's Edition. Hinde. Tit. Sequestration, p. 154.

The following is extracted from the Register's Book.

*Harvey v. The East India Company*. Reg. Lib. A. 1700, fo. 50 b. Sabb. 11 December.

"Whereas by an order of the 3d instant for the reasons therein contained, it was ordered that a commission of sequestration should issue, directed to certain Commissioners to sequester all the estate real and personal of the Defendants the *East-India Company*, until they should yield obedience to the decree made in this cause, and the Plaintiff be paid his debt, with the costs of the contempt for non-performance of the said decree, unless the said Defendants, upon notice thereof to their clerk in Court, should at the next seal shew cause to the contrary, and the Defendants' counsel coming to shew cause, &c., whereupon, and upon hearing the writ of execution of the decree, and an affidavit of service thereof, and a letter of attorney executed by the Plaintiff, empowering *Thomas Chettle* to demand and receive the money

due to the Plaintiff, read, and the Plaintiff being present in Court, and acknowledging he did execute the said letter of attorney, and upon hearing what could be alleged on the other side, this Court declared, that the Plaintiff had proceeded regularly and reasonably, and doth therefore order, that the said order of the 3d be made absolute. But, the Defendants' counsel insisting that a bill of review was prepared in order to reverse the said decree, and praying time to file the same, and that the performance of the decree may be dispensed with until the cause shall be again heard upon the said bill of review, it is thereupon further ordered, that the Defendants do pay unto the Plaintiff £4000, and give security to pay unto the Plaintiff the sum of £37,917, decreed to be due to him, deducting the said £4000, and also £100 already paid to the Plaintiff by the said Defendants, or such other sum as by any subsequent order shall be adjudged to be paid to the said Plaintiff, by the said *East-India Company*, together with interest at £6 per cent. from the 13th of *July* last, until the same shall be paid, &c. And therefore all proceedings upon the said order for the sequestration are hereby stayed until farther order; but such judgment is to be subject to the order of this Court, and the Defendants are to have time till the day after Twelfth-day to file their bill of review."

(2) Reg. Lib. B. 1817, fo. 79. *Mayor, &c., of Colchester v. Lowten; Lowten v. Mayor, &c., of Colchester.* Dec. 11, 1817.

Upon opening, &c., it was alleged, that by an order dated the 13th of *March* 1817, it was ordered that the Clerk of the Subpœna Office should forthwith issue Subpœna for payment by the Mayor, &c., of *Colchester* to the Plaintiffs in the second cause of the sum of £796, 13s. 8d. for costs, the said Plaintiffs by their Counsel undertaking that in case they recovered the said sum under that process, they would forthwith pay the costs directed to be paid by the two several orders made in the first cause, dated that day, unless such last-mentioned costs should be first deducted out of the said sum. That in pursuance of the said order a Subpœna issued, which was duly served upon the said Mayor, &c.; but the same not being paid, a Writ of Distringas was issued against the said Mayor, &c., directed to the Sheriff of *Essex*, to compel them to pay the said sum. That the said Sheriff has thereupon made his return, and thereby returned 40s. issues only. That, as the said Writ directed the said Sheriff to seize into his hands the goods and chattels, rents and profits, of the said Mayor, &c., the Plaintiffs in the said second cause conceive that such should have been his return. It was therefore prayed, That a Writ of Sequestration may issue, directed to the Sheriff of the county of *Essex*, or to certain Commissioners to be inserted in the said Writ, of the personal estate of the said Mayor, &c., and the rents, issues, and profits of their real estates, until the said Defendants shall have paid the said sum, or until further order. Whereupon, &c., Order, That a Commission of Sequestration issue, directed to certain Commissioners to be therein named, to sequester the personal estate of the said Mayor, &c., and the rents, issues, and profits of their real estates, until the said Mayor, &c., shall pay the said Plaintiffs in the second cause the said sum of £796, 13s. 8d. costs, or the farther order of this Court," unless cause shown.

Reg. Lib. B. 1817, fo. 107. (*Dec. 15, 1817.*)

Upon motion to make the former order absolute, *Ordered* accordingly.

[547] SIMMONS v. BOLLAND. *Rolls.* Dec. 1-8, 1817.

[*Fletcher v. Stevenson*, 1844, 3 Hare, 370; *Dean v. Allen*, 1855, 20 Beav. 4; *Official Managers of the Newcastle Banking Co. v. Hymers*, 1856, 22 Beav. 371; *Walker v. Banett*, 1857, 24 Beav. 419.]

Executor claiming to retain out of the residue certain parts of the property, to protect himself against a future contingent demand in respect of covenants entered into by the testator, for payment of rent and repairs of an estate held by him under lease from a Corporation, though there was no existing breach of covenant nor arrears of rent, in respect of which he was liable: on a bill by the residuary legatee for the property so retained, Ordered, that the funds in question be made over to the Plaintiff, on his giving a sufficient indemnity to the executor; the terms of such indemnity to be settled before the Master.

By indenture of lease dated the 23d of *July* 1798, the Mayor and Commonalty of *Canterbury* demised to *Simmons* (one of the Aldermen of their Corporation),

his executors, administrators, &c., for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, &c., on non-performance of all or any of which covenants, it was declared that the lease should be void, and a power of re-entry was reserved.

[548] *Simmons*, the lessee, by his will, gave all his real estates, and all his leaseholds and personal estate, to the Defendant *Bolland* and another (whom he also appointed his executors), upon trust to sell; and after payment thereof of debts and legacies, to invest the produce in their names upon certain trusts, subject to which he gave the entire residue of his estate to the Plaintiff on his attainment of the age of twenty-five years.

The testator died in 1807, leaving the Plaintiff his son, then a minor. The trustees and executors proved the will, possessed themselves of the whole of the testator's estate real and personal, and paid the debts and legacies without resorting to a sale of the real estate or of the leaseholds, into the possession of which (including the premises demised by the said indenture of lease) the Plaintiff, on his attaining twenty-five, entered; at which time also, the entire residue of the personal estate was transferred to him by the executors, except a bond for £1000 from the Mayor and Commonalty of *Canterbury*, under their common seal, to the testator; and a sum of £800, 5 per cents., which were still retained by them out of the surplus, and for the recovery of which the present bill was filed.

To this bill the Defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, "for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of *Simmons* deceased, in respect of rent due or thereafter to accrue due for the premises demised by the said indenture, or of the present or any future breach or non-performance of any of the covenants therein contained; the payment of which rent, and performance of which covenants, the Defendant was advised he was liable to under the said indenture"; and had ac-[549]-tually then lately received a notice to that effect from the Corporation. He at the same time admitted that there were then no subsisting breaches of covenant in respect of which he was so liable, and that no rent was then due or in arrear for the premises; but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the Corporation also extended.

Sir *S. Romilly* and *Wilbraham*, for the Plaintiff.

*Harrison's case*, 5 Co. 28 b. "A debt due by bond shall be paid before a statute made to perform covenants, when none of them are, nor perhaps ever will be broken, but are things in contingency and *in futuro*; and therefore such possibility, which peradventure may never happen, shall not bar present and due debts by bond and other specialties." And see *Philips v. Echard*, Cro. Jac. 8, 35, that a debt upon record shall be paid before an obligation, and debt upon obligation which is put in suit, before another that is not. In *Hawkins v. Day* (Amb. 160), it was decided that the payment by an executor of a simple contract debt, before breach of condition of a bond entered into by his testator, was good, and no *devastavit*, in case of a deficiency of assets; and what substantial distinction can be taken between a simple contract debt and a legacy? If the one be entitled to priority over a future contingent debt, upon what principle is the other to be excluded from the benefit of the same priority? The *dictum* ascribed to Lord *Hardwicke* (Amb. 162), that "all payments of simple contract debts made before breach of the condition are good, but not of legacies," is unsupported by any reasoning, and the point was not before the Court in the case referred to: the question there arising only on an [550] exception to the Master's Report, disallowing payment of certain sums by the executor on account of their being debts of an inferior degree to the Plaintiff's demand. *Wilbraham* also cited and relied upon the case of *Eeles v. Lambert*. (It was cited from Aley (p. 38), but is also reported by Styles, 37, 54, 73, as see *post*, in His Honor's judgment.)

*Cooke and Combe*, for the Defendant. This is not a bill for a general account, upon which, if a decree were obtained, an inquiry would also be directed as to debts, and the obligees in the bond would be at liberty to come in with the other creditors before the Master. So, when the Court makes a decree in a creditor's suit, all the

creditors are considered as being parties to the suit, and the direction for payment out of Court of any part to the parties entitled, is made in the regular administration of assets. But this is a suit instituted by the Plaintiff, claiming as residuary legatee, in the absence of the creditors whom there are no means of bringing before the Court; and it is a question of great importance, whether a decree made in such a suit would operate as an indemnity to the executor in any action that may hereafter be brought against him by the lessors upon a subsequent breach of covenant. It is clear, that at law it would be no indemnity. In this Court, no legatee has a right to call for the payment of his legacy before all claims upon the estate have been fully satisfied; and this is the distinction between legatees and creditors, which is one of the points in the case referred to. Then, are all claims upon this testator's estate, in the case which is now before the Court, to be considered as having been satisfied? It is perfectly clear that, at law, an executor is personally liable to the lessor of his testator, in respect of rent accrued due [551] since the death of the testator. "He is charged as assignee in respect of the perception of the profits; and it is not material whether he has assets or not. Therefore he cannot plead *plene administravit*; and, if judgment be given against him, it is *de bonis propriis*." "If the land be of less value than the rent, he may plead the special matter, and pray judgment whether he shall be charged otherwise than in the *detinet* only"; in which case the judgment is *de bonis testatoris*, and not *de bonis propriis*. (1 Williams's Saunders, 1, note; and the authorities cited.) The case cited by *Wilbraham* does not appear to have been ever decided; nor is it referred to in any subsequent cases, so that it is impossible to state it as an authority. In *Hawkins v. Day*, the question of legacies actually did arise, as appears by reference to the Register's book (see note at the end of the case); and the same principle has been acted upon in the case of the Duke of *Queensberry's* leases, in which the residuary legatees, and some of the particular legatees also, have been kept out of possession for years, by reason of the possible demands which may arise under the covenants which the Duke had entered into for quiet enjoyment.

Sir S. Romilly, in reply. This case is perfectly new; but the novelty of it is in the Plaintiff's favour, because it is impossible that the circumstances under which it has arisen have not been of frequent occurrence, although no such claim as that made by the present Defendant has ever before been instituted in respect of them. No such claim could have been established under the usual advertisement for [552] creditors to come in and prove their debts in the Master's office. The case of the Duke of *Queensberry's* leases is quite different. For those leases had actually been attacked; and there had been a judgment of the Court of Session against them, which judgment is now under appeal. As to the distinction supposed to have been taken in *Hawkins v. Day*, how can a legatee be said, as against an executor, not to be as much entitled in respect of his legacy, as a simple contract creditor in respect of his debt? Then it comes to the question, Whether there exists any prior actual demand? Can the executor be permitted to say, I will keep this in my hands for ever, to answer this future possible demand? or during the whole continuance of the lease, which may be of any possible duration? The cases referred to in *Williams's* note on *Saunders* are not applicable; for they only show that the executor is liable so long as he remains in possession. As soon as he has delivered over the possession to the legatees, his liability ceases, further than to the extent of assets remaining in his hands.

The Master of the Rolls [Sir Wm. Grant]. The equitable relief sought in this case depends upon a legal question, Whether an executor can safely make payment of legacies, or deliver over a residue while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case (of *Eeles v. Lambert*) reported both by *Styles* and by *Aleyn* (*Styles*, 37, 54, 73; *Aleyn*, 38, S. C.), the ultimate judgment in which is not, however, stated by either. There is also a case of *Nector and Sharp v. Gennet*, in Cro. Eliz. (Cro. Eliz. 466), where the same question arose, though in a different shape. A legatee sued in [553] the Ecclesiastical Court for his legacy. The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the Sheriff (to an amount exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the Sheriffs on an action for an

escape; and the executors had therefore nothing in their hands to answer the demand. This plea was disallowed, whereupon a prohibition was sued, which being demurred to, the Defendant prayed a consultation. Upon this the principal question was, Whether the escape was such that the Sheriff was suable in respect of it? for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered; so there was no inconvenience to any. To which the whole Court agreed, and determined that it was no plea, unless the obligation were forfeited. *Coke* said, "The difference is, 'when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty *maintenant*, which is in the condition (as 9 E. 4, 12). But otherwise it is, where a statute or obligation is for the performance of covenants, or to do a collateral thing. There, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie *in perpetuum*, and so no will should be performed.'" The majority of the Judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual Court to proceed according to their own established course, —namely, to compel the legatee to give security to re-[554]fund the legacy, in case of the executors becoming afterwards liable to be sued upon the bond. In the argument of *Eeles v. Lambert*, this case is noticed by *Rolle*, Justice; "It was *Nector and Sharpe's* case, 38 *Eliz.* that legacies ought to be paid conditionally, viz. to be restored if the covenant should be broken." (*Styles*, 56.)

In *Hawkins v. Day* (Amb. 160), Lord *Hardwicke* makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of *Ambler's* report of this case; for his statement is found to correspond with the Register's book; and although, in the order overruling the exceptions, particular legacies are specified, yet it appears, by a reference which has been made to the Master's Report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord *Hardwicke* stating the question with respect to them to be, "Whether payment of the assets, before there was any breach of the condition, ought to be allowed as a good administration of the effects." (See note annexed.)

In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the Corporation of *Canterbury*, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do, is to order the funds to be [555] made over on the Plaintiff giving a sufficient indemnity; and it must be referred to the Master to settle the terms of such security. (1)

(1) Reg. Lib. A. 1752, fo. 72. *John Hawkins*, Gent. and Others, Plaintiffs, against *James Day* and *Mary* his Wife, and Others, Defendants. *Wednesday*, 17th *January*.

"The matter of the exceptions taken by the Plaintiffs and the Defendants *Day* and his wife, to the report made in this cause, by Mr. *Holford*, one, &c., dated the 17th day of *June* last, coming on the 16th day of *January* instant, and also on this present day, to be argued before the Right Honorable the Lord, &c., in the presence of counsel learned for the Plaintiffs, and for the Defendants *Day* and his wife; and upon opening and debate of the Plaintiffs' first exception to the said report, and hearing what was alleged by the counsel for the said parties, His Lordship held the said Plaintiffs' first exception to the said report to be insufficient, and doth therefore order that the same be over-ruled; and upon opening and debate of the Plaintiffs' second exception to the said report, and hearing the 1st and 2d schedules to the said report read, and what was alleged by the counsel for the said parties, His Lordship held the said Plaintiffs' second exception to the said report to be insufficient, and doth therefore order that the same be over-ruled; and upon opening and debate of the Plaintiffs' third exception to the said Master's report, and the

said Defendants' first exception to the said report, being for that the said Master in and by his said report hath disallowed all the payments reported to have been made by the said Defendants in administering the estate of *William French* the testator therein named, which are mentioned in the said third schedule to the said report, amounting together to £3120, 19s. on account of their being debts of an inferior degree to the Plaintiffs' demand, whereas most of these payments were *bona fide* paid by the said Defendants many years before any [556] breach of the security bond in the pleadings mentioned is proved to have been made, and many years before any notice to the said Defendants of any such bond being existing; such payments were therefore a due administration of the testator *French's* estate, and as such were good payments, and ought to have been allowed to the said Defendants as good payments, against the Plaintiffs' demands; and the said Defendants ought not to pay the same over again out of their own proper estate. Upon debate of the matter, and hearing the articles, eight-partite, dated the 28th of *October* 1715, the articles dated the 16th of *January* 1718, the Master's report, dated the 29th of *July* 1747, and the said report, dated the 17th of *June* last, read, and what was alleged by the counsel for the said Plaintiffs, His Lordship held said Plaintiffs' third exception to be insufficient, and doth therefore order that the same be overruled. And it is further ordered that the said Defendants' first exception to the said report be allowed as to all the sums contained in the third schedule to the said Master's said report, except the two legacies of £15 and £100, and the sum of £355, under date of 20th *August* 1726, the sum of £630, and the four last items; and as to those sums it is further ordered, that the said exception be overruled; and upon opening and debate of the said Defendants' second exception to the said report, and hearing a bond signed *W. French*, dated the 11th day of *December* 1714, and the answer of the Defendants *Day* and his wife, read, and what was alleged by the counsel for the said parties, His Lordship held the said second exception of the said Defendants, *Day* and his wife, to be insufficient, and doth therefore order, that the same be overruled. And it is further ordered, that the sum of £5 deposited by the Plaintiffs, and the sum of £5 deposited by the said Defendants *Day* and his wife, with the Register on filing their said exception, be paid back to them respectively, and that it be referred back to the said Master to compute interest on so much as shall be found due on the balance according to the directions aforesaid, pursuant to the order made in this cause, the 21st *December* 1748."

The following statement of the report excepted to, as stated in the above order, is [557] also extracted from the Register's book.

"The Report of Master *Peter Holford*, dated 17th of *June* 1752, corrects some mistakes in the report of the then late Master *Holford*, dated 29th *July* 1747, as to the receipts and payments of the Defendants, *Day* and his wife, on account of the personal estate of *William French*; and the amount of such receipts and payments, as corrected, are stated in the first and second schedules to this report, and the balance appears to be £3059, 1s. 9d., to be paid by the Defendants *Day* and wife. —The report then proceeds in the following words.

"And I find that the said late Master *Holford* did by the said former report certify, that the said Defendants, *James Day* and his wife, had paid on account of the simple contract debts and legacies of the said *William French*, the several sums in the 9th schedule thereto annexed, amounting in all to £3621, 15s. 9d., but had not allowed the same by reason they were not of an equal degree with the debt due from the said *William French's* estate to the copartnership in question. in this cause, and there being some payments then which were made by the said other executor, and some other payments which ought to have been allowed the said Defendant, in the 8th schedule to the said former report. I have in the 3d schedule to this report set forth the particulars of the several sums so paid by the said Defendants, on account of such simple contract debts and legacies of the said *William French*, and otherwise as therein mentioned, and instead of the said sum of £3621, 15s. 9d. the same amount only to the sum of £3120, 19s., which said payments to the amount of £3120, 19s. I have thought fit likewise to disallow, on account of their being payments of debts of an inferior degree to the Plaintiffs; but in regard it has been insisted upon by the Defendants, *Day* and his wife, that many of these payments were made prior to any breach of the security bond in question, which they look upon to be a circumstance very favourable for the allow-



ing such payments, and are desirous the same should appear to the Court, I humbly certify that it has appeared to me that several of the sums of money which make up the said sum of £3120, 19s. [558] were paid before any breach is proved to have been made of the condition of the said security bond, notwithstanding which I have thought fit to disallow such payments, in regard it appears to me, that *Ebenezer Burdock* and *Benjamin Lane*, who was the principal obligor in the said bond, were two of the acting executors of the said *William French*, together with the Defendant *James Day*; and that the said *Ebenezer Burdock* was one of the copartners in the sugar-house, and one of the obligees in the said bond, and therefore cannot be presumed to be ignorant that there was such bond; and for that reason, there being notice to other acting executors, I apprehend I cannot presume that the Defendant *Day* had no notice of the said bond, so as to affect him in the administration of the assets of the said *William French*; and it does not appear to me that the Defendant *Day*, upon payment of the several simple contract debts and legacies above-mentioned, took any security from the persons to whom the payments were made, to refund the whole or any part of the money paid them, in case it should happen that the said bond should be demanded of the estate, which I apprehend he ought to have done."

The third schedule to this report is styled, "An account of what the Defendants, *James Day* and his wife, have paid in discharge of several debts of the said *William French*, by simple contract, and for legacies, and otherwise, which I have not allowed them."

[The several items which are excepted in the above stated order, are in the following terms:]

	£	s.	d.
Paid to <i>William French</i> , his son, by <i>Mary</i> his first wife, in discharge of a bond given by the said testator <i>French</i> , previous to the marriage with the Defendant <i>Mary Day</i> , his wife . . . . .	600	0	0
Paid for one year's interest thereof . . . . .	30	0	0
Retained by the said Defendant <i>James Day</i> , for legacies given to him and his former wife, by the said testator <i>William French</i> . . . . .	15	0	0
Retained by the Defendant <i>Mary</i> , his widow, the legacy left her immediately after his death . . . . .	100	0	0
[559] Aug. 20, 1726.—Paid Mr. <i>French's</i> widow for 5 years and 11 months' maintenance and education of his two children, <i>Thomas</i> and <i>Mary</i> , during the time of her widowhood, till her marriage with Defendant <i>Day</i> , 20th August 1726, at £30 per annum each . . . . .	355	0	0

The four last items were :

June 27, 1741.—Paid <i>Thomas Fane</i> his bill of law charges in the High Court of Chancery, <i>Day</i> and wife ats. <i>Hawkins</i> and Others . . . . .	124	0	0
Paid <i>Walter Morgan</i> in full . . . . .	1	19	0
To ship <i>Raymond</i> , cost by her as by account . . . . .	50	7	4
To <i>Noblett Bridgett</i> , by her as by account . . . . .	13	11	9

[All the other payments stated in this schedule appear to be in respect of simple contract debts.]

[560] BERTIE v. The Earl of ABINGDON and OTHERS. *Rolls.* Dec. 2-18, 1817.

[See *Earl of Clarendon v. Barham*, 1842, 1 Y. & C. C. C. 704; *In re Hoare*, [1892] 3 Ch. 99.]

On a bill by infant tenant in tail, a receiver was appointed, with an order to keep down the interest of incumbrances out of the rents. He kept down accordingly the interest of all but one mortgage, the interest of which (belonging to infants) was never applied for, except a small portion for maintenance, the residue of the rents being paid into Court to the credit of the cause. Tenant in tail, coming of age, suffers a recovery, and resettles the estate, and afterwards dies. The master, by his report, having certified that the deceased was not bound, while tenant in tail, to keep down the interest of the incumbrances, and consequently that the rents paid into Court, during that time, belonged to his personal representatives; the party claiming to be entitled to the estate under the settlement

petitioned for leave to except to the report, on the following grounds. *First*, that in the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of the rents; 2dly, That the direction to the receiver to keep down the interest, amounted to an appropriation of so much of the rents to that purpose; and, 3dly, That the deceased by not claiming the fund when of age, showed an intention that it should be so appropriated. But it was held, *first*, that the general question could only arise in favour of a remainder-man or reversioner, and all such rights were in this case barred by the recovery; 2dly, that the order was not meant to vary the rights of the real and personal representatives, but to prevent the incumbrances from being prejudiced by the Court taking the estate into its custody, and also to protect the estate from hostile proceedings on the part of the creditors; and did not amount to an appropriation; and lastly, that there was nothing in the circumstances to alter the character of the property, which, consisting of rents paid into Court, and neither applied in payment of interest, nor appropriated for such payment, was personal estate, and to be dealt with as such.

The Honorable *Peregrine Bertie*, by his will, after directing his debts to be paid, and giving several pecuniary legacies and annuities, and after charging his real estates with the payment of so much of his debts, funeral and testamentary expenses, and legacies, [561] as his personal estate would be insufficient to pay, and with the payment of the said annuities, devised his estates in the county of *Oxford* to *Willoughby Earl of Abingdon* for his life, with remainder to the second and other sons of the said Earl successively in tail male, with remainders over.

At the time of making his will, and of his death, the estates in question were subject to two several mortgages, one for £10,000, and the other for securing the sum of £14,815, borrowed by the testator of the trustees in the marriage settlement of the said Earl of *Abingdon*, to the interest whereof the Earl himself was entitled for life under that settlement.

Upon the death of the testator, the Earl came into possession of the estates by virtue of the devise contained in the will; and in *Hilary* Term 1795, the Honorable *Willoughby Bertie* (who was the Earl's second son) filed his bill, as tenant in tail in remainder under the will, to have the will established, and for an account, praying also that a sum, adequate to the payment of the principal and interest of such debts and legacies as then remained unsatisfied, might be raised by sale or mortgage of the estates, and for a receiver, who should be directed to keep down the interest from time to time out of the rents of the estates, until the principal monies should be discharged.

By an order, dated the 14th of *May* 1797, a receiver was appointed; but before the cause came to a hearing the Earl died, whereupon the Plaintiff became entitled as tenant in tail in possession, and the suit was revived against the heir at law and personal representative of the deceased.

[562] By the decree (10th of *July* 1804) it was declared, that the will be established, and referred to the Master to take an account of the personal estate of the testator *Peregrine Bertie*, and of his debts, funeral expenses, and legacies, and the arrears of the annuities given by his will, and to compute interest in the usual manner, and to distinguish such parts of the arrears of the annuities and interest of the debts as had accrued in the Earl's lifetime and since his death; and in case it should appear that the personal estate was not sufficient to answer and satisfy the debts, funeral expenses, and legacies, and the arrears of annuities, then that the testator's real estates, or a sufficient part thereof, be sold to make up the deficiency; and it was ordered that the receiver (who was also the Earl's personal representative, and a Defendant in the cause) should, out of the rents and profits of the estates, pay and keep down the interest of the mortgages and incumbrances, and the growing payments of the annuities charged thereon, and pass his accounts before the Master, and pay the balance (after the deductions directed by the former order and by that decree) into the bank, to the credit of the cause.

The interest of the mortgage for £10,000 and the annuities were duly paid by the receiver, and continued to be so in pursuance of the decree; but, with respect to the second mortgage for £14,815, the Earl being entitled to the interest thereof, as also to the rents and profits of the estates, for his life, such interest had not been

paid by the receiver, but the rents and profits of the estates were considered to be a satisfaction of the same during his life, and upon his death his younger children (who were infants) becoming entitled to £10,000 (part thereof), and his estate to the residue, the rents and profits applicable to the payment of such interest were, from and after that event, paid into Court by the receiver, and from time to time laid out in the [563] purchase of stock in the name of the Accountant-General, in trust in the cause.

In 1808, the Plaintiff *Willoughby Bertie*, being of age, suffered a recovery, and made a conveyance of the estates (subject and charged as by the testator's will) to trustees, in trust to sell and apply the money arising from sale to such purposes as therein mentioned, and (subject thereto) to stand seised of the estates, or such parts as should remain unsold, in trust for himself (the Plaintiff *Willoughby Bertie*) for life, with certain remainders, which did not take effect, and (subject thereto) upon trust for the Hon. *Peregrine Bertie* for life, with remainders over.

The Plaintiff, *Willoughby Bertie*, afterwards died; and the said *Peregrine Bertie* becoming entitled, as tenant for life, under this settlement, caused the former suit to be revived, and filed a supplemental bill against the representatives of the said late Plaintiff.

By an order (10th of August 1813) it was referred to the Master (among other things) to take an account of the testator's (*Peregrine Bertie's*) debts and legacies remaining unpaid, and the interest due thereon, and of the arrears of the annuities given by his will, and interest, and of the funds then standing in the name of the Accountant-General in trust in the cause, which were applicable to such payments; and it was ordered that the Master should enquire, and state, whether any part of such funds, and to what amount, belonged to the personal representative of the Plaintiff *Willoughby Bertie* deceased, in respect of rents and profits accrued during his life, and which had been paid in to the credit of the cause, and that the sale of the testator's real estates should be staid until the Master should have made his report.

[564] The Master made his report in pursuance of this order, whereby he found that £7105, 16s. 3d., 3 per cents., which was the fund purchased with the rents and profits accrued from the death of the testator (except such as were then standing to the account of rents and profits) to November 1808, when the late Plaintiff *Willoughby* became tenant for life, and the accumulations of such rents and profits, together with the dividends accrued on the said stock, belonged to his (the said late Plaintiff's) personal representative. That £1976, 8s. 8d., 3 per cents., being the funds purchased with the rents and profits accrued from November 1808 to Michaelmas 1810 (the quarter day preceding the death of the said late Plaintiff), and the accumulations, &c., were applicable to the payment of interest on the said £10,000 (part of the second of the above-mentioned mortgages); and in case the same should be more than sufficient for that purpose, the residue should belong to the late Plaintiff's personal representatives, and that a further sum of £1810, 14s. 5d., like stock (subject to certain deductions), also belonged to the same personal representative. And under the direction that the Master should enquire whether any and what part of the funds in Court belonged to the personal representative of the deceased Plaintiff, in respect of rents and profits accrued in his lifetime, and paid into Court, the Master stated that he was of opinion that such rents and profits as accrued while the said Plaintiff was tenant in tail were not applicable to the payment of the interest of incumbrances affecting the estate, notwithstanding the decree of the 11th of May 1813 directed that the receiver should keep down the interest of incumbrances.

A petition was now presented by *Peregrine Bertie* (the present tenant for life, and Plaintiff in the revived [565] suit), representing that the claim of the late Plaintiff's personal representative, in respect of such rents and profits, had not been properly put in issue by the pleadings, and no order made directing the account to be taken in that manner; and that the Master, in calculating interest on the £10,000 (part of the said second mortgage), had erroneously charged interest thereon from the 20th of August 1790, the day of the testator's death, instead of the 23d of September 1799, the day of the death of *Willoughby Earl of Abingdon*, up to which it appeared that all interest had been paid; therefore praying that the petitioner might be at

liberty to file exceptions to the report upon those grounds, the same having been omitted to be done within the regular time for taking exceptions.

Sir *S. Romilly* and *Phillimore*, in support of the petition.

*Heald*, for an incumbrancer on the estate, and for other parties entitled in remainder.

*Bell* and *Tinney*, contra, for the personal representative of *Willoughby Bertie*, the deceased Plaintiff.

In support of the petition it was contended, *first*, that in the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of the rents and profits of the estates; and, in support of that proposition, they referred to the case of *Sergison v. Sealy* (2 Atk. 416), and *Sanders's* note, but it was a point which had never been expressly decided. They also mentioned *Chaplin v. Chaplin* (3 P. Wms. 229), *Amesbury v. Brown* (1 Ves. 477), *Tracy v. The Countess of Hereford* (2 Bro. C. C. 128. And see *Lord Penrhyn v. Hughes*, 5 Ves. 99; *Loftus v. Swift*, 2 Sch. & Lef. 642.) *Secondly*, that the order directing the [566] receiver to keep down the interest amounted to an appropriation of so much of the rents and profits to that purpose. *Thirdly*, that the tenant in tail, by not claiming the rents and profits when he came of age, showed an intention that they should be appropriated to the payment of the interest.

The *Master of the Rolls* [Sir Wm. Grant]. There can be no question in this case with respect to the obligation on an infant tenant in tail to keep down the interest of incumbrances out of the rents and profits of the estate. For it is only by a reversioner or remainder-man that such an obligation, if it at all exists, can be enforced. Here Mr. *Willoughby Bertie*, the tenant in tail, on coming of age, suffered a recovery, and resettled the estate. There is, therefore, no reversioner or remainder-man to agitate a question as to what ought or ought not to have been done with respect to the incumbrances on that estate.

As to the real and personal representatives of *Willoughby Bertie*, the deceased tenant in tail, they have no equity against each other to vary the state of things as it existed at his death. If the interest of incumbrances has been in fact paid out of the rents and profits, the personal representatives cannot complain of any diminution which the personal estate has sustained by making such payment. If the interest has not been so paid, the person taking the real estate under *Willoughby Bertie*, the deceased tenant in tail, can as little complain that the rents and profits have not been applied in keeping down the interest. He takes subject to all incumbrances. What the incumbrances are is a mere question of fact. Unpaid interest is as much a part of the incumbrance as the principal money. In point of fact, the interest of the mortgage made by *Peregrine Bertie* to the trustees [567] under the late Lord *Abingdon's* settlement is unpaid. *Prima facie*, therefore, it must constitute a charge upon the real estate; and the owner of the real estate has no right to call upon the owner of the personal estate to exonerate him from that charge.

But it is said, that, though the interest be in fact unpaid, the order of the Court, directing the receiver to keep down the interest of the incumbrances, had the effect of an appropriation of the rents and profits to that specific purpose; and that the rights of the parties are, therefore, now the same as if the rents and profits had been so applied. Now, certainly, such a direction is given without the least view to the interests of the real and personal representatives. It is given, partly in justice to the incumbrancers, that they may not be injured by the act of the Court, in taking possession of the rents and profits, to which they had a right to resort for payment of their interest,—partly for the benefit of the estate itself, lest the incumbrancers, having their interest stopped, might be induced to resort to proceedings injurious to those who stand behind them.

The incumbrancers may or may not avail themselves of the order, by applying to the receiver. If they apply to him, they will either be paid their interest, or, if he refuses or neglects to pay them, they may complain to the Court of such neglect or refusal. But if they omit to apply for the interest, it is to be presumed that they are satisfied with the security they have, both for the interest and the principal. The Court does not force payment upon them; nor does it set apart any portion of the rents and profits to answer unclaimed interest. The balance is paid in by the receiver, and carried to the credit of the cause, without any previous [568] enquiry, whether all the incumbrancers have or have not received their interest. If the

estate were not in the possession of the Court, one incumbrancer might claim his interest, and insist on being regularly paid. Another might suffer *his* to run in arrear. The estate would be discharged of the one, and remain burdened with the other. Why should it be otherwise when the estate is in the possession of the Court? To benefit the real, at the expense of the personal estate, is no part of the purpose for which the order is made, although it may be a consequence of the incumbrancer's choosing to take the benefit of the direction given to the receiver.

Here is a fund, consisting of rents and profits, which had not been applied in the payment of interest in the lifetime of *Willoughby Bertie*, nor appropriated for such payment. What is that fund, then, but the personal estate of *Willoughby Bertie*? and what right has the person taking the real estate under him to say, that this portion of the personal estate shall, after his death, be applied to the exoneration of the real estate, from the burden of that interest? I conceive there is no ground for such a claim.

It was thrown out in argument, that *Willoughby Bertie*, by not applying, during the two first years after he came of age, to get this fund out of Court, has shown that he did not himself consider it as part of the personal estate. But, by merely doing nothing, he surely could not change the actual character of the property. The Court finds it personal estate, and must deal with it as such;—and, being personal estate, it belongs to the personal representative. I am of opinion that the Master's Report in this particular is right; and there is, therefore, no reason for allowing an exception to be taken to it.

[569] As to that part of the mortgage money to which *Willoughby Bertie* was entitled, the rents and profits that accrued in his lifetime, must, to be sure, go in satisfaction of the interest. The personal representative is not claiming both the interest and the rents and profits;—but only rents and profits. When they are paid, the demand for interest will be extinguished.

ANTROBUS and OTHERS v. DAVIDSON. *Rolls. Dec. 8–12, 1817.*

[See *Wolmershausen v. Gullick*, [1893] 2 Ch. 524.]

Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, &c., to which he may become liable by their default; the agents having afterwards become bankrupt; and government having given notice to the representatives of the Colonel (deceased) of a demand upon the Colonel's estate by virtue of an unliquidated account: a bill by the representatives of the Colonel against the representatives of the surety, to pay the balance due to government, and also to set aside a sufficient sum out of their testator's estate, to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*, dismissed with costs. No analogy to the case of *Simmons v. Bolland*, reported 3 Mer. 547.

Sir *William Fawcett*, being Colonel of the 15th Regiment of Foot, and subsequently also of the 3d Dragoon Guards, and Governor of the forts of *Tilbury* and *Gravesend*, appointed Messrs. *Ross* and *Ogilvie* his agents, who, as such agents, entered into a bond, by which they became bound to him, jointly with *Duncan Davidson*, as their surety, in the penal sum of £10,000, conditioned from time to time when required, to account with him (Sir W. F.) his executors, &c., in respect of, and pay to him and them, all sums, &c., due from them as such agents, and to settle all public [570] accounts which had been, or should, or might be, required, relative to their said concerns as agents, and also to indemnify him (Sir W. F.), his heirs, executors, &c., against all costs, charges, and expenses, which should or might be incurred by the neglect or default of them (Messrs. *Ross* and *Ogilvie*) in the premises, or in any manner relating thereto.

This bond was dated in August 1794. In March 1804, Sir W. *Fawcett* died. In the beginning of 1805, a commission of bankruptcy was issued against Messrs. *Ross* and *Ogilvie*; and shortly afterwards the following notice was sent from the War Office to the Plaintiffs, as representatives of Sir W. *Fawcett*.

"It having been found necessary, in consequence of the insolvency of Messrs. *Ross* and *Ogilvie*, late agents of the 3d Dragoon Guards, to give orders that the bills of the regimental and district paymasters, which had been drawn upon the

"said agents, for services for which the necessary funds had been impressed into their hands, should in order to prevent the serious inconvenience that would otherwise have arisen to the public service, be paid by the Paymaster General, I have the honor to acquaint you, that, under the responsibility of the late Sir W. Fawcett for the said agents, you are liable to make good the same payments. Which amount you will accordingly be pleased to pay into the hands of the Paymaster General, who has received directions to place the same, when received, to the account of the 3d Regiment of Dragoon Guards." Signed by the Under-Secretary at War.

The amount of the payments, of which notice was thus given, was therein stated to be £3225, 11s. 8d.

[571] The Plaintiffs took no steps in pursuance of the notice so received by them, being at that time, and until long afterwards (as stated by their bill), in ignorance of the bond which had been given. In *November* following they applied, and were admitted, to prove under the commission of Messrs. *Ross* and *Ogilvie* for the amount of the demand so made upon them; and afterwards, in consequence of the advertisement of a dividend to be made on the 4th of *August* 1806, another notice was issued to them from the War Office, intimating that "it would be desirable, and tend to facilitate the final arrangement of their accounts with the public, if colonels of regiments, and the representatives of deceased colonels, would grant to the assignees a special authority, to be approved on behalf of Government for carrying into execution the clearing warrants then granted and not acted upon, or that should thereafter be granted, for corps in the agency of *Ross* and *Ogilvie*." A similar proposition was sent to Messrs. *Ross* and *Ogilvie*, and their assignees, and by them transmitted to the Plaintiffs in a letter dated the 8th of *July* 1808, in which they (*Ross* and *Ogilvie*) requested to be permitted to send the Plaintiffs the requisite power of attorney; but the Plaintiffs finding, on enquiry, that no settlement of the bankrupt's accounts with government had taken place, took no notice of these applications. The Plaintiffs, being afterwards about to make a distribution of the funds in their hands, as representatives of the deceased, under a decree of the Court of Chancery, thought proper to apprise Government of such proceeding; and after repeated applications for an answer on the subject of such application, received from the Secretary at War a letter, dated the 31st of *January* 1815, as follows:

[572] "Gentlemen, I am directed to acknowledge the receipt of your letter of the 29th of *November*, and to enclose herewith a statement of the balance that appears to be due from the representatives of the late Sir *William Fawcett*, on account of the 15th Regiment of Foot and 3d Regiment of Dragoon Guards, and to acquaint you that the said balance is more likely to be increased than to be diminished upon the final examination of his accounts.

Regiment.	Period.	Sums due from the Public.	Sums due to the Public.
		£ s. d.	£. s. d.
15th Regt. of Foot.	{ From Christm. 1778 }	...	4768 15 2
	{ to Christm. 1783 }	...	1009 4 10
3d " Regiment " of Dragoon Guards.	... 1791	365 19 6½	...
" "	... 1799	111 2 3½	...
" "	... 1800	...	245 3 1½
" "	... 1801	...	1052 12 9
" "	... 1802	273 15 8	...
" "	... 1803	154 18 7	...
		£905 16 1½	£7075 15 10½

The bill, after stating the above particulars, went on to state that it was only a short time since the Plaintiffs discovered the bond in which *Davidson* was a surety; and that immediately on the discovery thereof, they served the Defendant (the

personal representative of *Davidson*) with a copy, together with a copy of the foregoing statement of the account claimed by Government; and that having been so called on for payment of the sum of £3225, 11s. 8d., and having afterwards found the increased sum of £6169, 19s. 9d. to be due to Government in respect to public money issued on account of the said regiments, and that there would probably be a much larger balance found ultimately to be due to Government on such account, and Messrs. *Ross* and *Ogilvie* having become bankrupts, and the said *Duncan* [573] *Davidson* being bound to indemnify Sir *William Fawcett* against all such deficiencies, they had applied to the Defendant accordingly to pay and discharge the balance already found due to Government, and (in order to enable them to make a just distribution of their testator's estate under the decree) to set apart a sufficient sum out of the estate of the said *Duncan Davidson*, to indemnify them in the event of a further sum being found due on a final adjustment, which was prayed accordingly.

The Defendant, by his answer to this bill, said he believed that upon the balance of accounts with *Ross* and *Ogilvie*, as army agents, in respect of the several regiments for which they acted, a large sum would be found due to *Ross* and *Ogilvie*; and that any balance which might be found due from them in respect of the 15th Regiment of Foot would be set off against such general balance. He alleged, that if at the time when the proposition made by Government to the effect above mentioned was transmitted to them, the Plaintiffs had furnished the power of attorney which was required, *Ross* and *Ogilvie* would have been able, and were ready, to procure the settlement of all the accounts in which they were concerned as Sir *William Fawcett's* agents. He submitted that the Plaintiffs had no claim against him by virtue of the bond, inasmuch as they had not, nor had their testator, suffered any loss, or been in any way damnified in respect of the accounts of *Ross* and *Ogilvie* as agents, and as he believed it was not probable that they ever would be so damnified; and that if they had any right to call upon the Defendant in respect of the same (but which he did not admit), they should have enforced their claim in a Court of Law, and could have no relief in Equity. The Defendant further stated (and his answer was supported by evidence [574] to the same effect), that the ordinary course pursued in settling the accounts of army agents by the Paymaster-General is to treat them as one general account, and to set off sums which were due to the agent in respect of one regiment against monies which might be due from the same agent in respect of other regiments; and also that it was not usual, or according to the ordinary practice of Government, in cases where they had been in the habit of settling accounts with any person as agent from time to time for any particular regiment, to call upon the colonel of that regiment for payment of any deficiency that might appear upon the said account, if there was money due to such agent in respect of other regiments sufficient to cover such deficiency.

It was also in evidence on the part of the Defendant, that the usual course of settling such accounts is with the agent, and not with the colonel;—that they are settled under powers of attorney from the colonel, or his representatives, and cannot well be settled without them;—that many colonels of regiments in the agency of *Ross* and *Ogilvie* had, since their bankruptcy, given powers of attorney to their assignees, under which the accounts of their regiments had been closed; and probably if the Plaintiffs had given such power, the accounts of the regiment in question would have been closed in like manner; and also, that although the accounts of *Ross* and *Ogilvie* with Government had not been finally settled up to the end of 1783, yet a general statement had been made by them, and delivered to the War Office, to the end of that year, including the over-issue on account of Sir *William Fawcett's* regiment, the balance of which was in favour of *Ross* and *Ogilvie* to the amount of £40,000; and one of the clerks at the War Office had frequently admitted that a very considerable balance, [575] although not to the same amount, was still owing to them on the accounts for that period.

Sir *S. Romilly* and *Roupeil*, for the Plaintiffs. Alleged that the bill was in the nature of a bill *quia timet*, and upon that principle to be supported, as in the case where Lord Keeper *North* held, that if *A.* is bound for *B.*, and has a counter-bond from *B.*, and the money is become payable on the original bond, Equity will compel *B.* to pay the debt, although *A.* is not troubled or molested for the debt, since it is unreasonable that a man should always have such a cloud hung over him. (1) The terms of the bond, in this case, are such as entitle us, not only to call for payment

of what is actually now claimed by Government, but to be indemnified to the extent of the penalty against future payments.

*Wetherell and Heald*, contra. This is only a claim made by the Secretary at War, not in respect of a settled account,—no debt actually due. The object is to compel the representatives of Mr. *Davidson*, as surety for Messrs. *Ross* and *Ogilvie*, to impound, by way of anticipation of a future possible demand, which the Plaintiffs, as representatives of Sir W. *Fawcett*, may be compelled to answer. It is impossible to produce any case in which the Court has, by way of anticipation, called upon a surety to make good the engagements of his principal, before the person en-[576]-titled to indemnity has in effect been damnified. If such were the legal effect of the bond, the Plaintiffs ought to go to law for their remedy, and can have no relief in a Court of Equity. But if not, there is no equitable ground upon which they are entitled to have that relief here which a court of law would refuse them.

Sir S. *Romilly*, in reply. This is not the case of principal against surety, but of surety seeking to compel payment by the principal debtor. Sir W. *Fawcett* was answerable to Government for his agents; but the agents themselves were the principal debtors; and thus the case comes within the principle upon which His Honour decided that of *Wright v. Morley* (11 Ves. 12, 22, referring to *Parsons v. Briddock*, 2 Vern. 608. And see *Glossop v. Harrison*, Coop. 61), which was, that as the creditor was entitled to the benefit of all the securities the principal debtor had given to his surety, the surety had full as good an equity to the benefit of all the securities the principal gave to the creditor; that the surety had precisely the same right that the creditor had, and was to stand in his place,—therefore determining that the surety was not only entitled, with regard to the payments actually made, to stand in the place of the creditor, and be reimbursed out of the fund assigned for the payment; but had also an equity to have the fund applied in his exoneration, that fund being provided by the principal debtor for the purpose of securing the payment. And it was accordingly decreed, according to the prayer of the bill, that the Plaintiff should be reimbursed what he had paid out of the fund in question; and that a sufficient portion should be set apart to answer the accruing payments. So in *Mosely*, [577] 318 (*Lee v. Rook*, Mos. 318), Sir Joseph *Jekyll*, Master of the Rolls, is represented to have said,—“If I borrow money on mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him.” It is nothing to say that such a bill as the present may have been seldom filed, or that no instance can be produced of such a decree as is prayed by it, if it can be shown, by analogy to decided cases, that it is according to principles upon which the Court usually acts, and which are completely established. The case of *Simmons v. Bolland* (3 Mer. 547), decided here a few nights ago, was, in principle, much stronger than this. There, no covenants were broken; but the executor claimed and was allowed to retain, out of the residuary fund, sufficient to protect him against the consequences of any future possible breach of covenants. So, in the case of the Duke of *Queensberry's* leases. That cited from *Aleyne* (*Eeles v. Lambert*, *Aleyne*, 38. *Styles*, 37, 54, 73), is also in point with the present. But, in *Simmons v. Bolland* it was most improbable that any demand could ever arise in respect of the covenants of which it was sought to guard against the effects of a future possible breach. Here a demand has been made already; and it is in the ordinary course of Government transactions that such demands are established after a much longer lapse of time than in the present case. We had an instance, only a few nights ago, of such a demand, in respect of transactions which had taken place during the seven years' war.(2) In this case, it should be [578] referred to the Master to ascertain what sum it will be proper to set apart to answer the demands to which the Plaintiffs may eventually become liable on account of the agency of *Ross* and *Ogilvie*.

The Master of the Rolls [Sir Wm. Grant]. The first point to be considered is, in what relation the parties to this bond stood to each other at the time of its execution.

Government allows the colonel of a regiment to appoint his own agent. The colonel is answerable for such agent, not by virtue of any security which he gives to Government, but because the law throws that responsibility on the principal. Large sums of public money pass directly into the hands of these agents, and accounts are kept and settled with them by Government, subject, however, to the ultimate



liability of the colonel, by whom they have been appointed. The colonel, however, takes security from his agent to indemnify himself against the consequences of such liability.

In the case of an ordinary money bond, there is no distinction upon the face of it, between the principal and the surety: but it is otherwise in the case of a bond of indemnity. In the present instance, Mr. *Davidson* stipulates for no act of his own: he had no money to receive, no account to settle; but as surety for Messrs. *Ross* and *Ogilvie*, he engages that they shall duly account, and that he will indemnify Sir *William Fawcett* against the consequences of their neglect or default. In doing this Mr. *Davidson* incurred a definite legal obligation. Then the first question that arises is, why should the Plaintiffs come into a court of equity to enforce a mere legal obligation? They say, because, as the representatives of Sir *William Fawcett*, they stand in [579] the situation of a surety, and, as a surety, are entitled in equity to a relief which they cannot obtain at law. It is true that a surety may come here to compel the principal to relieve him of his liability, by paying off the debt. But Sir *William Fawcett's* representatives and *Davidson*, do not stand in the relation of principal and surety in the sense in which the rule of equity considers that relation. Whatever loss there may be, it is true, will ultimately fall on *Davidson*, and therefore in a certain sense *Davidson* may be legally considered the principal debtor; but in equity he is no more the proper debtor than Sir *William Fawcett*. Both are answerable for *Ross* and *Ogilvie*; and though *Davidson* is bound to keep Sir *William Fawcett* indemnified, that obligation does not arise out of any principle of equity, but is created by special convention between the parties. Except for the bond, *Davidson* would have nothing to do with the debts of *Ross* and *Ogilvie*. The bond, therefore, which alone created, must determine the extent of, his liability. There is no principle, upon which a court of equity can extend the legal effect of the bond. Its legal effect is to protect against the consequences of future deficiencies, but not to entitle the party to call for anticipated and precautionary payment, by way of preventing the risk of his being hereafter damnified. I say this upon the supposition that a debt had been actually established as due to the public; but of this there is no evidence, beyond the mere assertion of the Under-Secretary at War, and that made not by way of claim upon *Ross* and *Ogilvie*, but merely in answer to the application of Sir *William Fawcett's* representatives to ascertain what that claim might probably amount to from the then state of the accounts. The £3225, 11s. 8d., stated to be the amount of payments for which Sir *William* had become responsible, in the first letter from the War Office, soon after the bankruptcy of *Ross* and [580] *Ogilvie*, was not claimed by Government in respect of a debt actually due from *Ross* and *Ogilvie*, but in respect of unpaid bills, which had been taken up, and for which the Paymaster-General had become answerable. The application was therefore made to the representatives of Sir *William Fawcett* to replace those securities, without regard to the balance which might ultimately be found to be due to the agents upon a general account with Government; and, from its subsequent silence, it must be taken that Government had suffered them to pass into that general account.

The account transmitted to Sir *William's* representatives in 1815 contained the whole demand which Government then supposed itself to have upon Sir *William's* estate, accompanied with a statement that the balance was more likely to be increased than diminished. There is no evidence that any sum of money in particular was at that time actually due from *Ross* and *Ogilvie* to Government. The *dicta* in the cases cited (of Lord Keeper *North* in *Ranelagh v. Hayes*, 1 Vern. 190; and of Sir *Joseph Jekyll* in *Lee v. Rook*, Mos. 318) furnish no authority for the demand made in this instance; for they presume that, even where a proper surety comes into equity to compel payment of a debt by the proper principal, he is able to tell what that debt is. Can a surety say to his principal, "Bring money into Court by way of deposit, because it may eventually turn out that a debt may be found to be due by you for which I may become answerable?"

What is here asked, is to have a new security, and one of a totally different sort from that which *Davidson* consented to give,—a security by deposit of money, instead of a security by personal obligation.

[581] There is no analogy in this case to the provision which the Court sometimes makes for an unascertained debt, as, for instance, where it refuses to direct a dis-

tribution of the estate among residuary legatees, if apprised that there are existing claims to which the executors may eventually become liable, in respect of covenants which their testator has entered into. (See *Simmons v. Bolland*, 3 Mer. 547.) The Court is not administering Mr. *Davidson's* estate. It is not called upon to distribute the residue, while it is uncertain whether a claim may not be made on the executor in consequence of this bond. The executor is not seeking its protection against an eventual legal liability. But a person, who is as yet no creditor, and who may never become one, is claiming to force out of the hands of the executor the utmost extent of what can ever become due. I cannot make such a decree, without laying it down as a rule, that, whenever a person bound in an obligation of this sort dies, a court of equity will compel his executor to bring into Court the whole amount of the penalty of the bond. I can find no trace of the exercise of any such jurisdiction, and therefore must dismiss the Bill.

Bill dismissed, with costs.

(1) *E. of Ranelagh v. Hayes*, 1 Vern. 190; 1 Eq. Ab. 79, pl. 5. This was only a case put by the Lord Keeper by way of analogy to the case before him, which was that of a bill by the Earl of *Ranelagh* for the specific performance of a covenant to keep harmless in respect of an assignment of shares of the Excise in *Ireland*, upon which he was sued by the Crown.

(2) In a case of *Kilby v. M'Adam*, the circumstances of which I am not acquainted with, and understand that it ended in a compromise.

[582] GREGORY and PARKER v. WILLIAMS. *Rolls. Dec.* 4-8, 1817.

[See *Grundy v. Heathcote*, 1863, 1 H. & M. 175; *Drew v. Martin*, 1864, 2 H. & M. 133. Explained, *In re Empress Engineering Co.*, 1880, 16 Ch. D. 125. See *Lloyd's v. Harper*, 1880, 16 Ch. D. 315; *Touche v. Metropolitan Railway Warehousing Co.*, 1871, L. R. 6 Ch. 677; *In re Flavell*, 1883, 25 Ch. D. 95.]

W. landlord to P., having the power to distrain for rent in arrear, and having actually distrained for part, and being a creditor of P. for money lent, as well as for rent in arrear, upon P.'s representing to him that he is also indebted to G. to the amount of about £900, for which he is in fear of arrest and about to leave the country, undertakes that if P. will give up to him the farm, and execute an assignment of all his property, he will pay G.'s debt in the first instance, out of the proceeds, and apply the residue in satisfaction of his own demand, and the surplus (if any) to P., who executes a bill of sale to W. accordingly on the faith of such undertaking. Upon the bill of G. and P., this agreement was enforced against W. to the extent of £900, the alleged amount of G.'s debt, but no further; the actual debt having proved to exceed that amount; and not prevented from having effect, either by the circumstance that P.'s property fell short of the estimated amount, or of P.'s being at the time indebted to other persons besides G. and W., which formed no part of the consideration for the agreement, although noticed in W.'s undertaking as having been represented otherwise. The engagement not to pay G. in the first instance, not being made directly to G. but through the medium of P., by whom also the consideration was furnished, P. held in a court of equity to be a Trustee for G. But *quære*, if the Plaintiffs could recover at law upon such an agreement.

The Bill made the following case. In August 1813, the Plaintiff *Gregory* being in the occupation of a certain farm as tenant to the Defendant, and having a considerable farming stock and crops thereon, with the Defendant's consent gave up the possession of the farm to the Plaintiff *Parker*, who thereupon agreed to give him (*Gregory*) the sum of £1069, 7s. 6d. (the estimated value) as a consideration for the stock and crops, of which he also took possession; and, not being able to pay the amount at the time, gave his promissory note for the same, payable on the 2d of February 1815, [583] with interest. After this arrangement was concluded, *Parker* held the farm, as tenant to the Defendant, till he quitted the same on the occasion of his executing the bill of sale after mentioned. On the 1st of January 1815, there being a considerable amount of rent in arrear, and *Parker* being moreover indebted

to the Defendant £539, 13s. for monies advanced, the Defendant distrained on the premises ; and *Parker* being then desirous to pay off the sum so due to the Defendant as well as his debt to *Gregory*, the Defendant undertook that, if he (*Parker*) would give up the farm, and assign to him (the Defendant) all his stock and crops thereon, and all other his property and effects, he (the Defendant) would, out of the produce thereof, in the first place pay what was due to *Gregory* on the promissory note, and apply the residue (so far as the same would extend) in satisfaction of his (the Defendant's) demand, and pay the surplus (if any) to *Parker*. *Parker* consented to the terms proposed, and, upon the faith thereof, executed to the Defendant a bill of sale of all his property accordingly ; whereupon, for the better securing the performance of his undertaking to pay *Gregory's* debt in the first instance, he (the Defendant) gave to *Parker* the following undertaking in writing.

" Mr. *Williams* will satisfy *Gregory's* demand, which he apprehends is about £900, upon *Parker's* relinquishing possession of the farms, and assigning to him all his property. This he consents to, that *Parker* may, if he sees it convenient, continue in the kingdom, and be released from all demands, Mr. *Williams* conceiving that there are only his and *Gregory's* debts owing by *Parker*.—28th Jan. 1815."

At this time, *Gregory* was absent, and at a distance ; and *Parker*, trusting to the Defendant to communicate to [584] *Gregory* the arrangement they had come to (which he, the Defendant, undertook to do), and not doubting *Gregory's* consent to the same, quitted the farm, and gave up his effects accordingly ; notwithstanding which, the first intimation given to *Gregory* of any arrangement between them, was by a letter from the Defendant's solicitor, dated the 30th of January 1815, and which was in the terms following.

" Sir,—Mr. *Williams* having made a distress upon Mr. *Parker's* goods for a considerable sum for arrears of rent, Mr. *Parker* being also indebted to him in the sum of £539, 13s. on simple contract, for money lent, and the remainder of the appraisal of stock, I think it right to acquaint you herewith, and that he has this day executed a bill of sale to Mr. *Williams* for the last-mentioned sum. It appears, from Mr. *Parker's* statement of his effects, that they amount to nearly £2000, and Mr. W. has agreed that you should share with him in proportion to the amount of your respective demands under the bill of sale, if you should signify your consent thereto immediately."

Upon receiving this letter, *Gregory* made enquiries for *Parker*, in order to ascertain the truth of the transaction ; and not being able to find him, and unwilling to distress him, acceded to the proposal contained in the letter, upon the faith of the representation thereby made : the bill, however, alleging that he so acceded, in absolute ignorance of the Defendant's having made such promise, and undertaking as before mentioned ; the fact of his having done so being since made known to *Gregory* by a mere accident.

[585] The bill, stating these circumstances, prayed a discovery, and an account of what was due to the Plaintiff *Gregory* for principal and interest on the promissory note ; and that it might be declared that he (*Gregory*) was entitled to have the same paid him by the Defendant out of the proceeds of the property assigned to him by the bill of sale, in the first instance, and in preference to the satisfaction of the Defendant's demand ; and that the Defendant might account for the property so assigned, and the proceeds thereof, and pay to him thereout what should be so found due upon the said promissory note accordingly.

It appeared by the answer of the Defendant, that, previous to his agreement with *Gregory* to take of him the farm which he (*Gregory*) rented, the Plaintiff *Parker* had held, and then continued to hold, another farm of the Defendant. That the valuation at which *Parker* took the stock and crops on *Gregory's* farm being very high, and farming having then become an unprofitable business, the Defendant (who was a large creditor of *Parker's* for rent in arrear and monies advanced), upon the understanding that he (*Parker*) had no other creditor besides himself and *Gregory*, did, with a view to his (*Parker's*) benefit, towards the end of 1814, propose and agree to take the security of his stock (estimated by *Parker* himself at £1990), and to make an abatement in the rent of the farms ; notwithstanding which, *Parker*, being under excessive alarm of an arrest by *Gregory*, shortly afterwards absconded ; and thereupon, in order to relieve him from the apprehensions so entertained by

him, the Defendant directed his solicitor to make to *Gregory* the proposal contained in his letter of the 30th of *January* 1815, to which he (*Gregory*) acceded, as was mentioned in the bill. That on the 28th of *January*, before the execution of the bill of sale (which was also executed on [586] the 30th), the Defendant sent in a distress, both upon *Parker's* original farm for £798, and on the farm which he had taken from *Gregory* for £532, rent in arrear; and that the whole of the stock and crops on the first farm were seized under the distress on the said 28th of *January*, and the clear amount received by the Defendant by sale thereof was only £433, 12s. 8d., leaving a balance of £364, 7s. 4d. on the said arrear of rent thereon. That the whole amount of the stock and crops taken under the bill of sale upon the other farm was £761, 15s. 3d., leaving a surplus, beyond the rent in arrear due in respect of that farm, of £245, 19s. 11d., being all that the Defendant had received under the bill of sale, and all that remained of *Parker's* effects to pay the Defendant's general debt from *Parker* of £539, 13s., besides the balance of £364, 7s. 4d., on the rent in arrear of the first-mentioned farm; but the Defendant stated that he was willing to account with *Gregory* for his proportion of such surplus, and insisted that in so doing he would have satisfied the proposal so made on his part to *Gregory*, which (he said) was the only proposal or offer he ever made, or intended to make, to *Gregory*, for that his letter to *Parker* of the 28th was never intended by him as a promise or undertaking, but merely as a private friendly communication to *Parker*, made in the confidence that his representations of the amount of *Gregory's* debt, and as to his being his (*Parker's*) sole creditor besides the Defendant, and as to the supposed estimate of his property to answer the same, were correct, but which turned out in every respect to be false.

He therefore submitted, that he (the Defendant) ought not to be held bound by any promise or undertaking so made to *Parker*; but, if the Court should be of opinion that the Plaintiffs were entitled to claim any thing of him under or by virtue of his letter of the 28th of [587] *January*, then he submitted that his (the Defendant's) undertaking by that letter could not be extended beyond the amount of £900, therein supposed to be the amount of *Gregory's* demand. He also insisted that the question, whether or not the said letter contained a valid promise or undertaking to satisfy any and what debt of *Parker* to *Gregory*, was a question altogether at law, and craved the benefit of that objection to the bill as if he had demurred thereto. He denied that the bill of sale was executed upon the conditions in the bill alleged, or upon the faith of such undertaking by the Defendant as therein mentioned; but admitted that *Parker* did in fact execute such bill of sale for such purposes only as appeared by the instrument itself; whereby, after reciting that a considerable sum of money was then due and owing from *Parker* to the Defendant for rents and arrears of rent, which would altogether amount to £1350, for part of which he (the Defendant) had made a distress, and intended to make a distress for the remainder; and that there was also due and owing from him (*Parker*) to the Defendant for simple contract debts, the further sum of £539 and upwards, which he (*Parker*) was willing should be paid and satisfied, so far as his effects, after the payment thereof of the said £1350, would extend; it was witnessed that, for the considerations therein mentioned, he (*Parker*) sold, assigned, &c., to the Defendant, his executors, &c., all his live and dead stock (and other the particulars therein mentioned) to hold, &c., without rendering any account, or being accountable to him (*Parker*), otherwise than that the Defendant should pay to *Parker* all monies which should come to his (the Defendant's) hands from the sale of the effects, and should remain after payment of the £1350 and £539 and the costs of the distresses and bill of sale, and of settling the said effects.

[588] A great deal of evidence was gone into on the part of the Defendant, in support of the allegations made by his answer; the effect of which may be sufficiently collected from His Honor's judgment.

*Hart and Horne*, for the Plaintiffs.

*Sir Samuel Romilly and Wilson*, for the Defendant.

[The substance of the arguments on each side may also be fully collected from the judgment.]

The *Master of the Rolls* [Sir Wm. Grant]. As things have turned out, it appears that Mr. Williams has entered into a very disadvantageous agreement; but the question is, Whether there be any equitable grounds on which he can be exempted from the performance of it. He was himself the judge of the advantages and dis-

advantages of obtaining that which he asked for from Mr. *Parker*, namely, the relinquishment of the two farms and the bill of sale of his property. He knew all his rights and all his powers as a landlord. He knew that he had executed one distress. He knew that, in two days more, he could distrain for a further claim of rent. It was for him to consider whether he would abide by his rights as landlord, or stipulate with Mr. *Parker* for the immediate conveyance of all his property, whatever it might be, whether more or less than the amount of the rent, and for the immediate relinquishment of the two farms; and he says, I think it for my advantage to stipulate for this, though I could by distress secure the payment of the rent. The offer he makes is to pay Mr. *Gregory's* debt, considering it to amount to a certain sum. The bill of sale is executed. He obtains what is stipulated for, and the effects are disposed of. It is impossible to restore the parties [589] back again into the situation in which they stood before this agreement was entered into.

The way in which I apprehend the second agreement, or rather the letter written by Mr. *Williams's* attorney, and which produced the acceptance on the part of Mr. *Gregory*, is introduced, is this. The Plaintiffs are apprehensive that they may be met by Mr. *Williams*, with a defence that, at a subsequent period, Mr. *Gregory* had assented to a different arrangement, namely, to take his share of the surplus that might remain after the discharge of the distress which Mr. *Gregory* had laid on. Now, they say we are not bound by that assent so given, because we were kept in the dark with respect to the first engagement; and I should certainly be of that opinion, because, if Mr. *Williams* meant to propose to Mr. *Gregory* a variation of the bargain which he had been willing to enter into with Mr. *Parker*, he should have distinctly stated to him what that bargain was, and asked him whether he was willing to relinquish the benefit he possessed, and to enter into a new arrangement; but Mr. *Gregory*, at the time he consents to a second arrangement, is totally uninformed of the existence of the first; and, therefore, I conceive it is impossible Mr. *Gregory* can be bound by his acceptance of the proposition.

It is then said, that supposing it is upon the first engagement that Mr. *Gregory* is to proceed, they ought to have gone to law, and to have recovered, as upon an undertaking in writing to pay the debt of another person, inasmuch as such an undertaking is undoubtedly valid at law. Now, it may be a doubt whether they could have recovered at law upon this agreement; for the engagement is not made directly to *Gregory*; it is made to *Parker* only; and the consideration is furnished by [590] *Parker*; for it is *Parker* alone that does the acts which constitute the consideration for the agreement. *Gregory* himself furnishes no part of that consideration; and he is no party to the contract. *Parker* acts as his trustee; and *Gregory* may derive an equitable right through the mediation of *Parker's* agreement; but I think it would be at least questionable whether he could have maintained an action at law. It seems to me like the case (1) where a person promised the wife of an intestate, that, if she would let his name be used in the administration, he would make up the deficiency of assets to pay the intestate's debts. Lord *Hardwicke* said that that was an engagement which could be made good only in a court of equity; for that it was not made to the creditors:—that they could claim therefore only through the wife, but that they were entitled to the performance of a promise made to her, because it was to be considered as made to her in trust for them. So here, *Gregory* has a right to insist upon the benefit of the promise made to *Parker*.

Then it is said, that the engagement ought not to bind *Williams*, unless it turned out that all the circumstances were as he supposed them to be; and that, as it appears there were other debts besides his own and *Gregory's*, he entered into the agreement under a mistake, or ra-[591]—ther upon a condition, which has not been performed, inasmuch as, there being other debts, his object has not been effected, which was to clear *Parker* of all his debts, and to enable him to remain in the kingdom if he thought fit; but I apprehend that, inasmuch as *Parker* does not disclose to *Williams* that there are any other debts, but makes a bill of sale without stating that any other exists, that is, on his part, equivalent to an assertion, that those other debts are of no consequence to the object which *Williams* and he had in view; that they are not such debts as he is likely to be harassed for, and the payment of which, or the pursuit of the creditors for which, would be likely to drive him from the kingdom. It appears, on *Williams's* own statement, that *Parker's* great fear was his being arrested by *Gregory*; that it was chiefly for the purpose of guarding against the consequences of his demand, that *Williams* thought it necessary to interfere; and that *Parker's* intention to

relinquish the kingdom was caused entirely by his apprehension of *Gregory*. Therefore, when *Parker* agrees to make the bill of sale, not mentioning the other debts, it is as much as if he said, I do not care for those other debts,—those will not prevent my remaining in the kingdom. I shall be satisfied with what you do for me in paying *Gregory*. Therefore I do not apprehend that this can be considered as a condition, on the failure of which there is no agreement between the parties. As to the question, whether this amounts to an agreement to pay the whole of *Gregory's* debt, whatever it may be, or only to the extent of £900, I apprehend it can be taken only as an engagement to pay £900, unless the debt had happened to be only a trifle more than £900, so as to answer the words “about £900,” and for this reason, that it does not appear that *Parker* did disclose to *Williams* what the true state of his debt to *Gregory* was ;—it does not appear that [592] he informed him it was not merely £900, or about £900, but nearly £1100, that was due to *Gregory*. Then could *Parker* be heard to say, when he gets *Williams* to enter into this agreement, on the supposition that only £900 was due, that *Williams* should pay whatever was due ? His silence at the time would debar him from setting up any such claim. It would be a fraud upon *Williams*, knowing that there was a larger sum due, to acquiesce apparently in *Williams's* statement that it was a less sum that was due. Then, if *Parker* could not claim the payment of a larger sum, neither can *Gregory* ; because *Gregory* can, in this case, claim only through *Parker*. There is no engagement with himself,—he can claim the performance of such agreement only as has been entered into with *Parker* ; and I apprehend that the engagement with *Parker* must be considered to be only to pay a debt of £900, or thereabouts. I am of opinion, therefore, that it is only to the extent of £900 that Mr. *Williams* has bound himself to make good *Gregory's* debt.

(1) *Tomlinson v. Gill*, Amb. 330, where also Lord *Hardwicke* says, “The Plaintiff “is proper for relief here, for two reasons, *first*, He could not maintain an action at “law, for the promise was made to the widow ; but he is proper here, for the promise “was for the benefit of the creditors, and the widow is a trustee for them. *2dly*, The “bill is brought for an account, and that draws to it relief, like the common case of “a bill to be paid a debt out of assets.”

[593] BENJAMIN VULLIAMY and B. LEWIS VULLIAMY, *Plaintiffs*, and WILL. NOBLE, L. WILSON, J. MORRIS, J. DORIEN, SAM. PEPYS COCKERELL, F. BOOTH, and the Governor and Company of the BANK of ENGLAND, *Defendants*. Nov. 17, 27, Dec. 8, 9, 12, 1817.

[See *Braithwaite v. Britain*, 1836, 1 Keen, 220 ; *Jones v. Mossop*, 1844, 3 Hare, 573 ; *Lodge v. Prichard*, 1863, 1 De G. J. & S. 614. Explained, *Middleton v. Pollock*, 1875, L. R. 20 Eq. 515.]

See *Devaynes v. Noble*, 1 Mer. 530.—V., a customer of the banking-house of D. & Co., transfers to N. a partner in the firm, a sum of stock by way of security for money borrowed of them, and gives notes for the amount, payable on the stock being re-transferred to him. He pays off these notes, and afterwards borrows a further sum on the joint note of himself and his son, without calling for a re-transfer. The stock so transferred having been blended with other stock, of which N. was in like manner possessed by way of security for other customers, is sold by the partnership, and the produce applied to the use of the partnership, except a small balance still remaining in the name of N. D. (another of the partners) afterwards dies, and the partnership is carried on without any alteration of firm till the surviving partners become bankrupt. On the bill of V. against the assignees of the bankrupts, and against the representatives of D. it was decided that he was entitled to the stock remaining in the name of N. (the other creditors in respect of stock transferred having been satisfied their demands), as being sufficiently appropriated ; to set off, against the joint note of himself and his son, so much of the money received by the partnership out of the sale of the remainder of the stock as was equal to the amount of such joint note ; to prove the residue as a debt against the estate of the bankrupts ; and to receive from D.'s estate the amount of the deficiency.

In the year 1793, *William Devaynes*, *Thomas Croft*, *John Dawes*, and the defendant *Noble*, carried on business as bankers, in partnership, under the firm of

*Croft, Devaynes, and Co.* During the same and the following year, the Plaintiff *Benjamin Vulliamy*, who kept cash with the said bankers on his own private account, borrowed of them several sums of money, to [594] the amount of £8500, and to secure the payment of the money so borrowed, signed notes, drawn by *Noble* (one of the partners), by which he engaged to pay to the partnership the several sums so borrowed, on their re-transferring to him (the Plaintiff), or his order, certain proportional sums of stock, transferred by the Plaintiff into the name of *Noble* (amounting together to £8700 £4 per cent. Bank Annuities, and £1425 £3 per cent. Reduced Annuities), as a collateral security for the payment of the notes. The notes were dated respectively the 10th of *May* 1793, the 1st of *November* 1793, and the 6th of *January* 1794, and were for the respective sums of £850, £770, 10s., and £6916, 12s. 8d.

In *September* 1796, *Thomas Croft* (one of the partners) retired, and *W. Close* entered into the partnership from which time the business was carried on by *Devaynes, Dawes, Noble, and Close* till *Michaelmas* 1800, when *R. H. Croft* was taken into the partnership. At *Michaelmas* 1803, *Close* retired, and *Barwick* was admitted a partner; after which the business was carried on under the firm of *Devaynes, Dawes, Noble, and Co.*, and continued to be so carried on by the surviving partners, without any alteration of name, after the death of *Devaynes* (another of the partners), which happened on the 29th of *November* 1809. The bill charging that the name of the deceased partner continued to be used in the firm, as aforesaid, with the permission of his representatives.

The bill further stated, that from the respective times of their several transfers of stock, the first named Plaintiff continued to keep a private cash account with the firms of *Croft, Devaynes, and Co.*, and *Devaynes, Dawes, Noble, and Co.*, as his bankers, down to the 2d of *May* 1810, when he closed his private ac-[595]-count with the partnership, as after mentioned; and, during all the time aforesaid, *Noble* received the dividends of the stock transferred, and carried the same to the plaintiff's account in the partnership books.

The bill then proceeded to state, that in 1806 both the Plaintiffs (father and son) borrowed of the banking-house or firm of *Devaynes, Dawes, Noble, and Co.*, £300, for which they gave their joint note, dated the 2d of *October* 1806; in 1807, the further sum of £990, for which they gave their joint note, dated the 2d of *September* 1807; and in 1809, the further sum of £3000, for which they gave their joint note dated the 2d of *May* 1809; amounting together to £4290, so borrowed by the Plaintiffs on their joint account.

That *Vulliamy*, the father, paid off all the £8500 borrowed by him on his private account (except £2750) on the 5th of *April* 1809, and took up his former notes, and gave to the firm of *Devaynes, Dawes, Noble, and Co.* a fresh note for the sum then remaining due, as follows:

"*London, April 5th, 1809.* I promise to pay to the order of Messrs. *Devaynes, Dawes, and Co.* the sum of £2750, with lawful interest, for value received, they transferring to me, or my order, £8700 4 per cents., and £1425 Red. Ann., which they hold as a collateral security. *B. Vulliamy.*"

That this note was written by *Noble*, and signed by the Plaintiff, and by him delivered to *Noble* for the use of the partnership, and kept by them until the amount was paid off by the Plaintiff, on the 2d of *May* 1810, when the note was re-delivered to him, whereby all the private debt of the said Plaintiff, for securing whereof the stock had been so transferred, became satisfied and [596] extinguished, and the stock ought to have been re-transferred; but the same being considered by the banking-house to remain in *Noble's* name as a collateral security for the money advanced to both Plaintiffs on their joint notes, and the Plaintiff *Vulliamy*, the father, having a high opinion of the honour and solvency of the house, he (the said Plaintiff) did not require a re-transfer.

On the 1st of *August* 1810, a commission of bankrupt issued against the firm of *Devaynes, Dawes, Noble, and Co.*, under which the Defendants, *Wilson, Morris, and Dorien*, were appointed assignees; and the bill further stated that, upon the failure of the firm, the Plaintiff *Vulliamy*, the father, applied to *Noble* respecting the stock so standing in his name and transferred to him as aforesaid, and demanded a re-transfer, when *Noble*, to the Plaintiff's great surprise, confessed that he had, with the consent, and for the use, of the banking-house, and during *Devaynes's* life-time,

sold out the whole stock, except £1444, 8s. 10d. 4 per cents. and £1085, 19s. 5d. Red. 3 per cents., which last sums, he admitted, were then still standing in his name, part of the stock so transferred to him as aforesaid, and which the Plaintiff required to have re-transferred to him accordingly.

The bill then charged, by way of evidence, that the stock transferred to *Noble* was the property of *Vulliamy*, the father, and held by the firm only in trust for him, and as a security for payment of the money due from him to them, that they regularly gave the Plaintiff credit in their books for the dividends, down to the time of their bankruptcy. It further charged that the whole of the stock (except the £1444, 8s. 10d. 4 per cents. and £1083, 19s. 5d. 3 per cents.) had been sold out, and the money arising from the sale thereof received by *Devaynes* in his lifetime, and by the bankrupts, or by [597] *Noble*, by their direction, and the produce applied to the use of the partnership. That such stock was clandestinely and fraudulently so sold out and applied, the Plaintiff never having been informed, or known, thereof, until after the house had stopped payment, when *Noble* acquainted the Plaintiff's solicitor therewith. It insisted that the £4290, which remained due from the Plaintiffs on their joint notes, ought to be set off against the produce of the stock so sold and disposed of, the amount whereof was charged by the elder Plaintiff to constitute a debt to him from the firm. It charged, moreover, that the personal estate of *Devaynes* was, and ought to be considered liable to the elder Plaintiff for the amount of the stock sold out, or for so much as the said Plaintiff could not set off against the demand of the bankrupt in respect of the joint notes of himself and the Co-plaintiff. And it consequently prayed, that the said Plaintiff might be declared entitled to have the whole of the stock so transferred by him to *Noble* for the purposes aforesaid replaced by the assignees by and out of the estate of the bankrupts, in the first instance, or by the Defendants *Cockerell* and *Booth* (*Devaynes's* executors), out of the assets of their testator; that accordingly the sums of £1444, 8s. 10d. 4 per cents. and £1083, 19s. 5d. 3 per cents., residue of such stock, might be repaid and re-transferred to the Plaintiff; and that an account might be taken of the stock sold out, and so much as should appear to have been sold out upon such account taken might be re-purchased by the assignees, or by *Devaynes's* executors, out of his assets, and transferred to the Plaintiff; and, in case he could not have the amount thereof so re-purchased, then that he might be declared entitled, and be permitted, to set off so much of the money which had been received by *Noble* and his partners as should be sufficient to answer and satisfy the amount of [598] the joint notes of the Plaintiffs, or so much as was then due in respect thereof, and that the notes might thereupon be decreed to be delivered up, and the Plaintiff *Vulliamy*, the father, declared a creditor upon the estate of the bankrupts for the residue; and, in case the Court should be of opinion that the said Plaintiff could not be permitted such set-off, then that he might be declared a creditor for, and entitled to prove under the commission, the whole amount of the produce of the stock so sold and disposed of, and entitled to receive satisfaction out of *Devaynes's* personal assets for so much of the stock as should appear to have been sold and applied to the use of the firm in his lifetime and whilst he continued a partner, so that he might receive the full amount thereof in manner aforesaid; and that the Defendants (the executors of *Devaynes*) might therefore either admit assets or account in the usual manner; and that all necessary directions might be given accordingly. The bill likewise prayed an injunction from sale of the stock remaining in the name of *Noble*, and from all proceedings at law in respect of the joint notes of the Plaintiffs.

The Defendants, *Noble*, and the assignees of the bankrupts, by their answer, admitted that, from the time of the respective transfers of stock made to him as aforesaid, to the months of *April* and *June* 1803, respectively, the Defendant *Noble* received the dividends, and the same were entered in the books of the partnership to the account of the Plaintiff, the father, and carried to his credit. They admitted the borrowing of the three several sums of £300, £990, and £3000, by both Plaintiffs, and that for securing the payment of the last-mentioned sum, they gave their joint note dated the 6th of *May* 1809, as aforesaid; but said that, for securing the two first sums, the Plaintiff, the father, [599] gave two separate notes signed by himself only; and they admitted that the said Plaintiff had since paid off the whole amount of his separate debts to the partnership, as in the bill mentioned, except the amount of the two last-mentioned notes; and that the same, together with the amount of



the joint note for £3000, and interest upon all of them, still remained due and owing from the Plaintiffs respectively.

They admitted that no part of the stock transferred by the Plaintiff to *Noble* had ever been re-transferred to the Plaintiff; and *Noble* said, that the reason why the same had not been re-transferred, during the solvency of the house, was, because the Plaintiff had always remained indebted to the house during that time. They said, that while the stock remained in *Noble's* name, no separate or particular account was kept thereof, but the same was mixed with other stock, in the same respective funds, standing in the name of *Noble*, which belonged to the partnership, and to various other persons who had accounts with the partnership; and that the whole of such stock was carried to the general accounts of the respective funds. That in *June* 1803 there was standing in *Noble's* name, on such mixed or general account, £24,044, 8s. 10d. 4 per cents., and £76,277, 13s. 10d. 3 per cents., and the further sum of £12,000 4 per cents., in the name of some one or more of the remaining partners of the firm, and on account thereof; which several sums of £24,044, 8s. 10d., and £12,000 4 per cents., and £76,277, 13s. 10d. 3 per cents., were then respectively applicable to the payment, as well of the stock transferred by the Plaintiff, as of that belonging to the several other persons who had claims thereon respectively. That, between the month of *June* 1803 and the month of *November* 1809, the Defendant *Noble* [600] at times received into his name several other sums of the like respective stocks, both on account of the banking-house, and of other persons, which were in like manner carried to, and blended with the two general accounts aforesaid; and that he also, during such last-mentioned period, from time to time sold or transferred out of the said mixed or general funds, various parts thereof, as occasion required, so that the aggregate amount of the said funds was, during all that time, continually varying. They admitted, that there were then standing in the name of *Noble*, the £1444, 13s. 10d. 4 per cents., and £1083, 19s. 5d. 3 per cents. stated in the bill, and that the same had always been standing in his name, ever since the Plaintiff's stock had been so transferred to him; but they said that the same were the respective balances of the said two general accounts, and appeared to have arisen from various purchases and sales of such stocks respectively, with which the Plaintiff's original stock had no connection. They admitted that the whole produce arising from the sale of the Plaintiff's stock was received by, and applied to the use of the firm, and that the interest and dividends thereof, after the same was sold out, were continued to be carried to the Plaintiff's credit on his account with the firm; but they denied that this was done with any fraudulent design towards the Plaintiff, and said that the firm was always ready, during its solvency, to have re-transferred the same to the Plaintiff at his request, and on payment of what was owing from him; and they submitted whether, under all the circumstances, the Plaintiff was entitled to such set-off as was claimed by the bill, and whether the Defendants, notwithstanding such sale, ought not to be permitted to sue the Plaintiffs respectively on the notes so due as aforesaid, and particularly upon this joint note for £3000, if they refused to take up and pay the same. [601] They insisted that the Plaintiff was not entitled to have the £1444, 8s. 10d. 4 per cents., and £1083, 19s. 5d. 3 per cents., remaining in *Noble's* name, transferred to him, inasmuch as the said sums were not (except as to some very small part thereof) parcel of his original stock, but had arisen, in the manner before mentioned, from subsequent purchases and sales of stock unconnected therewith; but that the same ought to be considered as part of the general estate of the bankrupts, and the Plaintiff only entitled to prove under the commission in respect of such demand as he might be able to establish thereon.

There was evidence in the cause, the material facts of which may be collected from the arguments and the judgment.

Sir A. Piggott, Trower, and Roupell, for the Plaintiffs.

The answer, which has been read, comprehends all the facts which constitute the equity of this case.

In 1793, the Plaintiff, *Benjamin Vulliamy*, had occasion for a sum of money, which he borrowed of the house of *Devaynes* and Co., and for the repayment of which he gave notes, and pledged certain sums of stock as a collateral security, which stock was transferred accordingly into the name of *Noble*, one of the partners in the firm. In *November* 1809 *Devaynes* died, but his name remained in the firm

down to the time of the bankruptcy, with the assent of his representatives. The Plaintiff continued, during all this time, to keep a private cash account with the house. In 1806, he borrowed £300, for which he gave his separate note. In 1807, he borrowed the further sum of £990, for which he gave his separate note also. And in May 1809 both Plaintiffs gave their joint note for £3000. [602] All these transactions took place in *Devaynes's* lifetime. Before the death of *Devaynes* all the debts owing by the Plaintiff to the partnership had been paid, except what was due upon the last-mentioned notes. At that time it appears, that there was no stock remaining which could have been transferred; however, the Plaintiff did not apply for a transfer, having no suspicion as to the responsibility of the house. Now it is contended, that the sums which are due on these notes, particularly the last of them (that for £3000), constitute a different debt from that for the security of which the stock had been transferred into the name of *Noble*, from the circumstance of its being a joint debt. But we must attend to what was at the time the actual situation of the parties, in order to see whether the circumstance of its being a loan to the father and son jointly, instead of to the father only, does in this case make any real difference. Considered as a loan to the father, it was (in fact) a loan to him of his own money; for the stock had at that time been sold, and the produce (which was the Plaintiff's own) had been unjustly appropriated by the partnership. What can afford more decisive evidence of an understanding between the parties, that the stock should remain a security for the joint and separate debt, than its having been suffered to continue in *Noble's* name, after all the original debt had been paid off, and after the new joint and separate debt had been contracted? With regard to the acts of *Noble*, committed without the privity or consent of the Plaintiff, they can make no difference in the nature of the Plaintiff's rights. The Plaintiff did not sanction the violation by *Noble*, of his duty as a trustee, by blending the stock committed to him by the Plaintiff, with the stock committed to him by other persons. It is this circumstance which constitutes the difference between the present case and all those which [603] were before the *Master of the Rolls*, upon the exceptions to the Master's Report. The stock transferred into the name of *Noble* was so transferred to him as a trustee for the Plaintiff. If he had performed his duty, that stock would now be remaining in the Bank of *England*, and there could be no question as to the Plaintiff's right to have it specifically retransferred. As that is not the case, he contends that he is entitled to have it replaced, or to have the notes for which it remained a security delivered up to him as being substantially satisfied out of the produce of the stock sold, and the residue made good. With regard to the stock admitted to be still remaining in the name of *Noble*, it is clear that the Plaintiff is specifically entitled to the 4 per cents., because it is also admitted, that the whole amount of that description of stock, which had been committed to him by others, had been restored (*Note*: This fact appeared by the schedule to the answer); and as to the 3 per cents., although it cannot be traced with equal certainty to be specifically a part of the Plaintiff's property, yet the fact that it is so, is made to appear highly probable.

The case against *Devaynes's* estate (the equity of which is now settled) is that his assets are clearly responsible for the deficiency of the partnership estate to make good these demands, and that they may be followed in this Court for such purpose.

Most of the questions which will here be agitated, were before the *Master of the Rolls* in *Devaynes v. Noble* (1 Mer. 529; *Ex parte Kendall*, 17 Ves. 514), to which it is now necessary only generally to refer. But, with respect to the responsibility of *Devaynes's* estate, His Honour's observations on that [604] part of *Clayton's* case, which relates to the Exchequer bills sold by the house in *Devaynes's* lifetime, and the produce applied to the use of the partnership, particularly apply (p. 578, 579).

Sir *S. Romilly* and *Palmer*, for the Defendants (the assignees). The questions which concern us, are two, first, as to the stock admitted to be remaining in the name of *Noble*, whether the Plaintiffs are entitled to have it transferred to them. Secondly, whether they are entitled to set off the produce of the stock sold against their notes remaining in the hands of the assignees. The rest of the case concerns only *Devaynes's* representatives.

Now, as to the stock remaining, and with regard to the 4 per cent. stock particularly, it is said, that it must belong specifically to the Plaintiff *Benjamin Vulliamy*,

because all stock of the same description which belonged to the other customers of the house has already been re-transferred to them. But, when the case is thus represented, the circumstances of it appear to have been forgotten. It might indeed be so said, supposing the stock had always remained in the name of *Noble*; but that was not the case: it was from time to time transferred into other names, sold out, and fresh stock purchased. At one period it was reduced to £444, 8s. 10d. That sum was unquestionably not *Vulliamy's*, because at that time (5th April 1805) there were many sums of stock belonging to different customers of the house, which had been sold out, and not yet replaced. It is impossible to say, then, that this is *Vulliamy's* stock, that it is the same identical stock [605] which *Vulliamy* had transferred to *Noble*. With regard to the whole of this stock, the 4 per cents. as well as the 3 per cents., it is evident, therefore, that the Plaintiff is only entitled to stand in the situation of a person having a claim on the house in respect of stock transferred to the house as a security, and sold by them in violation of their engagement. The partners, also, are not the same as at the time when the stock was sold, and the breach of trust thereby committed. *Barwick* was admitted into the house afterwards; and, subsequently to his becoming a partner, stock was purchased to a considerable amount. However, there is no pretence for saying that the stock is to be considered as a security, even for more than the sums actually advanced by *Vulliamy* on his own separate account, not, therefore, for the £3000, for which the Plaintiffs gave their joint note.

In support of this part of the argument, *Adams v. Claxton* (6 Ves. 228) was referred to; and on the question of set-off, *Ex parte Stephens* (11 Ves. 24), and *Ex parte Hanson* (12 Ves. 346. And see 18 Ves. 232; 1 Rose, 156, 273, and *Addis v. Knight*, 2 Mer. 117).

*Leach*, *Wetherell*, and *Abercrombie*, for the Defendants (representatives of *Devaynes*). The notes first given furnish, upon the face of them, evidence of the nature of the transaction, which was that the stock transferred was not to stand as a security for the general balance, but for particular advances, a fractional part of such stock being to be re-transferred upon the payment of each separate note.

Each successive partnership, as one partner died or retired, and another was admitted, stood to the Plaintiff in the same situation as the partnership immediately preceding; in other words, became a debtor to him for the stock deposited. This the assignees do not dispute. It is assumed, and taken for granted. To many of the objects sought by this bill it is the duty of *Devaynes's* representatives to lend their assistance. *Noble* was constituted by the partnership, and by *Vulliamy* himself, a trustee for *Vulliamy*. He was also a trustee for other persons besides *Vulliamy*. The Plaintiff's original stock cannot be considered as standing in *Noble's* name; for it is certain that nothing of that original stock was remaining at the time of the bankruptcy. But why was that stock transferred into the name of *Noble*, which was found standing in his name at the time of the bankruptcy? It was so transferred in order *pro tanto* to enable him to execute the several trusts which had been reposed in him. There is a long detail of transfers of stock in the answer; but the only question on the record is, whether the stock is there now upon trust for *Vulliamy* or for the general estate of the banking-house. It cannot be in trust for the banking-house, and therefore must be for *Vulliamy* only.

The next question is as to the claim of set-off. And admitting the bankrupts to be debtors for the amount of the stock by having assumed the debt of the prize partnership, upon what principle can this claim be resisted? It is a perfectly good ground of equitable set-off, notwithstanding the joint liability of the father and son.

On this part of the case, indeed, the assignees threw out a point of some difficulty; but they did not rest upon it. *Barwick*, individually, was never a debtor; and yet, when he assumes the liabilities of the banking-house by becoming a partner, he constitutes himself a debtor in [607] respect of those liabilities. He holds out to the public that he is responsible. But, morally speaking, it would be attended with some difficulty to attempt to make out that he ought not to be held liable. He had been a clerk in the house for many years. And can it be presumed that he was so ignorant of the concerns of the house as not to know of the stock standing in the name of *Noble*, and of the manner in which it had been converted? Suppose that he was ignorant, however, yet, where one of two innocent persons must suffer, there can be no question that a partner, not choosing to enquire into the state of

his house, is less an object of compassion than a mere stranger confiding in the assurances made to him.

What we have to contend is, that, when the Plaintiff states that he has assumed the several partnerships as they were formed in succession, for his debtors, the effect of his so assuming each successive partnership in its turn, is to release the prior partnerships. True, the Plaintiff says to the representatives of *Devaynes*, Your estate shall not benefit by the concealed fraud of your testator; and if there were no more in the case, this would be unanswerable. But was the loss, which has accrued, really occasioned by the concealment of which *Vulliamy* complains, or by his own failure to do that which common prudence would have suggested? It is no matter whether there was concealment or not, if his loss was not the consequence of the concealment. Why did he not, in May 1810, call for a re-transfer? He was then in a condition to do so, and the loss he has sustained is really imputable to his own negligence. From the moment when, having it in his power to call for a re-transfer, he neglected to do so, *Noble* only, and not the partnership, ought to be considered as the trustee of *Vulliamy*. Can it be said, in a Court of Equity, that the estate of a deceased person is charge-[608]-able for a loss occasioned solely by the want of that common prudence which every man ought to exercise in the management of his own affairs?

The suit is besides defective for want of parties. Why are *Devaynes's* representatives brought before the Court but upon the ground that *Devaynes* was a partner at the time when the fraud was committed? But, upon the same ground, any other person who was a partner at the time the fraud was committed ought equally to be made a party to the suit. *Close* was a partner until *Michaelmas* 1803, and long before that period all the stock had been sold out. Therefore it is impossible that the Plaintiffs can have the relief sought by them without bringing him also before the Court; that is, supposing the Court should hold *Devaynes's* estate liable. Otherwise, there is no necessity that the cause should stand over for that purpose.

The question in this case lies in a very narrow compass, and is not at all the same with those which were before the *Master of the Rolls* in *Devaynes v. Noble*, and which turned on the fact of the adoption of the new firm by the creditors of the old.

[The Lord Chancellor. It is very difficult to establish the identity of sums of stock sold by a trustee, who is trustee for several persons as to those sums. Suppose a man holds £30,000 stock in trust for different persons, and that he sells £20,000, his representatives, or his general creditors, have no right to say the remaining £10,000 is part of his general estate. So far is very clear. But, suppose he has sold the whole £30,000, and has afterwards bought £5000. Would that £5000 be (or not be) a part of his general estate? That is the present question; [609] or rather it is stronger still; for this is the act of third persons. The view in which the case was put by Mr. *Palmer* I take to be this: The stock was sold out by the old partnership, and the produce applied to the use of the old firm. The new partnership afterwards assumes the debts of the old partnership; and stock is then purchased generally. Does the circumstance of their having assumed themselves to stand in the place of the old partnership raise an inference that the stock replaced was meant to be appropriated?] (Note: It was upon this point that the case of *Adams v. Claxton*, before cited, was particularly referred to.)

For *Devaynes's* representatives. From the moment the Plaintiff might have called for a re-transfer and did not do so, he must be considered as having repudiated all claim upon *Devaynes's* estate, whether he knew the stock was standing in the name of *Noble* alone, or believed it to be in the names of all the partners. If he then suffered it so to continue, he must be taken to have consented to the new partnership becoming trustees upon a new footing altogether.

[The Lord Chancellor. I put out of the case *Noble's* declaration, that the stock would have been re-transferred, if all the money had been paid. (Note: This was stated in the answer of the Defendants, the bankrupts.) These are words of course, and go for nothing in my mind. The question is, whether the trust continued after the separate debt of *Vulliamy* the father was paid.]

For *Devaynes's* representatives. Supposing the stock had stood in *Devaynes's* name at the time of his death, it would have been the same [610] thing; the Plaintiff ought, in that case, to have called on the surviving partners. The survivors alone, and not *Devaynes's* representatives, were the persons to transfer the stock—they

were the persons to wind up the concern—to sue and be sued—to pay the debts of the partnership, and do all other acts in any way relating to the partnership. Illustrate this by the case of bailment; the bailor pays off his debt, and is entitled to call for restitution. One of his two pawnees dies. Can the bailor, by protracting a trust which has ceased, make his representatives liable? In the present case, it was as much a new bailment to *Noble*, as if *Vulliamy* had actually received the stock, and re-transferred it out of his own name, into the name of *Noble*. Then it is impossible to say that, when the original purpose ceased, for which the stock was transferred to *Noble*, and the stock was notwithstanding continued in the name of *Noble*, it was not so continued for other purposes. This is more than a case of negligence. There was an actual design to alter the nature of the transaction. If *Devaynes's* estate is indeed liable, *Close* or his representatives ought to be before the Court.

[The *Lord Chancellor*. No; you contend that, as *Devaynes* went out of the house, the continuing partners took the fraud upon themselves; and *Devaynes's* estate, if to be touched at all, cannot be touched till there is a deficiency of all the other partners. If so, then *Close*, who went out of the partnership before *Devaynes* died, cannot be touched except in case of a deficiency of *Devaynes's* estate.]

For *Devaynes's* representatives. The circumstance which distinguishes the present case from all the others that have arisen out of this bankruptcy, is, that this is a transaction of a peculiar [611] nature between individuals, not necessarily arising out of their situation as bankers and customers. The reason that *Vulliamy* did not call for his stock, when he was in a situation to call for it, was, because he had reliance on the new partnership, and having such reliance, entered into a new contract with them. Here then the transaction was completely altered, and all privity with the estate of *Devaynes* ceases.

Sir A. Piggott in reply. It has been said, the stock cannot be identified. But this is a case in which there has been a trust account of stock, and it is only necessary to recur to the schedules, to see that all the *cestui que trusts*, except *Vulliamy*, have been fully satisfied by a re-transfer of the stocks entrusted to *Noble*; and what is left is not sufficient to answer *Vulliamy's* claim. How then can it be said, that this balance does not specifically belong to *Vulliamy*? If it was considered as the property of the house, how comes it that it was not sold out to meet the distresses of the house? It is enough that it was left unapplied, to shew that the house did not so consider it. But, if not the property of the house, whose property was it but *Vulliamy's*? It is clear upon the evidence, that this stock was suffered specifically to remain, for the express purpose of repaying *Vulliamy pro tanto*; and this is admitted by the very argument upon which most stress has been laid on the other side; that argument supposing that the other *cestui que trusts* have not been satisfied.

The obligations of the house were in no respect altered or varied by the circumstance of *Barwick's* being taken as a partner into it. *Barwick* was admitted, as a partner, in 1803, having for several years previously acted as a clerk to the house. No notice was given of [612] his admission, and no change of firm took place. By this simple statement, the Court is relieved from the necessity of considering any nice questions of law, as to the liabilities of partners entering into a house, in respect of its previous transactions.

[The *Lord Chancellor*. Where one who has been employed as a clerk in a banking-house becomes a partner, he must certainly be taken to have known something of the state of the accounts of the house during the time that he was so employed by it; to have been generally acquainted with the transactions of the house during that period. And here, besides, the same transactions continued, to a certain extent, to be still carried on, after he became a partner.]

*In reply*. Upon the point of set-off, there can be no question, as to the two separate notes of *Vulliamy* the father, that there would be a clear set-off at law. But, as to the joint note of the father and son, can it be contended that this is not a fair case of equitable set-off? This was not money borrowed for the use of the son. The father carried on business by himself, till he admitted his son into partnership; and the money was borrowed by father and son, in respect of the trade in which they were now become jointly interested.

[The *Lord Chancellor*. The stock being the property of the father alone, there can be no doubt that, at law, he would be entitled to a set-off in respect of his separate

notes ; but there is a difficulty as to the joint note of father and son. What is the evidence of there having been an agree-[613]-ment that this stock should be held as a security for the joint debt ?]

*In reply.* That evidence is to be found in the nature, and in the continuance, of the transaction. And when all circumstances are taken together, and coupled with the fact, that no re-transfer was called for, and the books being attended to, in which both *Vulliamys*, the father and son, are credited, and the accounts made up according to this course of dealing and mutual understanding between the parties, it is impossible not to infer an intention that the stock of *Vulliamy* should remain a security for all the notes, both his own separate notes, and the joint note of himself and his son. It appears, too, that a joint note of the father and son was actually paid on the 6th of *October* 1809, and that before the partnership had taken place between them. Then, how can it be doubted that this was the real nature of the transaction, when *Vulliamy* does not, on the payment of this, or of any other notes, call for a re-transfer ?

*Dec. 9.* The *Lord Chancellor* [Eldon]. This is a bill by creditors seeking relief, due to them under every consideration which moral justice can furnish ; but whether it is sought consistently with the principles of a court of equity is another question. The object of the bill is either to have the stock re-transferred, or its amount specifically replaced ; or else to be permitted to set off separate notes of the father, as well as the joint note given by both Plaintiffs, against so much of the produce of the stock (sold out under circumstances the most fraudulent) as should be sufficient to answer them. [614] And it is insisted that this stock, although the sole property of *Vulliamy* the father, may be considered as connected, not only with the separate estate of the father, but with the joint debt of the father and son—not indeed at law, for it is not contended that, at law, it can be so considered ; but in equity. The bill then goes on to pray that, if this set-off be allowed, the smaller, but, if not, the larger sum may be permitted to be proved against the estate ; and, in case the sources should, altogether, be insufficient to make good the entirety of the Plaintiff's demand, then that he may be declared entitled to have satisfaction out of *Devaynes's* assets for the remainder. And the relief is prayed in this form, because it is admitted that, if *Devaynes's* estate is liable to *Vulliamy*, it will also be entitled to throw the burthen, as far as it is possible, on the estate of the bankrupts.

There is a peculiarity in the circumstances of the present case, which distinguishes it from every other in which the liability of a deceased partner has come in question. It is an admitted fact, that no notice was given of the dissolution of the partnership by the death of *Devaynes*. But I conceive that the death of a partner, of itself, works a dissolution of the partnership ; and I am not prepared to say, notwithstanding all I have read on the subject, that a deceased partner's estate becomes liable to the debts of the continuing partners for want of notice of such a dissolution. If, however, a surviving partner deals with the customers in the character of executor as well as partner, that circumstance makes it a different question ; for as executor, he has a right to bind his testator's estate. The present case is therefore to be considered, not only with reference to the general doctrine, but with reference also to this special circumstance.

[615] The question as to the stock is of very great importance, as it may affect other cases, as well as the present.

It seems that this partnership house was in the habit of taking stock by way of security from its customers, under an obligation that the stock so taken should remain in their hands as a security, not to be dealt with except by the authority of the person making each several transfer ; and that distinct accounts should be kept of the general concerns of the house, and of the trust-stock.

Now the question in the present case arises through the acts of *Noble*, which must be taken to be the acts of the house. He sells out £6000 of the stock so committed to him ; and the question is, who are the particular individuals, parties to the trust-account, who are to be prejudiced by this act—an act, which does not destroy the interest of all, but part of the interest of each ? After this first operation, he proceeds, however, so far in the sales of stock, as to have reduced the amount in his hands at one time to £444. Between that period and the time of the bankruptcy the amount of stock remaining frequently varied.—It was sometimes more

—sometimes less.—It turns out, however, in point of fact, that the 4 per cent. stock of all the other persons who had advanced stock to the partnership was ultimately replaced to their account ; and, to disembarass the case of this part of the circumstances attending it, we will now suppose that *all* the stock was so replaced with the exception of *Vulliamy's*, which still remained in the proportion of £1420 to £8700.

This introduces a very peculiar novelty into the case. It has been insisted that the Court cannot decree the [616] re-transfer of this stock or restrain the assignees from applying it, unless the Plaintiff is able to show either its identity or a specific appropriation ; and, if there were no particular circumstances in the case, it would certainly be matter of some novelty to say, that, if a man has sold stock in breach of trust, and afterwards buys other stock of the like description, any part of the stock so purchased can be considered as specifically the property of the *cestui que trust*. I cannot see how, in a case thus generally circumstanced, it could be so considered, unless other cases, which have been decided in this court, should be taken as having established that proposition.

But in the present case, it is impossible that I should take the stock now remaining in the hands of the assignees to be the same identical stock transferred by *Vulliamy*, for it is palpably not so. And, with respect to appropriation, though it is difficult to say that the stock re-purchased was specifically appropriated to supply the place of that which had before been sold out, I do not think that I am stretching the principle too far when I say, if the transactions prove that the banking-house intended *Noble* to be a trustee for the benefit of persons depositing stock by way of security for advances made by them, then the *cestui que trusts* have a right to consider the stock re-purchased as being distinguished by a species of earmark in their favour.

Upon this part of the case, I am consequently of opinion that *Vulliamy* has a right to the stock remaining in the hands of the bankrupts at the time of the bankruptcy.

With regard to the question of set-off, I must require the facts of the case to be laid before me more [617] clearly in order to enable me to decide it with satisfaction to myself. But I will now make such observations as have occurred to me respecting it, begging to be set right, if I have mistaken any of the circumstances, when it comes on again to be spoke to.

I have no doubt that, with regard to so much stock as was sold out contrary to the trust reposed in *Noble*, the person who was the owner of the stock is now a creditor of the house for the amount of it.

The difficulty throughout this part of the case is that in which *Vulliamy* has involved himself, owing to the circumstance of his having signed papers (which cannot but be taken against him), stating the particular purposes for which this stock was specifically pledged. And, notwithstanding what is represented as matter of fact arising out of the banker's books, it cannot be doubted that, in 1809, there was an engagement to re-transfer the stock upon payment of the £2750 then remaining due from *Vulliamy* to the banking-house.

Now, *Noble's* declaration, that the stock would have been transferred if the whole of the debt due to the house had been paid, I consider as amounting to nothing. A banker is likely enough to say so ; and I take that as no evidence whatever of the fact. There is no doubt that, in point of law, actions might have been brought, and that such actions could not have been met by a set-off, but only by bringing other actions. I apprehend also, supposing *Vulliamy* had died without assets to pay his debts, that *Noble* would have been a trustee for *Vulliamy* and his creditors, and not for the banking-house, and that the stock would have constituted a part of *Vulliamy's* general assets. [618] It is quite clear, therefore, if the transaction had been then put an end to, that, upon *Vulliamy's* paying the £2750 remaining due on the security of the stock, he would have been a creditor for money had and received, to the amount of the money which had been produced by the sale of the stock.

If to that amount, then the question arises, how the debts which *Vulliamy* owed to the house, or which the house owed to *Vulliamy*, are to be arranged. At law, a joint debt cannot be set off against a separate debt. Therefore, the point of law is against his claim ; and it is incumbent on him to make out, that, with reference to this simple state of facts, there is some principle of equity different

from the legal principle. If this can be so maintained, I shall be glad to have it so. On the other hand there is no doubt that, under particular circumstances, a joint debt may be set off against a separate debt, in equity. If there are such particular circumstances in the present case, as would justify the interference of a court of equity in allowing a set-off, I should be glad to have them very clearly and concisely brought before me. If you can shew a clear and distinct series of transactions, in which both the *Vulliamys*, father and son, have had credit given to them, as credit was given to the father only, you have certainly very strong evidence of such a case as would authorize a court of equity in allowing the set-off.

But there are other points in the case to which it may be expected that I should advert. It has been stated that, because *Barwick* came into the house at the time when he entered it, that circumstance makes a difference ;—that he assumed the debts of the house, and is as much bound as the others. I think not ;—[619] there is no reason to make *Close* a party. I take it as a fact that there was in his time a conversion, and *Barwick* must be considered as having taken-upon himself all obligations that *Close* was under.

The remaining question is, has the Plaintiff a right to go against *Devaynes's* estate for the deficiency ?

With regard to that question, I cannot take it that *Devaynes* was not to be considered as at the time of his death under an obligation to replace the stock which had been sold out in his lifetime. It cannot be disputed that he was subject to such liability. Nor can it any more be made a question that a deceased partner's estate must remain liable in equity, until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place ; but discharged they must be before his liability ceases. I remember a time when the point was doubted, as in *Hoare v. Contencin* (1 Bro. C. C. 27), but it is now completely settled, that the representative of a deceased partner may be sued in equity. This, however, cannot take place if the debt has been in any manner discharged ; and it was therefore very fairly urged, that this debt had actually been discharged in May 1810, when *Vulliamy*, with the note in his hand, paid the £2750, but did not call for a re-transfer. It cannot be stated, that he was not then in a condition to call for a re-transfer, because he did not know that the stock was no longer where he had placed it. On the contrary, the other parties did know that the stock was not there. *Devaynes*, at the time of his death, knew that the stock was not there. How can it be said that, under such circumstances, a new contract is to be inferred [620] from the silence of *Vulliamy* ? If *Vulliamy* had asked for the stock, *Noble* must have told him there was none ; and that is direct evidence that, at the death of *Devaynes*, all the then partners were debtors to *Vulliamy* for money had and received. Am I to say, then, that the obligation *Devaynes* was under at his death is cancelled, because *Devaynes* did not inform *Vulliamy* of the breach of trust committed in his lifetime ?

I therefore think, that *Vulliamy* has made good his claim against *Devaynes's* estate for the amount of the deficiency.

As to the point of set-off, I repeat that I wish it again to be spoke to.

Dec. 12. On this day the question of set-off came on to be spoke to, as desired by the Lord Chancellor.

Sir A. Piggot, Trower, and Roupell for the Plaintiffs, insisted that this case could not be distinguished in principle from that of *Ex parte Stephens* (11 Ves. 24), where the decision turned expressly on the fraud which had been committed, and not on the motion of establishing any abstract rule of equity, as differing from the rule of law with regard to set-off in general. They went on to compare the two cases, and cited *Ex parte Hanson* (1) as confirmatory of the same principle, contending that there could be no higher equity in the case of a surety, [621] than of a co-obligor, and that it would be contrary to every rule of justice to adopt any distinction between them. They also insisted, that being a case of such gross fraud, the Plaintiffs were entitled to costs out of the bankrupt's estate.

The only point in which this case differed from *Ex parte Stephens* was, that here it was a joint note, in the other joint and several, which made the present case the stronger of the two in favour of set-off.

*Wetherell* for *Devaynes's* executors, argued in favour of the same position.

Sir S. Romilly and Palmer, contra.



The Lord Chancellor [Eldon]. The case of *Ex parte Hanson* does not apply to the present. There A. and B. gave a joint undertaking in respect of a debt due from A. only. This was quite different from a case of set-off.

But the case of *Ex parte Stephens* went upon this. There the sister of a person who was debtor to the banking-house gave her personal undertaking for the debt of her brother, being at the time ignorant that the bankers had money of hers in their hands, for which they were accountable, and which she prayed by her petition might be set off against that particular debt. That is precisely the present case. You are right, therefore, in this point as to the set-off, and must have your costs, to which the two estates, of the bankrupts, and of *Devaynes*, must contribute proportionally.

(1) 12 Ves. 346, before Lord *Erskine*. Affirmed by Lord *Eldon*. 18 Ves. 232. See, also, 1 Rose, Bankr. Ca. 156. *Addis v. Knight*, 2 Mer. 117. *Ex parte Ross*, 1 Buck's Bankr. Ca. 128, note.

[622] HILL v. THOMPSON and FOREMAN. April 24, Dec. 15, 1817.

[See *Clark v. Adie*, 1877, 2 App. Cas. 335.]

In order to obtain an injunction against violation of a Patent, the party must, at the time of applying, swear as to his belief that he is the original inventor. Where there has been a length of exclusive enjoyment under a patent, the Court will grant an injunction in the first instance, without previously putting the party to establish his right by an action at law. Otherwise, where the patent is recent.

The Bill prayed an injunction to restrain the Defendants "from selling or in any manner disposing of any iron smelted and worked or otherwise produced by them, or by any person or persons on their behalf, by the means or use of the Plaintiff's invention and improvements (in the Bill mentioned); and from using slags or cinders and mine rubbish and lime, according to the Plaintiff's said invention and improvements; and from in any manner using the said invention and improvements in the smelting and working of iron, and from otherwise infringing the Plaintiff's patent (in the Bill also mentioned) during the remainder of the term thereby granted."

The affidavits in support of the injunction (which was moved for and obtained upon the filing of the Bill until answer or further order), stated the letters patent, dated the 26th of July 1814, for the Plaintiff's invention, which was alleged to consist in the use and application of the slags or cinders thrown off by the operation of smelting (which had previously been considered as useless) to the production of good and serviceable metal, by the admixture of mine-rubbish and otherwise, according to principles of the Plaintiff's own discovering.

The Defendants moved, on the coming in of their answer, to dissolve the injunction; and upon this occasion a variety of affidavits were produced on both [623] sides, tending respectively to impeach and to assert the validity of the patent, and of the injunction to restrain the breach of it. An affidavit made by the Plaintiff referred to the specification of his invention lodged in the Patent Office, alleging that he verily believed he was the inventor of the several improvements in smelting and working iron which were therein mentioned: and the specification referred to contained an explanation of the principles of the alleged invention, which was extremely diffuse, and objected to on the other side as either wholly unintelligible, or so confused and intricate as not to be capable of being reduced to practice. It was further objected that, except by reference to this obscure specification, neither the Plaintiff, nor any of his witnesses, had stated in what the alleged invention and improvements consisted, nor whether he claimed in respect of invention or of improvements merely; and that a patent, to be good, must not be more extensive than the invention. The Defendants' affidavits also went to deny the originality of the invention altogether. *Rex v. Else* (11 East, 109, note), *Boulton v. Bull* (2 H. Black. 463), *Hornblower v. Boulton* (8 T. R. 95), and *Harmer v. Plane* (14 Ves. 130), were cited, on the part of the Plaintiff, in answer to the objection to the specification.

The case was argued on several occasions, and at considerable length.

Sir *S. Romilly*, *Bell*, and *Phillimore*, for the Defendants, in support of the motion to dissolve the injunction.

*Trower*, *Wetherell*, and *Raithby*, contra.

[624] April 24. The *Lord Chancellor* [Eldon] said, he doubted whether the injunction ought to have been granted in the first instance, unless the affidavits had stated more particularly in what the alleged infringement of the patent consisted ; and that it should have been shewn to be, by working in the precise proportions mentioned in the specification, as being of the essence of the invention. That, when, in future, an injunction is applied for *ex parte*, on the ground of violation of a right to an invention, secured by patent, it must be understood, that it is incumbent on the party making the application to swear, at the time of making it, as to his belief, that he is the original inventor ; for, although, when he obtained his patent, he might very honestly have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince him that it was not his own original invention, and that he was under a mistake when he made his previous declaration to that effect.

The principle upon which the Court acts in cases of this description is the following :—Where a patent has been granted, and an exclusive possession of some duration under it, the Court will interpose its injunction, without putting the party previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday, and, upon an application being made for an injunction, it is endeavoured to be shewn, in opposition to it, that there is no good specification, or otherwise, that the patent ought not to have been granted, the Court will not, from its own notions respecting the matter in dispute, act upon the presumed validity or invalidity of the [625] patent, without the right having been ascertained by a previous trial ; but will send the patentee to law, and oblige him to establish the validity of his patent in a court of law, before it will grant him the benefit of an injunction.

In the present case, I shall say nothing as to my opinion of the validity or invalidity of the patent. The affidavits in support of the injunction represent, that the Defendants have made iron in the way mentioned in the specification. But, whether it is to be considered as a patent for extracting iron from slags or cinders, by working and smelting, and by the admixture of certain materials, to reduce the percentage to 40 per cent. ; or for mixing cinders, limestone, and mine-rubbish in certain proportions ; it should, before any injunction was granted, have been pointed out that the patent was actually infringed by so mixing the ingredients, or so reducing the per-centage. Here, I cannot but entertain a doubt, whether the improvement as to the lime destroying the cold-short is, or is not, a new invention ; but that is not for me to decide ; and, if on the trial of an action, the witnesses should prove the use of lime for the same purpose, previously to the grant of this patent, still another question will remain, admitting that a patent may be good, for a mere method of producing a more beneficial and effectual result from the adhibition of the same materials.

But it is enough, in the present case, to resort to the principle already laid down, and which is the same that governed the cases (which have been cited) of *Harmer v. Plane* (14 Ves. 136), and *Bolton v. Bull* (3 Ves. 140) ; because it cannot be said, that there has been, in this case, [626] such a possession or enjoyment under the patent, as would induce the Court to continue the injunction, upon such evidence as is here afforded, until its validity has been tried at law. Here the patent bears date *July* 1814, and the specification *January* 1815 ; and it appears by the affidavits, that the works were not completed so as to carry on the operations under the patent until *July* 1816.

His Lordship accordingly dissolved the injunction ; but directed that an account should be kept of slags used and iron made by the Defendants, according to the method described in the specification, the Plaintiff undertaking to bring an action ; with liberty to apply to have the injunction revived, after trial of the action, or in case of any unreasonable delay being interposed on the part of the Defendants.

*Dec.* 15. An action was brought accordingly, and the result of the trial, was a verdict in favour of the Plaintiff ; who now moved to revive the injunction.

In support of the motion, it was represented to be clearly settled at law, that there may be sufficient novelty to support an injunction as well in a mere improve-

ment upon an old method as in an original invention. The verdict of the jury was also stated to be conclusive as to the matter of fact, and the application now made as of course, and such as the Court could not refuse, without taking upon itself to meddle with what was the exclusive province of a Court of law.

On the other hand, it was stated to be the intention of the Defendants to move for a new trial at law, which could not be done before the next term, but that the motion would then certainly be made, and [627] with every prospect of success, on the ground of the verdict being pronounced against evidence; it having been clearly proved on the trial, that, previously to the grant of this patent, iron had been extracted from slags or cinders, by precisely the same process as that described in the specification. That the trial was at *Nisi prius*, where little opportunity is afforded for that consideration on the part of the Judge, which, in such a case as the present, was necessary to enable him properly to direct a jury. That the order, giving liberty to the Plaintiff to apply to the Court, to revive the injunction, left it at the discretion of the Court to grant, or to refuse, the application; and that, in the present case, its being revived would be attended with the greatest inconvenience and loss to the parties, in case, by the event of a new trial, they should be found to have a right to continue the works which had been commenced by them in consequence of the patent being ultimately pronounced to be invalid. That the verdict itself could not be considered as in any respect final or complete, till it were known whether it should stand, or abide the event of the new trial. That, in the direction of the Judge to the jury, it was expressly stated, that the patent was for the invention of certain improvements in the smelting and working of iron obtained from slags or cinders, and it, therefore, was a point still to be proved, if the contrary were insisted on, that the same thing had never been effectually accomplished before; whereas there was abundance of evidence, that the very same thing had been habitually practised in *Staffordshire* and *Shropshire*, although it might be true that it had not been resorted to in *South Wales*, where the works in question were situated.

To all this it was replied, that the injunction must be revived, as a matter of course, the verdict having been [628] obtained; and that to oppose it was, in effect, no other than to apply for a new trial to a Court incompetent to award it. That, in the opinion of the Judge who directed the verdict, it was clearly a patent for an improvement, and not for an original invention; and that the verdict pronounced agreeably to that direction gave a *prima facie* right to the Plaintiff, upon which the Court could not refuse to act.

The *Lord Chancellor* [Eldon]. In this case, the injunction was first granted upon the strength of affidavits, which were contradicted, as to their general effect, in the most material points, when it afterwards came before the Court upon a motion to dissolve the injunction so obtained. Many topics were then urged on both sides, and fully discussed in argument. It was insisted, on the part of the Plaintiff, and the Court agreed to that position, that where a person has obtained a patent, and had an exclusive enjoyment under it, the Court will give so much credit to his apparent right, as to interpose immediately, by injunction, to restrain the invasion of it, and continue that interposition, until the apparent right has been displaced. On the other hand, it was, with equal truth, stated, that if a person takes out a patent, as for an invention, and is unable to support it, except upon the ground of some alleged improvement in the mode of applying that which was previously in use, and it so becomes a serious question, both in point of law and of fact, whether the patent is not altogether invalid, then, upon an application to this Court, for what may be called the extra relief which it affords on a clear *prima facie* case, the Court will use its discretion; and if it sees sufficient ground of doubt, will either dissolve the injunction absolutely, or direct an issue, or direct the party applying to bring his action; after the trial of which, either he [629] may apply to revive, if successful, or else the other party may come before the Court, and say, I have displaced all his pretensions, and am entitled to have my costs and the expenses I have sustained, by being brought here upon an allegation of right which cannot be supported. And, as in this instance, the Court will sometimes add to its more general directions, that the party against whom the application is made, shall keep an account pending the discontinuance of the injunction, in order that, if it shall finally turn out, that the Plaintiff has a right to the protection he seeks, amends may be made for the injury occasioned by the resistance to his just demands.

In his directions to the jury, the Judge has stated it as the law on the subject of patents ; first, that the invention must be novel ; secondly, that it must be useful ; and, thirdly, that the specification must be intelligible. I will go farther, and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that, if a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled. On the other hand, there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials. If there be a patent both for a machine, and for an improvement in the use of it, and [630] it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether, on account of its attempting to cover too much.

Now it is contended, that what is claimed by the present patent is not a novel invention ; that the extraction of iron from slags or cinders was previously known and practised ; that the use of lime in obstructing cold-short, was likewise known. But to all this it is answered, that the patent is not for the invention of these things, but for such an application of them as is described in the specification. Now, the utility of the discovery, the intelligibility of the description, &c., are all of them matters of fact, proper for a jury. But, whether or not the patent is defective in attempting to cover too much, is a question of law, and as such, to be considered in all ways that it is convenient for the purposes of justice that it should be considered. This specification generally describes the patent to be "for improvements in the smelting and working of iron" ; and it then goes on to describe the particulars in which the alleged improvements consist, describing various proportions in the combination of the materials, and various processes in the adhibition of them. The question of law, upon the whole matter, is, whether this is a specification by which the patentee claims the benefit of the actual discovery of lime as a preventive of cold-short, or whether he claims no more than the invention of that precise combination and those peculiar processes, which are described in the specification. And when I see that this question clearly arises, the only other question which remains is, whether I can be so well satisfied with respect to it, as to take it for granted, that no argument can prevail upon a court of law, to let that first question be re-considered, by granting the motion for a new trial. If this be a question of law, I can have no right whatever to take its [631] decision out of the jurisdiction of a court of law, unless I am convinced that a court of law must and will consider the verdict of the jury as final and conclusive. But this only brings it back to the original question ; and I see enough of difficulty and uncertainty in the specification, and enough of apparent repugnance between the specification and the patent itself, to say, that it is impossible I can arrive at such a conclusion respecting it, as to be satisfied that there is no ground for granting a new trial.

In the order I formerly pronounced, was contained a direction, that the Defendants should keep an account of iron produced by their working in the manner described in the injunction. If the injunction is to be now revived, the whole of their establishment must be discharged between this and the fourth day of next term, when it is intended to move for a new trial, the result of which may be, that the Defendants have a right to continue the works ; to do which, they will then be under the necessity of re-commencing all their operations, and making all their preparations and arrangements *de novo*. It appears to me, that this would be a much greater inconvenience than any that can result from my refusal in the present instance to revive the injunction. My opinion, therefore, is, that this matter must stand over until the fifth day of next term, when I may be informed of the result of the intended application for a new trial ; the account to be taken, in the mean time, as before. Ordered accordingly.

[632] *N.B.* [I am informed that a new trial was afterwards moved for, and granted ; and that the result was against the validity of the patent.]

JOHN ADAM TRAUB, HENRICH SENYSLAKE, and BERNHARD TRAUB ; JOHANN FREDERICK ABEGB, HERMAN HENRICH MEYER, HEINRICH GREVE, JOHANN WILHELM KARSTENS, and ANDREAS STUCKEN, *Plaintiffs*, and GEORGE SCHMIDT, *Defendant*. Dec. 18, 19, 1817.

Attachment by the Plaintiffs in the Lord Mayor's Court on property of the Defendant in the hands of a garnishee. Defendant, residing at *Hamburgh*, is not summoned, and a verdict is obtained by the Plaintiffs, by virtue of which the money is paid them on their giving security to restore the same in case the Defendant shall, within a year and a day, appear and give bail to answer, &c., according to the custom. Defendant appears and pleads to the jurisdiction. Plaintiffs reply ; and Defendant joins issue as to part, and demurs to the other part, of the replication ; and obtains judgment both on argument of the demurrer and afterwards on trial of the issue. In the interval between the two judgments, Plaintiffs present a petition to the *Lord Chancellor* for a commission and writ of error, which are granted. Defendant now moves to supersede both the commission and writ—and the same are accordingly superseded on the ground of misrepresentation in the petition on which they issued ; by which it was alleged, first, that the Defendant had been summoned, when no summons had issued ;—secondly, that the validity of the Defendant's plea had been argued on a demurrer to the replication ; making no mention of the Defendant having joined issue as to part, which issue had not been tried at the time of presenting the petition—and other misrepresentations. The motion was further supported on the ground of the commission and writ having been sued out merely for delay, as was manifest from the Plaintiffs not having proceeded therein—it being, also, contended that, if the Court would not supersede them, the Defendant ought to be at liberty to take out execution notwithstanding ; such proceedings not amounting to a *cesset executio*—as to which, *quære*.

This was a motion, on the part of the Defendant, that the commission of errors issued in the above cause under the great seal, and directed to Sir *Vicary* [633] *Gibbs*, Knt., L. C. Justice of the Court of G. P., the Lord Chief Baron *Thompson*, Mr. Justice *Abbott*, Mr. Justice *Burrough*, and Mr. Baron *Richards*, and also the writ of error in like manner issued in the said cause, and directed to the Mayor, Aldermen, and Sheriffs of *London*, bearing date the 5th of *March*, then last, might be superseded ; or that the said Mayor and Aldermen might be directed to carry into effect and enforce the judgment and verdict respectively given for the Defendant against the Plaintiffs in the Lord Mayor's Court on the 21st of *November* 1816, and 5th of *May* then last, respectively, notwithstanding such commission and writ of error as aforesaid ; and that, for that purpose, the necessary writ or writs might be awarded and issued, directed to the said Mayor and Aldermen.

The case was as follows. The Defendant was owner of a cargo of tea and other goods, shipped on board the *Vesta* at *New York* in *August* 1809, and consigned to him (the Defendant) at *Hamburgh*, to which port the vessel was also bound, and, in the prosecution of her voyage, was captured by a *British* cruiser, and carried into *Yarmouth*. On the 22d of *December* following, the ship and cargo were restored by a decree of the Court of Admiralty to the owners ; after which the ship remained at *Yarmouth* till *May* 1812, when she was seized by the revenue officers, in consequence of some smuggling transactions, and both ship and part of the cargo condemned and sold, and proceedings instituted by the custom-house against the remainder, whereupon a claim being made by the captain on behalf of the Defendant, as owner, a compromise took place, by virtue of which £5300 was to be paid to the claimant out of the proceeds, and that sum was accordingly deposited in the hands of *Henderson*, an officer in the customs, for that purpose. Afterwards, in *March* 1814, a plaint was affirmed in [634] the Lord Mayor's Court at the instance of the Plaintiffs against the Defendant, in a plea of debt upon demand for £10,000, and process of attachment at the same time issued out of the said court on the sum so deposited in the hands of *Henderson*, the garnishee. The Defendant being absent, residing at *Hamburgh*, was not summoned to appear and answer, and a verdict was, on the 2d of *April* 1814, obtained in the action so commenced, against *Henderson*, for £5000, which was accordingly paid by him to the agent of the Plaintiffs, upon their (the Plaintiffs) the solicitor, and another person, a merchant, becoming sureties to restore the same to

the Defendant, in case he should, within a year and a day come into the court, and find bail and sureties to answer, and disprove or avoid the debt, according to the custom of the city, "and there remain ready to plead with the said Plaintiffs upon their bill original, or otherwise to discharge himself therefrom."

It was sworn, by the affidavit of his solicitor in support of the present motion, that the Defendant had no knowledge or information of the plaint or attachment, or of any proceedings under the same, until some time after the verdict obtained, and the £5000 paid, as before mentioned; but that, within the year and day, he (the Defendant) came into court, and found bail and sureties according to the custom, and brought his *scire facias* to disprove the debt or discharge himself—that the Plaintiffs appeared thereto, and the Defendant thereupon, by the advice of counsel, pleaded that the cause of action (if any) did not accrue within the jurisdiction of the lord mayor's court; to which the Plaintiffs replied that, as to £2100 (part thereof), the same *did* accrue within the said jurisdiction, and that, as to the residue, *Henderson* (the garnishee) resided within the same. To the first part of this, replication, [635] the Defendant joined issue, and to the other part he demurred, as being insufficient in law. The demurrer being argued, judgment was given thereon for the Defendant, on the 21st November 1816; and, on the trial of the issue, a verdict was also found for the Defendant, May 5th, 1817. In March 1817, the Plaintiffs presented a petition to the Lord Chancellor, alleging that the Defendant, instead of disproving the debt, had pleaded in bar to the jurisdiction, and that the validity of such plea being argued on a demurrer to the Plaintiff's replication, judgment was given for the Defendant; therefore praying a commission of errors, and writ of error, against the said judgment; whereupon his Lordship, on the 3d of March aforesaid, ordered that such commission and writ of error should issue, and the same were issued accordingly. (1) On the 5th of May, the writ was presented to, and allowed [636] by, the deputy register of the lord mayor's court; but the affidavit further stated, that no further proceedings had been taken by the Plaintiffs thereon, and no application made, or notice given to the Judges named in the commission, or any of them, and that the deponent verily believed the commission and writ of error had been sued for and obtained by the Plaintiffs for the purpose of delay only. That, on the 5th of December, he (the deponent) applied, on behalf of the Defendant, to the proper officer of the said court, for a writ of execution against the two sureties aforesaid, for the [637] £5000, to which he (the Defendant) had become entitled, according to the custom of the city of London, and the practice of the said court, by virtue of the verdict and judgment so obtained by him as aforesaid, but which writ the said officer refused to issue, by reason of the writ of error; and, further, he had been informed and believed, that *Boswell* (one of the sureties) had absconded, and was then in America.

In opposition to the motion now made, as above, on the part of the Defendant, two affidavits were filed on the part of the Plaintiffs, by the first of which the deponent (the deputy register of the Lord Mayor's Court) stated, that no writ of error had been brought upon any plaint or action commenced in the said court, during a period of thirty-five years, that he (the deponent) had been in office, except the writ of error which was brought in the present case—that a writ of error on any plaint or action in the said court, was a very rare proceeding; but that, after diligent search among the records, he (the deponent) found that a writ of error was brought in the year 1774, on an information in the said court, between *Thomas Nugent*, Esq., the then Common Serjeant, and *Samuel Plumbe*, Esq., concerning the disfranchisement of the said *Samuel Plumbe*.

The other affidavit sworn by *Henry Ashley*, partner with *William Windale* (attorney of the said court), stated, that at the time of commencing the aforesaid action, and of the subsequent proceedings, the said *Windale* was concerned as clerk in court, for the Plaintiffs and *Boswell* as their solicitor; that a commission and writ of error (as above mentioned) had been sued out by *Boswell* as such solicitor, and the same had been regularly allowed by the proper officer of the court—that the deponent had made search among the records [638] of the court for similar proceedings, and has found proceedings of that nature instituted in the said court in 1774, in a cause between *Thomas Nugent*, Esq. (Common Serjeant), and *Samuel Plumbe*, Esq., whereby it appeared that, after the commission to the Judges named therein was obtained, and the writ of error allowed, a precept of the commissioners was issued to the Lord Mayor, aldermen, and sheriffs, commanding the appearance of the Plaintiff

at a certain day to hear error—that the Defendant in the present cause, had not taken any proceedings, by virtue of his commissions and writ of error, to compel the appearance of the Plaintiffs, nor any further proceedings, except the application now made—that, after the writ of error in this cause was sued out and allowed, *Boswell* departed the realm for *North America*, where he then resided; and that, after his departure, the Plaintiffs, by their agent, placed the papers in the hands of Messrs. *Robinson and Hammond*, in his (their solicitor's) absence.

The following were stated as the grounds for the application, which was now made on the part of the Defendant.

First, mis-statement in the petition, upon which the writ of error was issued; viz. that the petition represented the Defendant to have been summoned; whereas it appeared by the affidavit of his solicitor, that he was not summoned, by reason of his being resident at *Hamburg*, which also appeared from the record of the proceedings, in these terms. "And thereupon it is commanded by the Court to *Thomas Newcome*, one of the Serjeants at mace of the said Court, that he (according to the custom of the said city) summon by good summoners, the Defendant to appear here to answer the Plaintiffs in the plea aforesaid, and that he return and testify what, &c. And afterwards (to wit) at the same court, the said Serjeant at mace [639] returned and testified, according, &c., that the Defendant had nothing within the said city, or the liberties thereof, whereof he could be summoned, nor was he to be found within the same."

Another objection to the petition was, that it stated imperfectly the terms of the security for restoring the £5000, which appeared from the record, to be as follows. "And thereupon, at the same court, the said (Plaintiffs) found sufficient pledges and sureties (that is to say, &c.) to restore to the said (Defendant), the said sum of £5000, so attached as aforesaid, if the said (Defendant) should, within a year and a day, according to the custom, find sufficient pledges and sureties to answer the said (Plaintiffs) in and upon the plea of their said bill original, and to disprove or avoid the debt demanded by the said bill, according to the custom, or to render his body to prison within the liberties of the said city, and there remain ready to plead with the said (Plaintiffs), and upon their said bill original, or otherwise, to discharge himself therefrom, according to the custom."

Besides these, were the mis-statement (already referred to) as to the validity of the plea to the jurisdiction having been argued, instead of the validity of the Plaintiffs' replication to part of that plea, viz. "that it was sufficient that the Garnishee resided within the jurisdiction"—that it was also omitted to be stated that, as to £2100 of the £5000, the Plaintiffs took issue to the Defendant's plea to the jurisdiction, and that the same was tried, and a verdict given for the Defendant. That the petition referred only to the judgment stated to have been given on the argument of the demurrer, as being erroneous, and the writ of error made out pursuant to the order of such petition (dated the 3d of *March*) was tested the 5th of *March* 1817, and [640] must, therefore, have been obtained after the judgment on the demurrer was given (21st *November* 1816), but before the trial of the issue (7th *May* 1817), and the same could not therefore, in any event, affect the verdict and judgment as to the £2100.

Then, as to the writ of error itself, it was there stated, that manifest error had intervened in the record and process of the plaint, as well as in the record and process of the attachment, and in the rendering of judgment,—making no distinction between the judgments, and not confining the error, in conformity with the petition, to the judgment on the demurrer. It was likewise imperfect in stating the errors to have intervened, to the great damage of the *Defendant*, as if he were the party prejudiced, and for whom the writ of error had been issued.

With regard to the previous proceedings—if any objection should be made to the Defendant's plea to the jurisdiction, as coming too late, it was represented, that it admitted of the following answers; first, that the non-appearance of the Defendant in the action, upon which the attachment was issued, was no *laches* in him; since it appeared from the return (*nihil habet*) that he neither had, nor could have, notice of the proceedings—although it might have been otherwise, if he had made default after a return of *summoneri feci*; and upon that ground it was evident, that the *primus dies* was the day given in the *scire facias*. Secondly, that, although a plea to the jurisdiction of one of the superior courts was treated with great strictness, inasmuch as it must be intended *prima facie*, that all causes are cognizable,

and all persons justiciable, there; yet no such intendment could be made in favour of an inferior and limited jurisdiction—and that, on the contrary, if in any stage of the proceedings, it appeared on the record, [641] that the original cause of action, or the defence, arose out of the jurisdiction, it was error. *Thirdly*, that if by any act or neglect of the Defendant, he had deprived himself of the benefit of a plea in abatement, the Plaintiffs should have relied on the estoppel in their replication; by omitting to do which, they had waived the estoppel, and set the matter at large, notwithstanding the estoppel appeared on the record (for which purpose Co. Lit. 303 b., and Saund. 324, were referred to). *Fourthly*, that all the proceedings against the garnishee were considered merely as *process* to bring the Defendant into court: and it was therefore conceived, that any step which the practice of the Court might require to be taken, in order to get back the money which had been attached, could no more prevent the Defendant from pleading to the jurisdiction, than putting in bail above in the Court of King's Bench, which are necessary to be done, in order to entitle the Defendant, the sheriffs, or the bail below, to be heard.

It was further to be observed, that, according to the terms of the security, the Defendant was entitled to have the £5000 restored, "if he disapprove, or avoid the debt, or otherwise discharge himself therefrom."

With respect to the case referred to in the affidavits made to oppose the motion, it was observed, that that case was a very notorious one, and had been published by the authority of the city—but that it had no bearing on the present case; both because the common Serjeant was invested with peculiar privileges by the custom of the city, and because *there* the Defendant (and not the Plaintiff) had been actor and mover in obtaining the commission and writ of error, whereas, in the present, the Plaintiffs had obtained the com-[642]-mission, and kept it in their possession, leaving the Defendant to get from the Judges their precept, without any commission, and on the bare authority of a copy of the writ of error, with which the Defendant was served; the whole proceeding, on the part of the Plaintiffs, rendering it evident, that their sole object was delay.

Sir S. Romilly, Bolland (senior counsel of the Lord Mayor's Court), and Palmer, in support of the motion. As to the question of the jurisdiction of this Court, whatever doubt may have existed formerly, it has long been settled, that the Court has power to supersede a writ, which itself has issued, either on the ground of mistake, or *quia improvide emanavit*, as in *Barlow v. Collins* (1 P. W. 436, note. And see *Rez v. Burrard*, *ib.* 435), where a writ *de excommunicato capiendo* was superseded on motion, as being "ill for uncertainty." There "the writ was enrolled in B. R.,—yet, being not returned there, to prevent a failure of justice, it was superseded in "Chancery." In *The Dean and Chapter of Dublin v. Donogate*, (2) a writ of error was sued out of Chancery, returnable in King's Bench. And it was said by Parker, C. J., (who, with King, C. J., and Bury, C. B., were desired by the Lord Chancellor to assist at the motion), "that the Court of Chancery might supersede this writ, *quia improvide emanavit*." [643] *Woodcraft v. Kynaston* (2 Atk. 317), was a motion to quash, or supersede, a writ of *certiorari*, which issued out of this Court, to remove a plaint of replevin in the Mayor's Court of London, upon the ground that the tenor of the record was only directed to be removed, and not the record itself. Lord Hardwicke superseded the writ, and awarded a *procedendo*.

Here, the only question on the writ is, whether the circumstances are sufficient to support the application. The first ground is error on the face of the writ, *Cooper v. Ginger* (1 Stra. 606) where, the judgment being against two, it was held, that a writ of error, *ad damnum* of one only, would not lie, and the writ was quashed accordingly. In which case, another, of *Brewer v. Turner* (3) was referred to, where the same point had been decided. This is a much stronger case than either of those, because here it is stated by the writ to be *ad damnum*, not of one, instead of two who are damaged, but of the wrong person altogether. In the case of *The Lessee of Lawlor v. Murray* (1 Scho. & Lef. 75), the questions arose upon a writ grounded on stat. Westm. 2, c. 31 (*vid. Reg. Brev. 182 a*), commanding the Justices of King's Bench to affix their seals to a bill of exceptions. This writ had been served on the Judges, and they, in obedience to it, had affixed their seals accordingly. Lord Redesdale superseded the writ; and one of the grounds upon which he superseded it was, that it was a writ which ought not to issue without a previous application to the Court, and an order made in consequence of such application.



[644] Then as to the commission, and the petition on which it issued. It is by no means of course to grant a commission, which is not due as matter of right, but a previous application is necessary, which ought to contain the facts of the case. Here there has been manifest and gross misrepresentation of the facts, tending to mislead and deceive the Court. The party is stated to have been summoned, and he was not summoned. The Court is given to understand, that the plea was demurred to *in toto*, whereas the demurrer was only to part of the plea. If then it is necessary that there should be a previous application, founded on the facts of the case, to ground a commission, that would alone be a sufficient reason for superseding the commission in this instance; and the present is a much stronger case than that before Lord *Redesdale*, above noticed.

Then with regard to the circumstances of the case, since the issuing the commission. It must be remembered, that this is not a proceeding of course, but (as represented in the Register), "*de speciali gratia*" (Reg. Brev. 131), that it is granted as a remedial process—and that it is consequently the duty of the party, in whose favour it issues, to use it as it was intended. (See the form of the writ, 3 Mer. 635 (note), by which it appears to be imperative on the party, not merely empowering him to make use of it at his discretion.) Then, how does the conduct of these Plaintiffs tally with the duty imposed on them, who have not only not prosecuted the commission, but never even acquainted the Judges delegate with their appointment?

We can find no precedent or authority, in point, where the *Lord Chancellor* has actually superseded a commission of this particular kind. But the instances [645] to be met with of such a proceeding as the writ itself, are extremely rare; the only two cases we have been able to find of its occurrence being that referred to in the affidavit already mentioned (as to which, see the preceding observations), and a reported case of *Greene v. Cole* (2 Saund. 228, 252), so long ago as the 22d of *Charles the Second*, which went to the House of Lords. And it may surely be inferred, with perfect safety, that the principles upon which the Court acts in superseding other writs and commissions are applicable to this. In what respect can it be stated, that this commission differs from any other commissions issued under the great seal?—From a commission of bankrupt, for instance, which it was the practice of the Court to supersede for want of prosecution, long before the order regulating the time for prosecuting the same? (Lord Loughborough's Order, 26th June 1793 (2 Cooke's Bank. Laws, 285, 5th edit.)) In *Kempland v. M'Auley* (4 T. R. 436), which was a rule to shew cause why the Defendant's execution for the costs founded on a judgment of non-suit should not be set aside, because it was sued out after the Plaintiff had served him with the allowance of a writ of error, the Plaintiff's counsel said, the Court would not *presume* that a writ of error is brought for the purpose of delay; but, on the contrary, had always required a declaration of the party suing out the writ, that such was his object, before they permitted the other party to proceed in defiance of the writ; to which Lord *Kenyon*, C.J., observed, that, "in general, the rule is as the Plaintiff had stated it; that a writ of error allowed and served operates as a supersedeas to an execution, and the Court will stay the proceedings of course; but that is on the supposition, that the party may have some [646] error to complain of in the judgment, which it is right should be examined into, before execution is awarded. And, therefore, if it appear clearly and unequivocally to the Court, that the writ of error is brought merely for delay, that reason does not hold"; *Buller*, J., adding, that "how that is to be made out, is matter of evidence in such case. In general, the Court require it to be proved by an acknowledgment from the party who sues out the writ of error; and they have held that the belief of the other party, that it is brought for delay, is not sufficient. But here it is apparent, that there can be no error of which the Plaintiff can avail himself." (See *Hawkins v. Snuggs*, 2 M. & S. 476; *Willes*, 271; and *Willer v. Neubald*, 1 East, 662.) See also *Viner*, "*Supersedeas*," C. 16. "If a writ of error is brought, and the day of the return is long, in order to delay the party, the Court may award execution." (Referring to 1 Keb. 109; Sid. 45, &c.) Com. Dig. "*Pleader*," 3 B. 12. "If a writ of error is returnable in B. R. or Exchequer, after the next term, or on the last return of the next term," &c., "it shall not be a *supersedeas*, for it seems an affected delay." (Referring to 1 Vent. 266; 1 Sid. 45, 454.) So, where delay is occasioned by the act of the party abating the writ, execution shall

go, without giving time to bring a writ of error *coram vobis*. *Jenkins v. Bates* (2 Stra. 1015), *Birch v. Triste* (8 East, 412).

But, if it should be thought that there is not sufficient ground to supersede this commission and writ, then what we ask is that we may be at liberty to sue out execution in the mean time, notwithstanding. And the propriety of this application depends on the question, [647] whether or not the writ which has issued amounts to a *cesset executio*? Now, it is not every writ of error that does amount to a *cesset executio*. As Lord *Ellenborough*, C. J., in the case already mentioned, of *Birch v. Triste*, says (referring to *Carthew*, 368, 369), "A writ of error *coram vobis* is not a *supersedeas* in itself"—although, he adds, that "execution cannot be taken out "on the judgment, whilst it is depending, *without leave of the Court*." (4) Now, it is this leave of the Court that we ask, and which we contend, under the circumstances, ought to be granted. This is the same thing, as to the application of the rule, as the "*coram vobis*"—because neither does this writ effect any actual removal of the record, empowering the justices therein named, or any two of them, to examine and correct the record, &c., "*at the Guildhall of the said city*," and, if error shall be found, &c., "the same to correct and amend, and to do full and speedy justice to the parties, *according to the custom of the said city*." (See the form of the writ 3 Mer. 635, note.) It is upon the same principle that an appeal does not operate as a stay of proceedings in the Court of Chancery.

Another ground for arguing that this writ does not, *per se*, amount to a stay of execution, is, that a special writ of supersedeas is provided for this purpose. (Reg Brev. 129; Fitz. N. B. 53.) And, if it was thought necessary to provide this special [648] writ, it is manifest that the writ of error, *per se*, was not held to amount to it.

Again, look at the writ itself; and we shall find that the sheriffs are not thereby enjoined to stay execution unconditionally, but only "if any error," &c.—"to do and perform what shall be ordered by our said justices to be done." (See note, 635.) From all which it follows that there is no actual *supersedeas*. And, if so, we should be entitled, of course, to the writ "*De executione judicii*" (Fitz. N. B. 43), which we have applied for, but have been refused it, on the ground that execution is stayed by these proceedings, which compels us to ask for the judgment of the Court on the point above submitted to it. As to the Defendant's strict right to the writ last mentioned, provided the law be with him on that point, see *Wilkins v. Mitchell*. (5)

But, supposing the contrary of what is here contended, and that these proceedings do, in fact, amount to a *supersedeas*, still it is a question whether the Court will not exercise its discretion, under the circumstances of the case, to award execution. The case of *Kempland v. M'Auley* went upon the circumstances, and the principle of the cases referred to in *Viner* and *Comyns*,—of *Jenkins v. Bates*, and *Birch v. Triste*, is the same, *viz.* that the Court will act upon the circumstances of the case, and the conduct of the parties, as affording a presumption that delay, and delay only, was contemplated [649] in issuing the proceedings—a delay, which, in the present case, is solely at the party's own will and pleasure, and not arising out of a single cause or motive independent of his arbitrary discretion.

*Leach* and *Bell* were heard in opposition to the motion (Note: The reporter heard only a part of the argument on this side of the question, and that (owing to accidental circumstances) very imperfectly); when by the former it was represented, that it is essential to a writ of error, that it virtually removes the record out of the court in which the proceedings were originally had, to the higher jurisdiction; the record itself being to be produced, which it cannot be without removal; that it is otherwise in an appeal from the Court of Chancery, where there is no removal or production of the record; but it is incumbent on the party appealing to put the court of appellant jurisdiction in possession of the circumstances of the case; and, for that reason, an appeal does not operate to stay proceedings, which must be the case where the record itself is removed. That delay is not a ground for quashing the writ, unless the delay is made the subject of a formal protest, and regular proceedings founded thereon; as, who ever heard of a writ of error being *ipso facto* non-prossed, upon the ground that no proceedings have been had in it? And the principle of this Court must be the same as of a court of law, where the party endeavouring to set aside the writ, must first obtain an eight-day rule for the purpose; at the expiration of which, if no proceedings are had, he is entitled to the

*writ de executione judicii*. That no argument can fairly be drawn from the existence of such cases as *Kempland v. Macauley*, which are in themselves anomalous, and not to be brought forward as precedents or authorities for any that are not precisely the same in circumstances. Be-[650]-sides, suppose the *writ* were to be superseded upon the authority of such cases, or of the reasoning adopted by way of inference from them, how is that to be made to apply to the case of a commission? That with regard to the alleged errors in the writ, and in the proceedings upon which that and the commission issued, the mere object of the writ being to remove the record out of the court below, those errors could be of no consequence, provided the subject matter were sufficiently ascertained. As, how could it be in the least material, whether the party had been summoned or not, since it is sufficiently manifest, that he appeared? And if it were, what proof is there that he was not summoned in fact? If, by the custom of the city, some peculiar form of summons be necessary in a case where the party is abroad, how can his absence afford a ground for the suppression of the writ, *quia improvide emanavit*? If the party falsely suggests circumstances, as entitling him to the remedy he seeks, he imposes on the Court, and falls within the direct reason of the rule. But how can it be pretended that the mistakes here complained of are such as at all affect the right of the party? Suppose it is irregular in form, there was no corrupt motive; the party meant fairly, and this Court will never supersede its proceedings, upon a mere defect of form, without protecting the party against the consequences which have been incurred without any fault or design whatever. Then as to the representation that the demurrer was to the plea only, no injury could be done to the Defendant by the accidental suppression of the fact of the demurrer being to the replication also.

[The Lord Chancellor here asked, Suppose the Plaintiff had, upon getting the writ, acted upon it immediately, before the verdict had been pronounced, what would have been the consequence?]

[651] *Leach*. The effect would have been to stay proceedings.

[The Lord Chancellor. Suppose the case of an action at law, that issue were taken as to part, and a demurrer to the remainder; and that after the demurrer had been argued, and judgment given against the Defendant, but before trial of the issue, the Defendant had taken out a writ of error; that the issue were then tried, and a verdict also had against the Defendant; could the Defendant have proceeded upon his writ of error in the first place, with respect to the demurrer, and complained that the judgment was wrong in point of law, and then come again upon the same writ of error, and complained, as against the verdict, that the declaration was defective in point of form?]

No answer was given to this question; and, on the following day (*Ex relatione*), Mr. *Bell* having finished the argument for the Plaintiffs, and Sir *Samuel Romilly* having replied, His Lordship said, he did not see how it was possible to support this commission and writ of error; and then repeated to the *Solicitor-General* the same question as he had put the day before to Mr. *Leach*; asking whether he thought such a writ as that he had mentioned could be maintained? to which the *Solicitor-General* replied, "Certainly not." Upon this, the counsel for the Plaintiffs admitted that the objection was fatal, and the Lord Chancellor ordered both the writ and the commission to be superseded, with costs. Reg. Lib. 1817, B. fo. 142.

(1) Form of the Writ of Error mentioned above, dated the 5th of March 1817. George the Third, &c. To the Mayor, Aldermen, and Sheriffs of London, &c. Whereas in the record and process of a certain plaint which was in our court of our city of London before you, &c., without our writ, according to the custom of the said city, between ——— and ———, of a debt of £10,000 that the same ——— demanded of the said ———, as, also, in the record and process of a certain attachment made thereupon before you, &c., of the said £10,000, in money numbered, as of the proper money of the said ———, in the hands and keeping of one ——— attached and defended. Likewise in the rendering judgment before you, &c., in our said court, &c., upon the plaint and attachment as aforesaid, as it is said, manifest error hath intervened, to the great damage of the said ———, as by his complaint we are informed. We, willing that the said error (if any be) be duly amended, and full and speedy justice done to the said parties in this behalf, have assigned our trusty and well-beloved ———, or

any two of them, our justices, to examine and correct the record and process of the plaint and attachment aforesaid, and the giving of judgment the plaint and attachment aforesaid, as, also, the adjudging of execution thereupon, with all things touching the same, in the presence of you, &c., by our said justices, or two of them, for that purpose convened, if you are willing to be concerned in this affair, at the *Guildhall* of the said city. And, if any error shall be found in the said record and process, or in the giving of judgment of the plaint and attachment aforesaid, or in the adjudging of execution thereupon, the same to correct and amend, and to do full and speedy justice to the said parties according to the tenor and custom of the said city. And therefore we command you, &c., that at a certain day, which our same justices, or two of them, shall make known, the record and process of the said plaint and attachment, and giving of judgment of the said plaint and attachment, and also the adjudging of execution thereon, with all things touching the same which remain with you, as it is said, before our said justices, or two of them, to the same place you cause to be brought. And we command you (the Sheriffs), that at a certain day which our said justices, or two of them, shall make known to you, you shall give notice to the said (Plaintiffs) that then they be there, if any error in the said record and process, or giving of judgment thereupon, which is known to belong thereto, and to hear further, and to do and perform what shall be ordered by our said justices in this case to be done. Witness ourself at *Westminster*, &c.

(2) 1 P. W. 348. The facts were these. The Archdeacon of *Dublin* had obtained a peremptory mandamus out of K. B. in *Ireland*, directed to the Dean and Chapter, to admit him to a stall in the Cathedral Church there; whereupon the Dean and Chapter sued out a writ of error here, returnable into K. B.; and, no return having been made, it was moved that the Court of Chancery would order the Court of K. B. in *Ireland* to make their return, and in the mean time stay all proceedings on the *mandamus*.

(3) 1 Stra. 233. And see the first-mentioned case reported in Lord Raym. 1403, where it is stated that costs on quashing writs of error are to be given in all cases, under the stat. 4 Ann. c. 16, s. 25.

(4) 8 East, 416. See Bro. Ab. "Error," p. 66, where the reason why, after a writ of error issued and allowed, execution cannot be awarded, is stated to be—"Car, per le briefe d'error, le recorde mesme est remove, et donc-ques le Court n'ad vien unde d'agarde execution." 7 H. 6, 42. To the writ *coram vobis* this reason does not apply, because that writ does not effect an actual removal of the record.

(5) 3 Salk. 229. "In an action of debt for rent, brought in an inferior court, the Plaintiff was nonsuit, whereupon the Defendants had judgment; but they refusing to execute it, B. R. was moved for a *mandamus*, but it was denied, because the Defendant had a legal remedy, viz. by the writ *de executione judicii* out of Chancery.

[652] ANDREW SCOTT, GEORGE ARBUTHNOT, and PETER CHERRY; WILLIAM HARRINGTON, HENRY BURNABY, and H. H. HARRINGTON, *Plaintiffs*, and JOSEPH DUPRE PORCHER, and OTHERS, Partners under the Firm of Messrs. PORCHER and Co., *Defendants*. *Rolls*. Dec. 18, 24, 1817.

[See *Malcolm v. Scott*, 1843, 3 Hare, 46.]

*H.* and Co., of *Madras*, make a consignment of pearls to *B.*, with directions to sell and pay the proceeds to *P.* (to whom *H.* and Co. were at the time indebted) on account. *B.* acknowledges the receipt of the consignment, and undertakes to perform these directions; but no notice is given by either party to *P.*, *H.* and Co. subsequently write to *B.*, requesting the pearls to be sent to *America*, and there disposed of; and afterwards, being insolvent, make an assignment of all their effects in trust for the benefit of their creditors. Held that the directions accompanying the consignment did not constitute an appropriation, but amounted to no more than a mere mandate, revocable at the pleasure of the consignor; and which was actually revoked by the subsequent disposition of the property; and that *P.*, who had no express notice of the consignment, but,

on receiving information of it after he knew of the failure of *H. and Co.*, had laid an attachment on the pearls in the hands of *B.*, on which he had proceeded to judgment, and actually sold the pearls under it; having also executed the trust-deed as a creditor; was bound to account with the trustees for the proceeds.

The Bill stated, that the Plaintiffs *Harrington, Burnaby, and Harrington*, who were in partnership as general agents at *Madras*, under the firm of *Harrington and Co.*, becoming indebted to an amount beyond what their estate was sufficient to pay, agreed to make an assignment of their stock in trade, and all their effects, both in their partnership and individual characters, to *James Strange* (then of *Madras*), and to the Plaintiffs *Scott and Arbuthnot*, in trust for their creditors; and that, accordingly, by indenture dated the 19th of *December* 1811, between the Plaintiffs [653] *Harrington and Co.*, of the first part; the said *James Strange*, and the Plaintiffs *Scott and Arbuthnot*, of the second part; and the several persons therein mentioned (creditors of *Harrington and Co.*), of the third part; it was witnessed that, in pursuance of the said agreement, &c., the Plaintiffs *Harrington and Co.* assigned to the said parties of the second part, all, &c. (subject to such claims, rights, or interests, as any other person or persons might have therein), upon trust to sell and dispose of the same, and, out of the produce, in the first place, to retain to themselves all costs and expenses, and then (as soon as sufficient funds should be realized), to make and declare a dividend of 10 per cent., to and among the subscribing creditors, upon the amount of their debts, and afterwards to proceed in paying off the several debts then due, when sufficient should come to hand to enable them to make or declare a dividend of 5 per cent.; and to pay the surplus to the Plaintiffs *Harrington and Co.*; in consideration whereof, the subscribing creditors released to the said Plaintiffs all actions, &c. In which indenture was also contained a power enabling the creditors, or a majority, to nominate or appoint either or any of the Plaintiffs to act as trustees or trustee conjointly with the said parties of the second part, and to appoint new trustees, &c., in virtue of which power the Plaintiffs *William Harrington and Burnby* were, shortly after the execution of the indenture, appointed to act as such trustees jointly with *Strange, Scott, and Arbuthnot*; and, *Strange* having declined to act, the Plaintiff *Cherry* was substituted as a trustee in his room.

The Bill proceeded to state, that previous to the execution of this indenture (in the month of *January* 1810), the Plaintiffs *Harrington and Co.* consigned to Messrs. *Burnie*, in *London*, two boxes of pearls, one [654] "on account of *Harrington and Co.*," the other "on account of (the Plaintiff) *William Harrington*" only; and that, at the time this consignment was made, directions were sent by *Harrington and Co.*, and also by *W. Harrington*, to Messrs. *Burnie*, to sell both the boxes of pearls so consigned, and pay the proceeds to arise from the sale of the first of the boxes to the Defendants *Porcher and Co.*, on account of *Harrington and Co.*, and the proceeds to arise from the sale of the other box to one *Moffatt*, on account of *W. Harrington*. That the pearls arrived in safety; and Messrs. *Burnie* acknowledged the receipt of them by letters, dated the 12th of *July* 1810, and addressed to Messrs. *Harrington and Co.* and *W. Harrington*, respectively, whereby they also undertook to pay the proceeds according to the directions so transmitted to them. That, at the time the consignments arrived, the market for pearls in *England* was much depressed; and Messrs. *Harrington and Co.* having been made acquainted therewith by Messrs. *Burnie*, formed the design of consigning the same pearls to *America*; in consequence whereof they, on the 6th of *January* 1811, wrote to Messrs. *Burnie* the following letter:

"Dear Sirs,—In consequence of the very unfavourable report received from you of the state of the *London* market for the pearls consigned to you by the *Surry*, as well as the unpromising prospect of any improvement to our advantage, it has occurred to us to desire inquiries to be made of the probable vend in *America*. You will receive from Messrs. *Higginson and Co.*, of *Boston*, a particular statement of the markets with them, having furnished them with copies of the invoices, for the purpose of aiding their inquiries; and, should it appear on a view of circumstances, at the same time taking into consideration the drawback on [655] the export of the pearls on the one hand, and the charges of shipment, &c., on the other, that the result which may be held out by Messrs. *Higginson and Co.* of a sale in the *United States* will be comparatively favourable, we request

"you will ship them accordingly to their consignment on our account, covering all risks, and advising us thereof by the first opportunity. We shall allow of your charging your 2½ per cent. commission, the same as if you had made the sale, in compensation for your trouble on the occasion. We apprehend the advantage of a prompt sale in *America*, which is an additional motive. You will be pleased to consider these instructions as including the consignment per *Surry* on account of our *William Harrington*, as well as of ourselves."

The bill further stated that, before the pearls could be sent to *America*, Messrs. *Porcher* and Co. received information of the failure of Messrs. *Harrington* and Co., and thereupon caused an attachment to issue out of the Lord Mayor's Court, whereby the pearls were attached, as goods in the hands of Messrs. *Burnie*, belonging to the house of *Harrington* and Co., and to the Plaintiff *W. Harrington*, who were (as was alleged) respectively indebted to *Porcher* and Co.; that about the 20th of *February* 1812, the Plaintiffs (trustees) sent a copy of the indenture to *Porcher* and Co., and requested them to act as their agents in *London* for collecting all sums due to the estate of *Harrington* and Co., procuring the signature of creditors, and making payment among them of such monies as should come to their hands. The bill also stated, that at the time of the execution of the indenture, *Harrington* and Co. were largely indebted to *Porcher* and Co., and that *Porcher* and Co., upon receiving the indenture, executed the same as creditors, thereby (as the Plaintiffs insisted) subjecting themselves [656] to all the provisions thereof; that, in answer to the application made to them for that purpose, *Porcher* and Co. at first declined the agency, except upon the terms, that their acceptance of it should not prejudice their interest or affect the benefit they might, under the laws of *England*, be entitled to, either by virtue of their attachment, or from the possession of goods, bills, or other property of *Harrington* and Co. in their hands, or from any future legitimate means that might be presented for their security, and reimbursement of such debts as were due to them. That, afterwards, on the 10th of *August* 1812, they (*Porcher* and Co.) wrote to the Plaintiffs (trustees) stating, that they perceived that the terms of the deed not only excluded them from appropriating to themselves any property of *Harrington* and Co., that might thereafter come to their hands, but also from the benefit of their attachment; admitting, however, the equity of the arrangement thereby made, and engaging to apply whatever should be realized from the produce of the general funds, for the benefit of all the creditors, parties to the deed. That, notwithstanding, subsequently to their execution of the deed, they (*Porcher* and Co.) proceeded on their attachment, and obtained judgment therein, and by virtue thereof got possession of the pearls, and had since sold the same, and applied the produce in discharge of the debts due to them from *Harrington* and Co., without bringing any part to account with the Plaintiffs (trustees). The bill then proceeded to charge them (*Porcher* and Co.) with notice, at the time when they executed the deed, and accepted the agency, or (at least) when they received the pearls, or the produce thereof, of the consignment to *Burnie* and Co., with directions to pay to them (the Defendants); but insisted that any directions which were given, with respect to the appropriation of such produce, were revoked by the subsequent directions contained in the [657] letter of the 6th of *January* 1811; and that, in case they were not so revoked, yet, as they had not been carried into execution at the time of the failure of Messrs. *Harrington* and Co., and the pearls had not been then sold, they (the pearls) ought to be considered as part of the estate of *Harrington* and Co., and to have been vested by the trust-deed in the Plaintiffs (trustees) for the benefit of the creditors. The bill, therefore, prayed an account of the pearls, and of the money arising from the sale thereof, which had come to the hands of the Defendants, or any of them, and that they (the Defendants) might be decreed to pay to the Plaintiffs (trustees), what should be found due on the taking of the account, in order that the same may be applied according to the provisions of the trust-deed.

The Defendants, by their answer, admitted, that they received information of the failure of Messrs. *Harrington* and Co., but whether before the pearls could be sent to *America* they could not say. They believed, however, that the news did not reach *England* till many months after the instructions had been received by *Burnie* and Co. to send the pearls eventually to *America*. They also admitted, that they caused the attachment to issue after they knew of the failure. They

stated, that, at the time of the execution of the indenture, *Harrington* and Co. were indebted to them (the Defendants) in £60,000. They denied that they executed the indenture as creditors, admitting that they at first declined the agency, and stating, that, at the time when they wrote to Messrs. *Harrington* and Co., as mentioned in the bill, they had not adverted to the clause in the deed, whereby any creditor executing the indenture would be prevented from proceeding at law; and that, upon discovery thereof, they determined to sign, and waive the benefit of their attachment; and wrote to Messrs. *Har*-[658]-*rington* and Co., apprizing them of that determination, and that they would prosecute the attachment for the benefit of their estate. But they farther stated, that they had since been informed of the pearls having been consigned to *Burnie* and Co., to be sold, and the proceeds paid to them (the Defendants) in part payment of their debts; and, admitting that they had proceeded in the attachment, and obtained judgment thereon, by virtue whereof they had possessed the pearls, which they had since sold for £8000 and upwards, they insisted on their right to retain and apply the same in discharge of their own debt, so far as it would extend, by virtue of such consignment.

It appeared, both by the answer and evidence in the cause, that the Defendants did not know of the first intended appropriation, under which they claimed, till after they had executed the indenture, and also had obtained judgment, and recovered the pearls under the attachment.

*Bell*, *Dowdeswell*, and *Abercrombie*, for the Plaintiffs, stated the principal question to be, whether the original consignment amounted to a specific appropriation of the pearls in favour of the Defendants; and they argued, that to render such an appropriation valid, there must be three concurrent circumstances: First, a specific direction from the consignors so to apply the produce; secondly, acceptance of the commission on the part of the consignees; and lastly, the assent of the party for whose benefit it is intended, to the appropriation. Suppose the third requisite wanting, and that, without any communication to Messrs. *Porcher* and Co. of the consignment and accompanying directions, Messrs. *Burnie* and Co. had sold the pearls, and afterwards been robbed of the produce; would that have [659] been a discharge of the debt due from *Harrington* and Co. to the defendants? This was no more than one merchant sending goods to another, directing him to sell, and pay the money in at his bankers. No lien attaches, unless there is an effectual binding contract between all the three, the consignor, the consignee, and the party to whose use the consignment is appropriated. And they cited *Williams v. Everett* (14 East, 582), and *Wilkins v. Savage* (2 B. & P. 459).

[His Honor having asked how this question came into a court of equity, seeing it was the proper subject of an action at law, as money had and received to the use of the Plaintiffs; *Bell* answered, that it was clearly a matter of account, as between principal and agents, factors and brokers; where no specific sum can be demanded but the balance, after deducting brokerage, &c. That, besides, no objection on that ground was taken by the answer; but, if it were raised, it was conceived, that a person in the situation of an agent (as *Porcher* and Co. had constituted themselves) could no more sustain such an objection than the factor or broker himself (Messrs. *Burnie* and Co.) might have done. That it is well settled, that a court of equity does not lose its jurisdiction, because an action for money had and received may lie, but in such cases exercises a concurrent jurisdiction with the court of law; and that, in the present case, the question was brought before this Court by consent; in the way of an amicable suit, for the purpose of determining the question.]

Sir *S. Romilly* and *Shadwell*, for the Defendants. First. Here is a consignment for a specific purpose, and an acceptance on the part of the consignees. The [660] communication to the third party is not essential to the appropriation. There are cases, in which the party to whom the consignment or remittance is made, has refused to accept the commission in terms; and the question has been, whether the party was duly constituted a trustee in respect of the property; for otherwise it is admitted, that there could be no appropriation. That was the case of *Williams v. Everett*: where, although the Plaintiff had received a letter from the remitter of the bills, ordering payment of his debt out of the remittance, yet the Defendants (who were the bankers of the remitters) having refused to indorse the bill away, or otherwise to act upon the instructions they had received from him, it was held,

that they (the Defendants) did not, by the mere act of receiving the bills, and afterwards the produce of them, bind themselves to apply the money in discharge of the Plaintiff's debt, according to the directions ; and that the property in the bills, and their produce, still continued in the remitter. The circumstance of the third party (the Plaintiff) having, or not having, notice of the intended application, therefore, formed no part of the principle which decided that case ; and accordingly Lord *Ellenborough* says, "The case of *De Bernales v. Fuller*" (14 East, 590, note ; and 2 Campb. 426), "which has been urged in argument on the part of the Plaintiff, is clearly distinguishable, by this circumstance ; that the Defendants in that case had antecedently received the bill, which was to be paid at their house from *Newnham* and Co., the bankers of *De Bernales*, the holder, for the very purpose of receiving payment for them (the *Newnhams*) of such bill ; and having taken the bill for this purpose, the Court thought that the Defendants (*Fuller* and Co.) could not, by themselves or their clerk, renounce [661] this purpose, but must apply the money brought by *Fuller's* clerk specifically for the discharge of that bill, then lying at their house, to that very purpose and no other ; and that they were in effect to be regarded in that case as the Plaintiff's agents, through the intervention of *Newnham's* house, for the purpose of that receipt ; and could therefore hold and apply it to no other. Here no agency for the Plaintiff ever commenced, but was repudiated by the Defendants in the first instance." (14 East, 598.)

In the present case there is no question whatever that Messrs. *Burnie* and Co. were duly constituted trustees ; and the question, whether the consignors might not subsequently revoke their commission does not arise. There were no express directions to send the pearls to *America* contained in the letter of *Harrington* and Co., to the consignees, dated the 6th of *January* 1811 ; which letter amounts to no more than the declaration of a conception, on the part of the consignors, that they had a right to apply the consignment to some other purpose than that originally intended. But it never was, in fact, so applied ; and therefore their change of intention (if there were any) is nothing to the purpose.

The next question is, whether any thing had been done by the Defendants (*Porcher* and Co.), to preclude them from availing themselves of the consignment made in their favour. Whatever was done by them, it is said, was done in total ignorance of their interest ; and it is, therefore, impossible that such a question can at all be argued. If any loss had been incurred, it certainly would not have been the loss of *Porcher* and Co., until [662] they had notice. But the same must be the case with every assignment made for the benefit of creditors.

[The *Master of the Rolls*. And yet the answer to that very question is the criterion by which to determine whether an appropriation was finally made or not.]

*Shadwell*, for the Defendants. A material difference between the case of *Williams v. Everett* and the present has already been stated to consist in the refusal of the bankers, in that case, to apply the produce of the bill according to the directions of the remitter ; that is, to take upon themselves the trust intended to be reposed in them. The decision of *De Bernales v. Fuller* is in favour of these Defendants ; for it establishes the position, that, where money is put into the hands of any person for a given purpose, which purpose is for the benefit of another, unless he expressly repudiates the commission, he becomes a trustee for that other person. *Burnie* and Co. were not at liberty subsequently to repudiate, having become trustees by their acceptance of the commission. Then how can a trust, so created, be destroyed ? It cannot be said that *Porcher* and Co., by any act of their own, have done it, any more than those parties who have actually filed this bill for relief. But the party remitting seeks to have restitution ; and, for that purpose, would fix upon the Plaintiffs (who are merely trustees) the consequences of his own error. In *Williams v. Everett*, the *cestui que* trust of the remittance brought his action against the party to whom the remittance was made. Here, Messrs. *Harrington* and Co., through the trustees named in a deed of their own creation, seek to disturb a trust which they also had previously constituted. Can it be said that they are now at liberty to act in this manner ? But [663] *Williams v. Everett* has really nothing at all to do with this case ; there having been here a specific direction to apply the consignment, and an acceptance of the commission.

Then it is said, there must be notice to the third party of the benefit intended him. But where is it to be found, that such notice must be either immediate or



simultaneous? It is only laid down, in general terms, that there must be notice; and, in point of fact, there *was* notice to Messrs. *Porcher* and Co., and acceptance by them.

[The *Master of the Rolls*. It may be said, that the notice ought to have preceded the assignment in trust for creditors.]

*Bell* replied.

Dec. 24. The *Master of the Rolls* [Sir Wm. Grant]. This case is stripped of almost every circumstance that has ever been relied upon as constituting an irrevocable appropriation. *Harrington* and Co., who made the consignment, never informed *Porcher* and Co., that any remittance was made, or intended to be made, on account of the debt due to the latter. The consignees, who were mere factors for the consignors, had no directions to apply the produce of the consignment in payment of any specific debt, or in taking up any particular bill of exchange. The only order they received was, that, when the sale should be effected, they should pay over the proceeds to *Porcher* and Co. They informed their principals that they would act in conformity to the directions received, but they had no communication what-[664]ever with *Porcher* and Co., on the subject. This amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it.

The assignment of it in *December* 1811, was such a disposition. Under that assignment the general creditors of *Harrington* and Co. became entitled to the benefit of every description of property over which they had a disposing power. There was no third person who had then acquired any interest, legal or equitable, in the goods in question; and therefore *Harrington* and Co. could dispose of them, and they have disposed of them to the present Plaintiffs, who are consequently entitled to a decree.

Decree in favour of the Plaintiffs.

Reg. Lib. 1817, B. fo. 702.

N.B. Immediately after His Honour had delivered the above judgment, which terminated the sittings of the Court after *Michaelmas* term, Sir *Arthur Piggott* rose, and made the address, which is printed at the end of the second volume of these Reports; to which His Honour made the answer there also mentioned, taking his leave of the bar on his retirement from office.

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[665] APPENDIX, CONTAINING SOME NOTES OF CASES DECIDED BEFORE THE PERIOD AT WHICH THESE REPORTS COMMENCE, AND NOT COMPRISED IN ANY OF THE CONTINUOUS REPORTS.

N.B. Most of the following Notes were communicated by different professional Friends, and have been compared (wherever it was practicable) with the *Register's* Books, to which References are made.

[667] CARLETON v. Sir WILLIAM LEIGHTON.(1) 1805.

Plea of bankruptcy to a bill by heir at law against devisee; over-ruled as bad in point of form, not averring distinctly, and in succession, the facts upon which the bankruptcy rested. Not sufficient, for the purpose of such a plea, to state that the Plaintiff was duly found a bankrupt under the commission. Expectancy of an heir either presumptive or apparent, not an interest or possibility capable of being made the subject of contract. Estate descended after the bargain and sale of the commissioners, and before certificate, is the property of the bankrupt, and does not vest in the assignees, except by a subsequent assignment.

The Plaintiff by his bill claimed certain real estates in the Defendant's possession, to which the Plaintiff alleged himself entitled as heir at law; and the case was, that

the Plaintiff's alleged ancestors, by their respective wills, dated respectively in 1794 and 1796, had devised to Sir *William Leighton*. But, as to the will of 1794, it was void at law, which let in the Plaintiff; and as to that of 1796, there was, with regard to it, such an influence by the Defendant over the testatrix as would raise in equity a trust in the Defendant (as devisee) for the Plaintiff (as heir at law). The bill therefore charged fraud, &c.

To this the Defendant put in a plea in bar, stating that the Plaintiff had no right or interest in the estates in question: for that, in 1792 or 1793, before the date of either of the wills, a commission of bankruptcy was duly issued against the Plaintiff, under which he was afterwards duly found and declared a bankrupt, and all his estate and effects were thereupon duly transferred and assigned to *John Jackson* of, &c.

[668] This plea was set down by the Plaintiff, and now came on to be argued.

In the course of the argument it was further stated, that the Plaintiff obtained his certificate in 1803, and had paid every creditor the full amount of his debt.

*Fonblanque* and *Cullen* for the plea. The interest or possibility of an heir at law in the property expected from his ancestors may be made the subject of contract. *Beckley v. Newland* (2 P. Wms. 182), *Hobson v. Trevor*. (2) It is a possibility which, if not assignable at law, is nevertheless within the statute (5 Geo. 2, c. 30, s. 1). In the present case, therefore, the possibility which the Plaintiff had as heir at law of the testatrix passed by the bargain and sale of his commissioners leaving him (the Plaintiff) without any right or interest whatever. But even if it did not so pass, but descended on the Plaintiff, then it must be bound by a trust for the creditors, and ought to have been made the subject of a second bargain and sale; so that the beneficial interest must be in the assignees, and the Plaintiff cannot be entitled in equity. In *Benfield v. Solomons* (9 Ves. 77. And see *Saxton v. Davis*, 18 Ves. 72), a demurrer was allowed to a bill by a bankrupt, because it only charged collusion generally, and did not aver that there would be a surplus, or that there had been a specific application to the assignees to sue.

[669] If the plea be thought informal, leave will be given the Defendant to amend it.

*Sir Samuel Romilly* and *Owen* for the Plaintiff. The same strictness in pleading is required in equity as at law. "All the facts necessary to render the plea a complete equitable bar to the case made by the bill so far as the plea extends, that the Plaintiff may take issue upon it, must be clearly and distinctly averred. (Gilb. on Ch. 58. Mitf. 236.) Who ever heard of pleading bankruptcy, in the general language that this plea uses? Such a plea should state distinctly the trading, the contracting debts, the petitioning creditor's debt, the act of bankruptcy, the commission, the finding bankrupt, and the assignment; and if real estate is in the case, the bargain and sale should be clearly mentioned. Chancery pleading has been often stigmatized as too loose; this seems to be an experiment to carry it to the greatest possible laxity. If such a mode of statement were sufficient in a bill, it does not follow that it would be so in a plea; but it will not do even in a bill. It was some time before it was settled, that such an averment, even with an admission of the facts by the Defendant's answer, would be sufficient. At law, it is clear, all the facts must be stated in a plea, although greater latitude is allowed in declarations; and, when a bankruptcy had gone so far as the granting of the certificate, the certificate could not be pleaded without stating every previous step, until the statute (5 Geo. 2, c. 30, s. 7) enabled the bankrupt to plead his bankruptcy and certificate generally. Therefore, even supposing this property to have been liable to the commission, this plea is quite informal, and will not be allowed. Another thing is, that the [670] plea purports to be a plea in bar; now, if it were correct, it could be only a plea in abatement, therefore, permitting the defendant to amend his plea, will be to allow him to substitute a plea in abatement for a plea in bar, which is never suffered. But if it were a mere plea for deficiency of parties (the assignees not being before the Court), or if such a suggestion had been made in the answer, the plaintiff would reply to it, by shewing that, having paid every creditor 20s. in the pound, he is absolutely entitled to the estate, and that the assignees have no interest at law or in equity. The proposition, that this property passed by the first assignment, is too extravagant to be supported; in answer to it, it may be sufficient to refer to *Moth v. Frome* (Amb. 394).

[The Lord Chancellor, in the course of the Plaintiff's argument, said that the informality of the plea was manifest; for that it only stated that a commission duly issued, which might be the case though the party were no bankrupt.]

*Fonblanque*, in reply. The plea, in substance, being correct, it would be mere superfluity to state what was not substantial; and the objection, that it only states that the commission duly issued, is obviated by the averment that the party was duly found and declared a bankrupt,—such general pleas are not uncommon at law. With regard to the matter pleaded, it seemed not so extravagant, having been much discussed in the cases cited, and the words which conclude the report of the case in *Ambler*, viz. “that it must be a possibility that can be assigned or released,” coupled with the cases in *Peere Williams*, and that of *Jones v. Roe* (3 T. R. 88, 94, 95; 1 H. B. 30), appeared to [671] warrant the opinion that the estate descended passed by the first assignment as a possibility vested in the bankrupt that could be “assigned or released.” The plea does not seek to avoid the justice of the case; all the Defendant asks is, that he may not be obliged to account with one, who, having no right or interest, is incapable of giving him a proper release.

The *Lord Chancellor* [Eldon] decided that the plea must be over-ruled. That it was bad in point of form, as it was clearly contrary to all practice to plead bankruptcy without stating all the facts successively and distinctly; that to admit such a mode of pleading by general language would be very inconvenient; for that, although in the present case the party opposed to the plea being the alleged bankrupt himself, the several facts would be within his knowledge if issue were joined, yet such a plea used against third persons unacquainted with the facts would be attended with great and unnecessary trouble; that it was no defence to say that the averment that the Plaintiff was duly found a bankrupt would supply any preceding defect; that a man may be duly declared a bankrupt (that is, according to the evidence before the commissioners) and yet not be so; for that the assignees are obliged, at law, to submit the whole facts to the jury, the first time they have occasion to try any question; and that jury may decide that the party was not a bankrupt.

That the expectancy of an heir presumptive or apparent (the fee-simple being in the ancestor) was not an interest, or a possibility, nor was capable of being made the subject of assignment or contract (see 3 Mer. 668, note); that the cases cited were cases of covenant to settle or assign property [672] which should fall to the covenantor; where the interest which passed by the covenant was not an interest in the land, but a right under the contract; (3) therefore, that no interest in the estates in question passed under the bargain and sale of the commissioners.

That, as to the argument that the beneficial interest would nevertheless be in the assignees (the property having descended during the bankruptcy), all property was at law in the bankrupt till duly and legally conveyed to the assignees; that it frequently happened that the creditors, being contented with what they had got, and satisfied with the bankrupt's conduct, did not call for any second assignment; that this applied most particularly where the bankrupt, as in the present case, had paid 20s. in the pound; and that, until the creditors chose to take the benefit of the property, it remained in the bankrupt both at law and in equity. Lastly, that the matter of the plea being such, it would be fruitless to allow it to be amended.

The plea was over-ruled accordingly.

(1) This case, which was communicated to me by Mr. *Hodgson*, is referred to by Mr. *Beames* in his “Elements of Pleas in Equity,” p. 118, 119, 120.

(2) 2 P. Wms. 191. See, as to the doctrine of these cases, Maddock's Princ. and Pract. of Chanc. Vol. I. p. 437, where, referring to a MS. case of *Harwood v. Tooke*, it is observed, that Lord *Eldon* has expressed a serious doubt with respect to it. And see post. 671.

(3) It seems that a covenant to settle estates, which should afterwards fall or descend to the covenantor, is only personal during his life, and can never attach on the estate which is the subject of it directly, and, circuitously, only as a part of the covenantor's real estate, if the words “Heirs” be in the covenant.

Qu. Might not the argument in this case have been put thus? “The Plaintiff could not claim a right to, or interest in, these estates, otherwise than as the heir of the two ladies at the time of the bankruptcy and assignment. But he could not claim as heir; for he could not stand in that capacity; because *nemo est hæres viventis*. Therefore, at the time of the bankruptcy and assignment, he could claim no right or interest whatever.” J. H.

[673] RICHARDS v. NOBLE. April 9, 1807.

*Ex relatione* Mr. *Simpkinson*.—Lord of a manor is entitled to injunction and account in respect of waste by a copyholder.

Bill by lord of a manor against copyholders, for an account of turves cut and taken, and for an injunction ; not waiving the forfeiture.

Defendants put in a demurrer for want of equity.

Sir *S. Romilly*, *Hart*, and *Heald*, in support of the demurrer. There is only one case on the subject, which settles this point : that of *Dench v. Bampton* (4 Ves. 700). Copyholds are *strictissimi juris* ; and a court of equity will leave the lord to his remedy at law for a forfeiture. (*Vide* Anon. Skin. 142.)

*Leach* and *Bell*, for the Plaintiff, impeached the authority of the case cited, arguing that it was a strange determination to say, that equity would not relieve, when the waste committed was such as amounted to forfeiture ; and they cited the instance of a remainder-man in fee filing a bill against tenant for life, who had committed waste ; it was never pretended that such a bill would not lie. They admitted that, without the prayer for an injunction, the Plaintiff could not have an account. (*Jesus College v. Bloome*, 3 Atk. 262.)

The Lord Chancellor took time ; but said, that, in many cases, the forfeiture was a very inadequate remedy ; and he noticed the instance of a barren spot upon which many valuable timber trees grow. If the [674] copyhold tenant only forfeited his copyhold by cutting down these trees, he might in such case be a considerable gainer by his own wrongful conduct.

The demurrer was over-ruled accordingly ; and, afterwards, upon affidavit in support of the principal facts alleged by the bill, the injunction was awarded. (17th August 1807. Reg. Lib. 1806, B. fo. 1224.)

BASEVI v. SERRA. Rolls. July 15, 1807.

Communicated by Mr. *Hodgson*. See 14 Ves. 313, where the circumstances will be found more fully stated.—Equity of a bankrupt's wife against the assignees of her husband or their vendee for a settlement of her *choses en action*. Jewish Settlement.

In this cause there was a question between the wife of a bankrupt and a purchaser for valuable consideration from the assignees, as to the wife's equity to have a settlement out of a fund of £200 a year, part of her *choses en action* ; and it was stated to be the practice of the Jews on marriage, that the husband (they being for the most part in trade) takes all the wife's fortune, and gives his covenant to restore it with £50 per cent. profit, and that was done in this case ; the settlement was, that in consideration of £3000 stock paid to him before the marriage, the husband, *J. M. Da Costa*, covenanted, that his executors, &c., would, within six months after his decease, replace to the wife that sum with £50 per cent. profit ; and so that if, during the marriage, the husband should receive or become entitled to any further sums of money in right of his wife, his ex-[675]-ecutors, &c., should, within six months, restore them with the like profit.

For the wife it was pressed, that the purchaser from the assignees must stand liable to the wife's equity, in the same manner as the assignees, or the bankrupt himself, would have been liable ; and the cases of *Bosvil v. Brander*, 1 P. Wms. 458. *Worrall v. Marljar*, and *Bushnan v. Pell*, *ibid.* 459, note ; and 1 Cox, 153 ; and *Oswell v. Probert*, 2 Ves. Jun. 682, were cited. (1)

For the purchaser it was insisted, that independently of his standing in the favoured character of a purchaser for a valuable consideration, without notice, he could not be liable, as the assignees had in fact received all the benefit. That he did not come to the Court for its aid (see *Bosvil v. Brander*, *ubi sup.*), but was brought there by the wife and the assignees ; and that in point of fact the husband was a purchaser of his wife's fortune by the settlement.

The Master of the Rolls [Sir Wm. Grant]. Whatever may be the general equity of a wife against her husband's assignees, or purchasers from them, to have a settlement made out of her *choses in action*, where the husband is not a purchaser by

settlement, and where he, or his assignees, or their vendee, come to the Court for its aid, the wife, in this case, can have no such equity, because she has ex-[676]-pressly abandoned it; and by her settlement consented to rest upon her husband's covenant. Where there is no such covenant, or where such a covenant has been *actually broken*, the equity would no doubt attach, but here the covenant is not to be performed till after the husband's death, and he is living. As to the plea, that the husband in point of fact has not received or become entitled to this money, that cannot take the case out of the reasoning drawn from the settlement; for, suppose he should again become solvent, and the wife was to come to the Court for a settlement, he could not say then he never took this money. The answer would be, that his estate had the benefit of it, and it was his fault or his misfortune, that his bankruptcy carried to others what he would else have become entitled to.

In the same case it was also said, that where a fund is to be divided between several parties, and one or more of them, by charging their shares with mortgages, annuities, or other incumbrances, have contributed to swell the expense of the suit, the practice is to divide the fund in the first place, and direct the Master to calculate the costs of the suit, with reference to each share, and so to deduct them; in which mode of doing it, each party bears his own costs most equally; and so it was in *Mocatta v. Lousada*,<sup>(2)</sup> which His Honour acknowledged, and said it was a good rule. (Reg. Lib. 1806, A. 2, fo. 1147 b.)

(1) See also *Mitford v. Mitford*, 9 Ves. Jun. 87. *Carr v. Taylor*, 10 Ves. Jun. 578. *Wright v. Morley*, 11 Ves. Jun. 12. *Beresford v. Hobson*, 1 Madd. 362; where the cases are collected in a long and elaborate judgment of the present *Master of the Rolls*, then *Vice-Chancellor*.

(2) 12 Ves. 123; where, however, the point is not noticed.

[677] COVENTRY v. BENTLEY. *First Seal after Hilary*, 1808.

*Ex relatione Mr. Simpkinson*.—Defendant to a bill of discovery is entitled to the costs of the discovery immediately on putting in a full answer; and his right to these costs is not waived by his subsequently accepting the costs of an amendment, nor by his neglecting to serve the Plaintiff with the order for costs of discovery until after he has himself been served with the order to amend.

Bill for discovery. Answer put in. Exceptions taken and allowed. Further answer referred back to the Master, who reports it sufficient. The Defendant then obtains an order, on petition, for the costs of the discovery. The Plaintiff afterwards moves for leave to amend, and is served with the order for costs, subsequently to his obtaining the order to amend. It appeared that the bill had, in fact, been amended; and that the Defendant had accepted the usual costs of the amendments; but, whether before or after the order for payment of costs of the discovery was served on the Plaintiff, did not appear.

*Perry*, for the Plaintiff, moved to discharge the order for payment of costs of the discovery, for irregularity, upon the ground of the Plaintiff's not having been served with it, till after he had served the Defendant with the order to amend. He also insisted that the Defendant had waived this order by accepting the costs of the amendment.

*Richards*, contra. After a full answer, the Defendant has a right, of course, to the costs of his discovery. They attach immediately; and, consequently, they cannot be affected by his likewise receiving the costs of amendment. Suppose, after the discovery, the Plaintiff alters the frame of his bill, and makes it a bill for relief; can it be contended that the defendant, by accepting the costs of [678] amendment, has waived his right to those which he was entitled to for the discovery? (1)

The motion was refused accordingly.

(1) See *Butterworth v. Bailey*, 15 Ves. 348. After answer to a bill of discovery, motion to amend the bill by adding a prayer for relief, refused with costs. And, *vice versa*, after answer to a bill for discovery and relief, motion to amend by striking out the prayer for relief, also refused. *Earl of Cholmondeley v. Lord Clinton*, 2 Ves. & B. 113.

HARRIS v. COTTERELL. *In the Exchequer.* June 28, 1808.

*Ex relatione* Mr. Hodgson.—On a bill for examining witnesses *in perpetuum rei memoriam*, held that publication of the depositions should not be allowed unless in a strong case.

This case arose on a rule to shew cause why publication of the depositions of witnesses, taken by commission in a suit for perpetuating testimony, should not pass, which on the part of the Plaintiff, it was contended was a matter of course. The Plaintiff was devisee under a will, the Defendant heir at law, and the Defendant had failed in one ejectment brought by him, to set aside the will ; but he had commenced a second action, which he now stated by affidavit, he intended to try at the ensuing assizes. The Plaintiff's bill was for a commission to examine witnesses to prove the due execution of the will, and the sanity of the testatrix, *in perpetuum rei memoriam* ; and he laid the usual ground, that the Defendant hung back, threatening, &c., but neither the bill nor answer noticed specifically the proceedings at law. The commission had issued, and under it all the witnesses examined on the former trial at law, and intended to be called in the second action, on both sides were examined.

[679] *Dauncey, Thompson, and Puller*, for the Defendant, resisted publication, on the ground that this was a mere examination *de bene esse*, ancillary only to the suit at law, and therefore within the general rule, that the Court never allows publication, unless in the case of a witness dying or being incapable of attending to be examined in chief ; and they cited *Fowler* (2 Fowl. Exch. Pract. 147), *Harrison* (Ed. Newl. 52, *et seq.*), *Practical Register* (Wyatt's edit. 71, 72, 73), *Duke of Dorset v. Girdler* (Pre. Cha. 531), and *Cann v. Cann*,<sup>(1)</sup> and they urged the great inconvenience and impropriety of allowing the depositions to be published, putting the Defendant at law in possession of the Plaintiff's mode of proceeding, &c., and insisted that no good end could be answered by allowing the publication.

The *Solicitor-General* [Sir Thomas Plumer], *Hollist*, and *Hall* (for the Plaintiff) contended, that this was not the case of an examination *de bene esse* in chief, being after issue joined ; and that in this case (as well as on bills for relief), the Plaintiff might be allowed to examine *de bene esse* before issue joined, on shewing good cause for such examination ; and they cited the 35th General Rule of the court (1 Fowl. 52, where a part only of this general rule is referred to) : viz. That in a suit for perfecting testimony, the Plaintiff may, after a certain delay in putting in the answer, have examination *de bene esse* ; that, as soon as issue is joined, there must be a second examination, and that, on the turn of that commission, the depositions taken under it, together with those taken *de bene esse* of any witness who died before [680] they could be examined in chief, shall be forthwith published (*Note* : The Court censured the inaccurate and confused manner in which this article is worded) ; and relied on the practice, insisting that publication of depositions, taken as these were, is a mere matter of course. As to the particular inconvenience, they put the case of a witness dying so near the time of the trial at law as to make it impossible to pray publication afterwards, and the case of a contract for sale of the estate, the purchaser objecting to complete it while the cloud hangs over the title, but willing to take it on seeing the depositions.

The Court seemed much disposed to refuse the application ; but, as it was considered a new and important point of practice, it stood over, in order that further enquiry might be made.

*Graham, B.*, took a material distinction. He said that great confusion had arisen (which was admitted on all sides) between three distinct objects ; first, examinations *de bene esse* ; secondly, examinations on a bill merely to prove a will *per testes* ; and, thirdly, examinations of witnesses, on such a bill as the present, *in perpetuum rei memoriam*, which obtain on wills and deeds, on modusses, on legitimacy of marriage, &c., &c. As to the first, they are not published, but by consent, or on a strong case being made. As to the second, they stand on a distinct ground, because none but the subscribing witnesses are examined, and they are examined to the question of sanity, merely as incidental ; and there publication is of course. But, as to the third, he thought none of the cases or dicta applied to it, and that if publication had been

usually allowed, it was *sub silentio*, and the question never discussed. That the danger of publishing such depositions as the present is [681] very great, there being no limits as to the points to which the witnesses are to be examined : and therefore he thought that it is matter for discretion in the Court, to allow publication, or not, according to the case made.

On a subsequent day the case was again mentioned, and the Court refused the publication. *Macdonald*, C. B., stated that precedents had been searched, and none found in point to support the publication ; and that, on consulting the *Lord Chancellor*, he was of opinion it should be refused in this case ; with which all the Court concurred.

(1) 1 P. Wms. 567. And see *Lord Bacon's Orders*, 73. (*Beames's Ord. in Chanc.* 32, and the authorities referred to in note 116.)

HIBBERT v. HIBBERT. *Rolls. Aug. 5, 1808.*

*Ex relatione* Mr. *Simpkinson*.—Testator directs “that A. be appointed receiver of his real and personal estate,” and dies seised of no real estate, except an estate in the *West Indies*, having by his will directed a sum of money to be invested in the purchase of lands in *England*. A. appointed manager of the *West India* estate, upon entering into a personal recognizance to account for the produce. (*Morris v. Elme*, 1 Ves. Jun. 139.)

Testator devises his real and personal estate to four persons, upon certain trusts. He also appoints them his executors, and directs, that upon his death, they shall institute a suit in Chancery, for the purpose of carrying his will into effect, under the direction of the Court. By a codicil, dated a short time before his death, he directed that his friend, *Ambrose Humphreys*, should be appointed receiver of his real and personal estates, and expressed, in strong terms, his opinion of *Humphreys*, adding, that he made this appointment for the sake of benefitting *Humphreys* in a pecuniary point of view. He also directed, that *Humphreys* should be the solicitor for all parties in the cause in Chancery.

[682] The only real estates which the testator died seised of were situated in *Jamaica* ; though he directed £40,000, part of the residue of his personal estate, to be invested in the purchase of lands in *England*, to be settled to the same uses as his real estate in *Jamaica*.

Upon the testator's death, a suit was instituted in Chancery, in which *Humphreys* acted as solicitor for all parties.

*March 30, 1808.* The cause was set down by consent at the *Rolls*, when His Honor appointed *Humphreys* consignee of the *Jamaica* estates, and receiver of the personal estate directed to be invested in the purchase of real estates. He was not, however, ordered to give security ; not even his personal recognizance. All the *cestui que trusts* were infants.

Two of the trustees afterwards brought a petition of re-hearing, by which they contended, that *Humphreys* ought not to have been appointed consignee, and that he ought to have given security like other receivers.

Sir A. *Piggott*, *Hart*, and *Cooke*, for the petition, contended, that it could not have been the testator's intention to have appointed *Humphreys* consignee. How can a solicitor be fit for such an office ? A consignee is in fact the person who receives and sells the produce of the estate ; who sends out supplies, &c., &c. In short, he ought to understand thoroughly the nature of the *West India* market. It must rather have been the intention, that he should receive the rents of the estates to be purchased in *England*. At all events he ought to have given security, at least his own personal recognizance.

Sir *Samuel Romilly* and *Wetherell* for *Humphreys*. It is quite clear, that the testator intended *Humphreys* [683] should be consignee. The testator had no real estates, except those in *Jamaica*, therefore no other real estates to which this word can attach. What, in fact, is the difference between the terms Receiver and Consignee ? None. The former, at least, necessarily includes the latter. Even if *Humphreys* is an unfit person, the testator has expressly appointed him. As to the point of security, there is no instance of the Court directing security to be given, where a receiver is appointed by the testator.

Sir A. Piggott, in reply. The testator was a *West India* planter. Is it probable that he would have applied the word Receiver to these estates? This word is never used in the *West Indies*. If he had such an opinion of *Humphreys*, why not appoint him consignee during his life? He very properly employed *West India* merchants, who are clearly the proper persons.

Aug. 5, 1808. The *Master of the Rolls* [Sir Wm. Grant]. This argument would have considerable weight, if the testator had died seised of other real estates. I must either strike out these words, or admit the construction contended for by *Humphreys*. There is, indeed, no other sense in which these words "Receiver of my real estates," can attach. As to security, he need give none, except his personal recognizance; which ought to have been directed by the former decree, he not being appointed by the Court, but by the testator himself.

"Order, that the former decree, dated the 30th of *March* 1808, be varied, so far as the same directs that the appointment of *Ambrose Humphreys* to be receiver and agent of the real and personal estates of the testator, shall be without his entering into the usual recognizances, with sureties in like cases required by this Court; and, in-[684]-stead thereof, that such appointment be upon his entering into his own recognizance, to be approved of by the said Master, duly and annually to account for what he shall receive in respect of the said estates, as such receiver, agent, and consignee, and pay the same as this Court hath by the said decree directed, and shall hereafter direct; and, with the said variations, that the said decree be affirmed. Costs of re-hearing, as between solicitor and client, to be paid out of the testator's estate." Reg. Lib. A. 1807, fo. 1327.

NEWLAND v. ATTORNEY-GENERAL and OTHERS. July 3, 1809.

[See *Nightingale v. Goulbourn*, 1847-48, 5 Hare, 490; 2 Ph. 595.]

*Ex relatione* Mr. *Simpkinson*.—Bequest of stock to government "in exoneration of the national debt." Directed to be transferred to such person as the King, under his sign manual, shall appoint.

In the will of *Abraham Newland*, dated May 2, 1799, was a bequest of stock "to His Majesty's government in exoneration of the national debt."

The *Lord Chancellor* [Eldon] directed it to be transferred to such person as the King, under his sign manual, should appoint.

*Newland v. Clark* and Others. On further directions, July 17, 1809. Ordered "as to" the several stocks therein mentioned, "and as to any interest or dividend which shall accrue due on the same, previous to the transfer hereafter to be directed, the same to be transferred and paid to such person or persons as his majesty, by his sign manual, shall think fit to nominate for that purpose; and any person or persons who shall be so nominated is or are to be at liberty to apply," &c., as devised. Reg. Lib. B. 1808, fo. 1214.

[685] HOLLAND (Infant) and ANOTHER, Plaintiffs, and HUGHES and WIFE, Defendants. *Rolls*. May 10, 1809.

[See S. C. with note, 16 Ves. 111.]

*Ex relatione* Mr. *Shadwell*.—Testator in *India* bequeaths a sum of sicca rupees to his wife for life, with remainder to his children, and appoints his wife executrix, who invests the money on *Indian* securities, producing a large rate of interest, and afterwards comes to *England* with her only child, an infant. On bill by the infant, held, that the widow is not compellable to refund the excess of interest received by her, beyond what the legacy would have produced if invested in the *English* funds, but ordered, the money to be remitted to *England*, and laid out in 3 per cent. Annuities.

*William Holland*, of *Calcutta*, by his will, duly executed, &c., gave, devised, and bequeathed to *Rebecca*, his wife, 50,000 sicca rupees, for her life, to be raised out of the bulk of his property: and, after her, he gave the said principal money to be



equally divided among his children by his said wife, who should survive her ; and, for failure of children, to his said wife absolutely. And, after giving several other legacies, he gave, &c., all the residue of his estate, real and personal, to his wife for life, and after her death to his children, as before ; and appointed his wife and *Samuel Holland* (one of the Plaintiffs) his executrix and executor, and guardians of his children.

The testator died, leaving his said wife, and only one child (the infant Plaintiff) by his marriage with her. The wife alone proved the will in *India*, and collected the estate, and, after retaining the legacy of 50,000 sic. rup. (which she placed out at interest in *India*) and, after payment of the testator's debts, and the other legacies given by his will, invested the clear residue, amounting to 100,000 sic. rup. in *India* bonds, the interest of which, as well as of the 50,000 legacy, she received to her own use, and afterwards came to *England* with her child (the infant Plaintiff) leaving her agent in *India* to collect [686] and receive any outstanding property of the testator's there, and to remit the interest to her in *England*. The other Plaintiff (who was the executor named in the will) proved in *England*, and instituted this suit, in the names of himself and the infant, against the widow (who had subsequently married again) and her husband, for an account and administration ; to have the amount of the property ascertained, and all outstanding parts of it called in and remitted to *England*, and laid out and invested under the authority of the Court.

It appeared that the 50,000 sic. rup. legacy, and also the residue of the estate, so far as it was collected, had been invested on securities, yielding a rate of interest much more considerable than that afforded by the public funds of this country ; and, upon the question being now raised, his Honor, the *Master of the Rolls*, was of opinion that the widow was not compellable to refund the excess of the interest which she had hitherto received, above that which would have been produced had the property been immediately invested in the *English* funds, but that the infant Plaintiff, being in this country, had a right to have the property remitted, and invested in the 3 per cents., in the name of the *Accountant-General* ; which was ordered accordingly.

*Order.* The usual accounts to be taken, &c. The Defendants to cause such part of the estate as remained in *India*, to be remitted to *England*. The Master to ascertain how much of 3 per cent. consols the sum of 50,000 sic. rup. will purchase ; the same to be purchased accordingly with a competent part of the estate remitted, and to be transferred into the name of the *Ac-[687]-countant-General*, in trust in the cause ; the interest thereof to be paid to the Defendants during the life of the Defendant, *Rebecca* ; with liberty to apply. Further directions reserved. Reg. Lib. 1808, A. fo. 968.

ATTORNEY-GENERAL V. NICHOL. July 15, 1809.

[See S. C. with note, 16 Ves. 338.]

*Ex relatione* Mr. *Simpkinson*.—Injunction against obstructing ancient lights granted on affidavit, before appearance, and without notice ; the Plaintiff having also commenced an action previous to filing the bill.

Information and bill for injunction, to restrain Defendant from proceeding in a building which obstructed the ancient lights of a house belonging to the Scottish corporation.

The relators had commenced an action at law, and now moved upon affidavit, for an injunction, before appearance, and without notice.

Injunction granted, till answer or further order ; the *Lord Chancellor* being of opinion, that the action commenced made no difference ; nor did he order the relators to discontinue their action, although they offered to do so, if necessary in order to entitle them to the injunction.(1)

(1) The Injunction was afterwards dissolved, on Defendant undertaking, if the verdict at law should be against him, to remove the injury. *Attorney-General v. Nichol*, 16 Ves. 338.

In *The Attorney-General v. Bentham*, 1 Dick. 277. (See *Ryder v. Bentham*,

The trial was in a motion for an injunction to restrain the Defendant from building on or in violation of the rights of the Plaintiff's house. It was ordered by the court that the parties should proceed to trial in an action to be brought against the Defendant and an injunction until after the trial. The case was adjourned to the 10th day of the next term and the trial was held on the 10th day of the next term.

### THE L. L. V. CASE. 1888-89.

See also *12 L. R. 211* (1888) and *13 L. R. 211* (1889).

*Ex parte* *the L. L. V. Case*.—Injunction before Master to restrain Defendant from building on or in violation of the rights of the Plaintiff's house. Defendant having previously established his right to do so.

The Master upon evidence of full trial and affidavit for an injunction to restrain the Defendant from digging or removing any earth, stones, shingles or other material from or immediately under a bank belonging to the Plaintiff, which protected his lands from the inundations and incursions of the sea. The bank was situated in the parish of *Monaster* in the island of *Jersey*. It appeared that the Defendant had sometime since removed some and of stones from this bank, whereupon the Plaintiff brought an action of trespass against him: the Defendant justified in the action as part of the market: and the jury found a verdict with damages for the Plaintiff. The affidavit further stated that the Defendant nevertheless had again begun to remove earth and stones from the bank: and that if he was permitted to continue so to do the Plaintiff's lands would be exposed to inevitable inundation as the bank formed their only protection from the sea.

The *Lord Chancellor* (Lord), granted the application in consideration of the trespass in which the Plaintiff was likely to sustain. He added that he would not however have granted it if the Plaintiff had not previously established his right to do so. See *The Attorney-General v. Wood* (the last case) and the references.)

The injunction awarded to restrain Defendant, his agents, servants and workmen, and all other persons [588] employed or concerned in, or on the part of Defendant from removing or any further quantities of soil from off the said premises, or any part thereof, until answer or further order. Reg. Lib. A. 1889. in 794.

### POPE v. WHITCOMBE. *Bills*. July 14, 1890.

[Report corrected. *Finch v. Hollingsworth*, 1885, 21 Beav. 112.]

*Ex rel.* *Mr. Simpson*.—Word "Relations" in a will means "next of kin."

*Ver.* *est.* *de residuo* to testator's wife for life, with a direction to dispose of the residue amongst his relations in such manner as she should think fit. Appointments to relations not being next of kin void, and the residue decreed to be distributed amongst those who were next of kin to the testator at the time of his death.

*James Child* gave the residue of his estate and effects to his wife, *Mary Child*, for life, with remainder to his son, *J. Child*, absolutely, if he should attain twenty-one; but in case of his son's death before twenty-one, and without issue, then he gave certain legacies to some of his relations: and he directed his wife to dispose of the residue amongst his the testator's relations, in such manner as she should think fit.

The son died under twenty-one, and without issue, in the life-time of the testator.

After the testator's death, the wife appointed this residue to a natural son of one of the testator's nephews, and to other persons, who were related to the testator, but not his next of kin.

At the time of the testator's death, his next of kin were *John Child*, his half-brother, and *Thomas* and *John Whitcombe*, the sons of a deceased sister. *Thomas* and *John Whitcombe* both died in the life-time of the wife.

At the hearing, the usual accounts were directed, and the Master was directed to enquire who were the testator's next of kin at the time of his death, and who, [690] at the time of the death of *Mary Child*, and whether the appointees of *Mary*

*Childe* were within any and what degree of relationship to the testator. The Master reported as above ; and the cause came on this day upon further directions.

*Hart* and *Wyatt*, for *John Childe*, contended, that the wife could only appoint to the next of kin, and that, the appointment being bad *in toto*, *John Childe* was entitled to the whole, he being the only next of kin living at the death of the wife ; and upon this last point they cited *Harding v. Glyn* (1 Atk. 469), and *Cruwys v. Colman*.(1)

*Simpkinson*, for the representatives of *Thomas* and *John Whitcombe*, agreed, on the first point, and cited *Edge v. Salisbury* (Amb. 78), and *Hands v. Hands* (1 T. R. 437). The Court always construes relations to mean next of kin, except in those cases where a power of selection is given ; and there is no instance of the Court extending the rule, except when the testator gives the power of appointing to "such of his relations as it shall think fit," or uses other words to the same effect. Here no power of selection is given. *Mrs. Childe* had only the power of fixing the proportions in which the next of kin were to take. The residue, therefore, vested in those who were the testator's next of kin at the time of his death ; though in uncertain proportions.(2) The cases cited in favour of the half-brother of the testator, apply only where a [691] power of selection is given, and the person to whom that power is given dies without having exercised it ; but here the interest vested.

*Toller*, for the appointees.

The Court was clearly of opinion with *Simpkinson*, and decreed accordingly. One moiety to go to *John Childe*, and the other to the representatives of *Thomas* and *John Whitcombe*.

*Declare*, That the will made by the testatrix, *Mary Childe*, is not a valid appointment of the residuary estate and effects of the testator. [Reg. Lib. B. 1809, fo. 1535.]

(1) 9 Ves. 319. See *Wright v. Atkyns*, 17 Ves. 255 ; 19 Ves. 299 ; 1 V. & B. 313. *Forbes v. Ball*, 3 Mer. 437.

(2) *Hands v. Hands*, ub. sup. et vide *Rayner v. Mowbray*, 3 Bro. C. C. 234. *Masters v. Hooper*, 4 Bro. C. C. 207. *Doe v. Lawson*, 3 East, 278.

#### GALLINI v. NOBLE. *Rolls. Aug. 1, 1810.*

*Ex relatione* Mr. *Simpkinson*.—Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil, not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real. Bequest of "all the testator's money in the Bank of England," held to pass stock in the funds, testator having never had any cash in the Bank.

Sir *John Gallini* devises certain real estates to trustees to be sold, and directs the money to be produced by the sale, to be applied in the same manner as his residuary personal estate. He then gives certain legacies, and directs his residuary personal estate, and the money to arise from the sale of these real estates, to be applied in payment of his debts, and the residue amongst his children equally. By a codicil not duly executed according to the statute of frauds, he revokes the residuary bequest amongst his children, and gives the residue to his two daughters. It was attempted to [692] be argued for his heir at law, that the real estates resulted to him, as the testator had formed one fund of the produce of the real and personal estates.

But the Court held clearly, that the bequest of the personal estate only was revoked, and that the will was still in force with respect to the real estates.

Another point was made upon another part of the will. The testator bequeathed all his money in the Bank of England to his daughters. It appeared that he never had money in the Bank, but was entitled to some 3 per cents. and 5 per cents. Bank annuities.

The Court held, that the Bank annuities passed, though the testator had certainly expressed himself very inaccurately ; and compared the case to that of an incorrect description of the intended legatee, and to the case where leaseholds have

been held to pass under a devise of lands, there being no other property to answer the description.

*Declare*, That the will of the testator ought to be established, and the trusts thereof performed, so far as respects the real estate. And that the Plaintiffs, by virtue of the bequest of all money in the Bank of *England* belonging to the testator, are entitled in equal moieties, to the sums of ——— 3 per cent. reduced annuities, and ——— 5 per cent. annuities, standing in the testator's name, in the books of the Governor and Company of the Bank of *England*. Defendant to transfer the same accordingly. Reg. Lib. A. 1809, fo. 1372.

[693] KING v. BURR. Aug. 9, 1810.

Demurrer, to bill of discovery in support of an action to recover the expenses of entertainments given by the Plaintiff under an agreement with the Defendant to introduce him to a woman of fortune, with a view to marriage, allowed.

The bill stated, that the Defendant, being desirous of marrying some person of fortune, applied to the Plaintiff to introduce him to a woman of that description; that the Plaintiff agreed so to do; that he accordingly gave many sumptuous entertainments, to which he invited the Defendant, together with various women of respectability and fortune; and that the Defendant undertook to pay the expense of these entertainments. The bill also stated various letters from the Defendant to the Plaintiff, by which it appeared, that the Defendant had it in his power to marry either of the women so introduced to him that he pleased to select. It then proceeded to state, further, that the Plaintiff had commenced an action at law to recover the money expended in these entertainments, and prayed a discovery in support of such action. The Defendant demurred generally.

The Lord Chancellor [Eldon], without hearing the counsel in support of the demurrer, allowed it, and said he would not give any assistance in support of such an action.

Demurrer to Discovery allowed. Reg. Lib. A. 1809, fo. 828.

[694] BRIDGES v. ROBINSON. Rolls. July 4, 1811.

*Ex Relatione* Mr. *Simpkinson*.—Purchaser not to pay interest on the deposit, even where he has rendered a suit necessary by refusing to perform the contract on the ground of an objection to the title, which could not be supported.

A. contracted to sell to B. by auction. B. paid a deposit to the auctioneer, and then refused to complete, alleging that the title was bad. A. filed his bill, and it was found he had a good title, and B. was ordered to pay the residue of his purchase money, with interest, from the day on which, by the terms of the contract, it ought to have been paid, together with the costs of the suit.

On petition, day after *Easter* term, it was prayed, that the minutes be varied, by directing interest to be paid on the deposit, on the ground that, as B.'s conduct rendered a suit necessary, the deposit was locked up from A. during the suit.

Sir Samuel Romilly, and Shadwell, for the Plaintiff.

Johnson for the Defendant.

His Honour [Sir Wm. Grant] took time to consider, and, on the petition day after *Trinity* term 1811, gave judgment, that A. was not entitled to interest on the deposit.

Afterwards, on motion by Johnson, on behalf of the Defendant, it was ordered, that the minutes of the decree should be varied, and be as follows.

Decree, That the agreement in the pleadings mentioned be specifically performed, &c. Refer it back to the Master to compute interest on the remainder of the [695] purchase-money (after deducting the deposit). The Defendant to pay the sum of £—— (remainder of the purchase money, after deducting as aforesaid),

with interest at 4 per cent., from the ——— day of ——— (the day on which the purchase-money ought to have been paid according to the terms of the contract).  
Reg. Lib. 1810, A. fo. 844.

BRODIE v. BARRY. *March 26, 1811.*

*Ex relatione* Mr. *Simpkinson*. See this case reported on other points, in 2 Ves. & Beam. 36, 127, &c.—Receiver appointed, before answer, in a case of a devise to four trustees, of whom two declined to act; all parties being before the Court, and consenting.

This was the case of a devise to four persons (Defendants), their heirs, executors, &c., of all the testator's freehold and leasehold estates, and all his works, stock in trade, &c., and all his personal estate and effects whatever, to hold, according to the nature of the estates respectively, upon the trusts in the will mentioned; and the testator appointed the same four persons his executors.

Two of the four only proved the will; but the bill charged that all the four (particularly those who had proved) possessed themselves of the personal estate, and entered into possession and receipt of the real estates; therefore praying (among other things) an account, and a sale of the real estates, or of so much as should not be necessary for carrying on the works in the bill mentioned; and the appointment of new trustees, in case of any of the four refusing to act, and in the meantime a receiver.

Upon a motion now made, to refer it to the Master, to appoint a proper person to be receiver, with the [696] usual directions, it was alleged that all the Defendants had appeared, but that no answers had yet been put in, and that the two Defendants who had not proved, declined to act in the trusts of the will.

Sir *S. Romilly* and *Clason*, in support of the motion, referred to a late case of *Beaumont v. Beaumont*, (1) in which it was stated to be settled, that the Court will, upon the application of all parties beneficially interested, appoint a receiver, when any of the trustees refuse to act.

*Hart*, for the Defendants (the acting trustees and executors);

*Shadwell*, for the Defendants (trustees named in the will, who declined to act);  
and

*Johnson*, for the other Defendants, beneficially interested;

Severally consented to the prayer of this application.

The *Lord Chancellor* [Eldon], upon the authority of the case cited, made the order accordingly.

*Ordered*, That it be referred, &c., and that the Defendants (the acting trustees and executors), or either of them, may be at liberty to propose themselves or [697] himself to be such receivers or receiver. The master to approve of a reasonable salary to be allowed for the receivership, upon proper security, &c. Reg. Lib. A. 1810, fo. 485.

(1) I have not been able to find this case in the Register's book, upon the point here mentioned. But see *Metcalf v. Pulvertoft*, 1 Ves. & B. 180–183, where the *Lord Chancellor* says, "With respect to appointing a receiver before answer, the cases where the Court has refused, it turned upon this: that the party applying for the appointment could not state that he had, strictly speaking, an equitable title."

LLOYD v. PASSINGHAM. *July 29, 1811.*

Motion for a Receiver, against the legal estate, upon evidence in a cause which had not been heard, refused.

In this case, a motion had been made by the Plaintiffs for a receiver, supported by affidavits of certain facts alleged by the bill, which bill was demurred to as to so much as sought a discovery of the facts in question. The Defendants being in

possession under a legal title, the motion was refused, upon the ground that, although "cases of fraud, combined with danger to the property, might arise, as to which a court of equity would interfere upon affidavits," yet the Court always reluctantly interferes against the legal title, and only in a case of "fraud, clearly proved, and of imminent danger if the intermediate possession should not be taken under the care of the Court." (1)

The motion was now renewed, upon the effect of the evidence that had been taken in the cause. (2)

The Lord Chancellor [Eldon]. (*Ex relatione* Mr. Rose.) Do you, Mr. Richards, or does any gentleman at the bar, remember an instance of a motion for a Re-[698]-ceiver, upon the effect of the evidence in a cause, before hearing? I cannot entertain such an application without hearing the cause, as it would be a general mischief to grant it. I should have a hundred similar motions in the course of next term.

[Liberty was given to mention it again, but I do not hear that the application was ever renewed.]

(1) Reported, 16 Ves. 59, where the circumstances of the case are stated. And see *Maguire v. Allen*, 1 Ball & Beatty, 75, and references in the note, p. 76.

(2) See the effect of this evidence, Cooper, 152, 4, where the case is reported upon the hearing.

#### The ATTORNEY-GENERAL v. BROOKE, July 29, 1811.

*Ex relatione* Mr. Rose.—A decree by default having been made absolute, the proper course to set it aside is by presenting a petition for a rehearing. A motion to discharge the order to make absolute, and for a day to shew cause, refused accordingly.

A decree having been pronounced upon default at the hearing, a motion was now made, on the part of Defendant, to discharge the order for making it absolute, and for a day to shew cause against the decree *nisi*, on payment of the costs occasioned by his default.

*Leach and Edwards*, in support of the motion, cited the case of *Vowles v. Young* (9 Ves. 172).

Sir Samuel Romilly, and Bell, contra.

The Lord Chancellor [Eldon]. Referring to *Cunningham v. Cunningham* (Ambl. 89; 1 Dick. 145, S. C.), as reported by *Dickens*, and *Kinsay v. Kinsay*, there cited (cited, 1 Dick. 145), and to the case of *Hankwitz v. Ocarrel* (1 Dick. 109), in the same book, said that he thought it would be more fit to rehear the decree, upon terms, than to discharge the former order; and accordingly directed that leave [699] should be given to present a petition for that purpose. (1)

*Order.* Defendant to be at liberty to present a petition to rehear the cause, upon such terms as should be just—the same to come on in the regular course with the cause petitions. Reg. Lib. 1810, A. fo. 920.

(1) A petition was afterwards presented accordingly. See *Attorney-General v. Brooke*, 18 Ves. 319; where, however, the ground upon which the present application was refused is not correctly stated.

#### The Dowager Lady SUFFIELD, Plaintiff, and Lord SUFFIELD and OTHERS, Defendants. Rolls. Feb. 24, 1812.

*Ex relatione* Mr. Shadwell.—Covenant by husband, in consideration of £—— (the purchase-money of an estate of the wife), within two years to convey lands in the county of N. of the value of such purchase-money, by way of settlement. The husband having died without performing the covenant, performance of the same decreed, against his representatives, by laying out in the purchase of land so to be settled, a sum equal to the present value of estates in N., which (at the time when the covenant ought to have been performed) would have been worth the amount of the purchase-money, with interest at 4 per cent. from the death of the covenantor.

By indentures of lease and release, and fine (24th and 25th March 1766), the late Lord Suffield and the present Plaintiff (his Lady) settled the moiety of certain

estates of Sir *Ralph Asheton*, deceased, of which the Plaintiff was seised in fee, as one of his daughters and coheirs, to such uses as they (Lord and Lady *Suffield*) should jointly appoint; and (subject to such appointment) to the use of Lord *Suffield* (the husband) for life; remainder to his wife (the Plaintiff) for life, [700] with remainder to the children of the marriage in strict settlement.

By deed of appointment (18th June 1773), Lord and Lady *Suffield* executed the power reserved to them by appointing a part of the said moiety to trustees for sale, and upon trust to pay the purchase-money to other trustees therein named for such uses as they (Lord and Lady *Suffield*) should jointly appoint; and, in default of appointment, to invest in other hands to be settled to the uses of the first-mentioned indentures.

By another deed (27th May 1774), Lord and Lady *Suffield*, in execution of the power last reserved to them, appointed the sums of £18,750, and £1500 (purchase-moneys arisen from the sale), to themselves for their own use.

And by indenture, of the same date, Lord *Suffield* covenanted with trustees therein named, in consideration of Lady *Suffield* having joined him in that appointment, within two years from thenceforth, to convey, settle, and assure, an estate in fee, to be situate in the county of *Norfolk*, of the value of the said sums of £18,750, and £1500, to and upon the same uses as the estates, which were to have been otherwise purchased, would have been settled to and upon, in pursuance of the deed of the 18th of June 1773.

Lord *Suffield* died in 1810, without having performed his covenant contained in the last-mentioned indenture; and the present Plaintiff (his widow) filed her bill against his devisees and executors to have the benefit of that covenant.

Sir *S. Romilly*, and *Shadwell*, for the Plaintiff.

[701] *Hart*, *Bell*, and others, for the several Defendants.

It was admitted, on the authority of a late case of *Lewse v. Popkin* (before Lord Chancellor *Eldon*), that the Plaintiff was entitled to have as much money laid out in land, pursuant to the covenant, as would, at the present time, be the value of an estate in fee-simple, in the county of *Norfolk*, worth, in 1776, the sums above mentioned: and it was decreed accordingly.

Reg. Lib. 1811, B. fo. 1451. "Referred, to ascertain the present value of estates in the county of *Norfolk*, which were, in the year 1776, of the value of £18,750 and £1500.—Declare, the personal estate of *H.* late Lord *S.*, and (in case the same should not be sufficient) his real estate included in the 2000 years' term (for payment of debts) liable to answer the same, with interest, at 4 per cent., from the death of the said late Lord *S.*, in satisfaction of the covenant; and that Plaintiff is entitled to such interest; the principal money to be laid out upon the trusts of the deed of the 27th of May 1774."

[702] *EMLY and OTHERS (Assignees of BOROUGH, a Bankrupt) v. GUY. Rolls. Nov. 19, 1812.*

*Ex relatione* Mr. *Shadwell*.—A., tenant for life, with remainder to his children, redeems the land-tax on the estate with his own money, introducing into the contract for the redemption his own name, and that of another, as trustees for his children; and afterwards becomes bankrupt. On bill by his assignees against a purchaser of his life-estate, and of the land-tax so redeemed, a specific performance decreed, as being within the stat. 1 Jac. 1, c. 15, s. 5.

*Michael Borough*, a trader within the bankrupt laws, being seised for life of certain freehold premises, with remainder to his children, and having issue at the time three children, entered into a contract for the redemption of the land-tax, amounting to £57, upon the said premises, the certificate whereof was executed by the commissioners, who thereby certified that they had agreed with *Michael Borough* and *James Goddard* (as trustees for the infant children of him the said *Michael Borough*), for the redemption of such land-tax at the price of £2090, 3 per cents., to be transferred to them (the commissioners) by instalments. It was stated by the bill, and admitted, that *Goddard* had no interest either as trustee or otherwise, in the premises, and that *Borough* procured both their names to be introduced into the certificate, as trustees, to make it appear that the land-tax

was redeemed for the benefit of the children only. The certificate was duly registered, the transfer made, and the receipt indorsed; and it was further admitted that the stock so transferred belonged to *Borough* himself, and was exclusively his property.

*Borough* afterwards became bankrupt, and his assignees put up his life-estate in the premises to sale by auction, at which the Defendant was declared highest bidder, and signed an agreement to complete the purchase, at £8000, according to the conditions; by one of which conditions it was expressed "that the purchaser was to pay, over and above the purchase-money [703] for the land, the amount of the money paid for redeeming the land-tax, and that he would thereupon become entitled to the amount of such land-tax as a fee-farm rent charged on the estate, for ever, subject to redemption, according to the form prescribed."

A bill was filed by the assignees for a specific performance; to which the Defendant stated, by his answer, that he had no objection, if the Court should be of opinion that the Plaintiffs were able to make a good legal title to the amount of the land-tax so charged, and redeemable as aforesaid. The cause was heard upon bill and answer.

Sir *Samuel Romilly*, and *Shadwell*, for the Plaintiff.

*Richards*, and *Wilson*, for the Defendant, contended, that the assignees could not make a good title to the charge, not having the equitable interest in it; and that the case did not come within the statute.(1)

But the Court over-ruled the objection; and a specific performance was decreed. Reg. Lib. A. 1812, fo. 61.

(1) 1 *Jac.* 1, c. 15, s. 5, providing that "a bankrupt conveying his lands or goods to any of his children, or others, without valuable consideration, the commissioners shall have power to assign by bargain and sale."

[704] TROWER v. NEWCOME. *Rolls.* June 29, 1813.

[See *Lord Brooke v. Rounthwaite*, 1846, 5 Hare, 305; *Smith v. Land & House Property Corporation*, 1884, 28 Ch. D. 14.]

*Ex relatione* Mr. *Simpkinson*.—Specific performance decreed against a purchaser at a public auction, where the representation in the particulars of sale (complained of as calculated to mislead) was so vague and indefinite that it ought to have put the purchaser on making previous inquiry.

This was a bill, by the vendor, for specific performance of an agreement to purchase the advowson of *Honychurch*, in the county of *Devon*. The bill stated (which was admitted by the answer), that the Plaintiff being seised in fee of the advowson in question, caused the same to be set up to sale by auction, when the Defendant became the purchaser, according to the conditions of sale. The printed particulars contained a description of the situation, number of acres, &c., and added "a voidance of this preferment is likely to occur soon," but made no mention of the present incumbent.

The Defendant, by his answer, said he was induced to attend at the sale by the representation in the particulars above noticed; that the auctioneer, at the time of sale, said (in explanation) "that the living would be void on the death of a person "aged eighty-two," of which the Defendant took a note in writing, or a copy of the particulars; and that he was, by such statement, induced to bid, and did bid accordingly; and was declared the purchaser, and signed the agreement. He then proceeded to state, that he (the Defendant) had, since the sale, discovered that the then present incumbent of the living was aged only thirty-two, upon which discovery, his (the Defendant's) solicitor, sent back the abstract (which had been furnished) to the Plaintiff's solicitor, with a note on the margin, stating the representation made at the time of sale, with these words added; "How does it become "void?" to which the Plaintiff's solicitors returned for answer, "We do not consider the purchaser entitled to call for any security [706] for the voidance of the "living, at the death of a person aged eighty-two. No such security was required "at the sale, and the auctioneer only stated that such a voidance would take place.



We have no objection, however, to the patron engaging by covenant or bond, that "the present incumbent will avoid the living on the death of a gentleman aged "eighty-two."

Upon this statement, the Defendant insisted, that the particulars of sale, and the representations made by the auctioneer, were untrue, and calculated to mislead, and that they did, in fact, mislead the Defendant; and that he (the Defendant) would not have bid for, or become the purchaser of, the advowson, if he had not given credit thereto; and that he, therefore, ought not to be compelled to complete the purchase.

It appeared in evidence that the incumbent of *Honychurch* expected to be presented to another living on the death of its incumbent, who was aged eighty-two, which would cause the avoidance of *Honychurch*.

*Hart, Wetherell, and Simpkinson*, for the Plaintiff.

*Sir S. Romilly, and Stephen*, contra.

The Master of the Rolls [Sir Wm. Grant] thought the representation made by the printed particulars so vague and indefinite that the Court could not take notice of it judicially, and that its only effect ought to have been to put the Defendant upon making inquiries respecting the circumstances under which the alleged evidence [avoidance] was likely to take place, previous to his becoming the purchaser. That such a representation was capable of being supported by the fact, either of the incumbent being old, or infirm, or by various collateral circumstances. His Honour compared this representation to that made in a case lately before him, respecting the purchase of a leasehold estate, which was stated in the particulars to be renewable "on the payment of a small fine"; leading to the question, "What is a small fine?" with reference to the circumstances of the property, and the expression being so vague that no importance whatever could be attached to it. (See *Stewart v. Alliston*, 1 Mer. 26.)

Specific performance decreed. Reg. Lib. 1812, B. fo. 972.

#### WARD v. WARD. July 1, 1813.

*Ex relatione Mr. Rose*.—The Court will change a next friend upon his not proceeding with a cause. Solicitor is not to attach without orders from his client. But, where the client is next friend of an infant, and moves to discharge the attachment on that ground, although otherwise regularly issued, it seems that the Court will refer it to the Master to see whether it is for the interest of the infant that the next friend should be continued.

The Lord Chancellor [Eldon]. "The Court will change the next friend of an infant, if he will not proceed in the cause; or it must be submitted to the Court, whether it is a proper cause to go on with. Certainly a solicitor ought not to attach without orders from his client; but if that client is next friend of an infant, and the solicitor regularly takes that step in course of process, and the next friend comes here (as in this instance he did) and moves to discharge it, it is a question, whether the better course is not to refer it to the Master, to see if it is fit, that the next friend should continue so any longer."

#### [707] In the Matter of SLEWRINGE'S CHARITY. Exchequer. July 16, 1814.

*Ex relatione Mr. Simpkinson*.—Under the act providing a summary remedy in cases of charity, after one order on petition, the subsequent orders may be obtained on motion.

A petition was presented in this matter under the act (52 Geo. 3, c. 101), for the directions of the Court with reference to the application of the surplus rents of the charity estates, praying that the petitioners might be at liberty to lay a scheme before the master for that purpose with the other consequential directions. Before the hearing of the petition, a reference was accordingly made to the Master. And now this matter coming on upon motion to confirm the Master's report, the Court doubted whether, by the act, jurisdiction being given to the Court upon petition only in the first instance, the subsequent applications ought not also to be by petition.

But upon *Simpkinson* citing *Ex parte a Friendly Society* (10 Ves. 287), the Court made the order upon the authority of that case.

WALLWYN v. COUTTS. May 11, 1815.

*Ex relatione* Mr. *Shadwell*.—Trust-deed for payment of creditors, no creditor being a party, nor made by agreement, and without consideration on the part of any creditor. The debtor afterwards executes other deeds, varying the trusts of the first. Motion for an injunction by a creditor under the first deed, who had filed a bill, to restrain the trustees from executing the trusts of the subsequent deeds till they had raised money to answer the first, refused.

The Duke of *Marlborough* and Marquis of *Blandford* by deed created a trust for payment of their creditors, by conveying lands to Mr. *Blackstone* and [708] Mr. *Coutts*, specifying a particular order of payment. To this deed no creditor was a party, nor was it made by agreement with any creditor, nor was there any release, or other consideration, moving from any creditor. The Duke and Marquis afterwards executed other deeds, varying the trusts of the first deed. *Wallwyn*, a creditor under the first deed, filed his bill against the Duke and Marquis, and the trustees, to have his debts declared a lien on the estates, and for an injunction, to restrain the trustees from executing the subsequent trusts, till they had raised money sufficient to answer the first trusts, under which the Plaintiff was interested. This injunction was moved for on the coming in of the answers. But the *Chancellor*, on hearing the motion only, without hearing the other side, refused it, on the ground that, the trust being voluntary, the Court would not enforce it against the Duke and Marquis, who might vary it as they pleased.

Reports of CASES ARGUED and DETERMINED in the HIGH COURT OF CHANCERY, during the Time of LORD CHANCELLOR ELDON; from the Commencement of the Sittings before Hilary Term, 1818, to the End of the Sittings after Michaelmas Term, 1819. By CLEMENT TUDWAY SWANSTON, Esq., Barrister-at-Law. Vol. I.

[1] *COMMERELL v. POYNTON*. Jan. 12, 1818.

[See *In re Faithfull*, 1868, L. R. 6 Eq. 327; *In re Hawkes*, [1898] 2 Ch. 13.]

A solicitor declining to be farther concerned in a cause is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the Court or the Master, as may be necessary in the conduct of the cause.

During the proceedings in the Master's Office, preparatory to his report in this cause, disputes having arisen between the Defendant and his solicitors, they, on the 29th of November 1817, wrote a letter to him, desiring him to consider that they were no longer concerned as his solicitors, apprizing him that the Plaintiff would, on the day appointed, proceed on his charge, which would be followed by the Master's report; and declaring their readiness to deliver the papers to any person whom he might appoint, on discharge of their accounts.

On the 13th December 1817, a motion was made by the Defendant, that the solicitors might be "ordered to proceed as solicitors in this cause for the Defendant to the termination of the same, or that they might on a short [2] day to be named by the Court, deliver up to him all his papers in their possession relating to the said cause."

Mr. Cooke, in support of the motion, referred to an anonymous case in *Siderfin*, 31, pl. 8, and to *Creswell v. Byron* (14 Ves. 271).

Sir Sam. Romilly and Mr. Simpkinston against the motion.

Jan. 12. The Lord Chancellor [Eldon]. This is a motion of great importance to the suitors in this court. I should be unwilling to establish a new rule without the concurrence of the Judges, but in this I am quite clear, that no solicitor in this court can say to a suitor in this court, I have such a lien on your papers that I will neither deliver them to another solicitor, nor permit another solicitor, whom you may employ, to make such use of them as is necessary for proceeding with the suit. The solicitor who has possession of the papers must allow the new solicitor to see them at all reasonable times; and must himself attend with them before the Master, or suffer the new solicitor to have them for that purpose. A solicitor cannot, by virtue of his lien, prevent the king's subject from obtaining justice. (See *Ross v. Laughton*, 1 Ves. & Beam. 349.)

The order directed the solicitors to permit the Defendant, or his agents, to inspect

the Defendant's deeds, papers, and writings in this cause in their possession, at all reasonable times, and on giving reasonable notice, and the Defendant was to be at liberty to take copies thereof, or extracts therefrom, as he should be advised, at his own expence ; and the order farther directed the solicitors to produce the said deeds, papers, and writings before the Master, on taking the accounts, and making the enquiries directed by [3] the decree, and at the hearing of the cause for further directions.

*Ex parte* BRIGHTWEN, in the Matter of WILLIAM WELLS, a Bankrupt. Jan. 13, [1818].

On a petition for the sale of mortgaged premises by an equitable mortgagee under a written agreement for a mortgage, the petitioner is entitled to costs.

The bankrupt, some time before the bankruptcy, had signed a written agreement for executing a mortgage of certain premises to the petitioner, within a month from the date of the agreement. The petition prayed the usual order for the sale of the premises. No objection was made to the prayer of the petition, but it was insisted that, by the practice of the Court, the order must be made without costs.

Sir Sam. Romilly and Mr. Rose for the petition.

Mr. Girdlestone for the assignees.

The Lord Chancellor [Eldon]. I have thought it right to withhold costs in those cases in which there is no evidence of the agreement to mortgage, but a deposit of deeds, cases with which in the administration of justice, it is extremely difficult to deal ; but where the agreement is in writing, I think the mortgagee entitled to costs.

[4] *Ex parte* SMITH. Jan. 14, 15, 1818.

Commission of lunacy directed to be executed in the neighbourhood in which the lunatic resided prior to his lunacy, not in that to which he had been since conveyed ; although evidence was given of his inability to bear removal.

On the 15th of November an order was made, on the petition of Anne Smith the wife of the supposed lunatic, that a commission in the nature of a writ *de lunatico inquirendo* should be issued, to enquire of the lunacy of Thomas Smith. Two petitions had been since presented ; one by Anne Smith, praying that the commission might be executed at Lampeter Pontstephen, in Cardiganshire ; the other by Mary Smith, mother of the supposed lunatic, praying that the commission might be executed at Swansea, in Glamorganshire. The facts of the case appeared to be as follows.

Thomas Smith, the supposed lunatic, had resided during the last fourteen years at Olmarch or at Vailallt, both of which places are in Cardiganshire. On the 4th October last, on his way from Olmarch to Llanstephen, a bathing-place in Caermarthenshire, he fell from his horse on his head, and, after that accident, betrayed many symptoms of lunacy during his stay at Llanstephen, where he remained three days, and after his return to Olmarch. On the 10th of October, Thomas Smith, together with his wife, went again to Llanstephen ; and on the Sunday evening following, his mother and one of his brothers, in the absence of his wife (who returned to Olmarch, respecting the removal of some furniture to Llanstephen, leaving him under the care of a person who had been in his service during the last six years), removed him in a post-chaise to Swansea, and placed him under the care of a physician practising there, who conducted an establishment for the reception of lunatics.

Several witnesses examined on the part of the wife deposed, that they had long known Thomas Smith, and always considered him a person of sane mind till some time after [5] the 4th October. It was also sworn by her solicitor, that all the witnesses whom it would be material to examine on her part (except the physician under whose care Thomas Smith was placed at Swansea) reside within ten miles of Lampeter, including several magistrates and clergymen, whose attendance in Swansea, at a distance of about fifty miles, would be very inconvenient to themselves, and to the inhabitants of their respective places of residence, and would subject

*Anne Smith* to an expense which she was unable to sustain. On the part of *Mary Smith*, the affidavits of the physician under whose care *Thomas Smith* was placed at *Swansea*, and another medical man practising there, stated their belief, that the disease was of considerable duration, and not caused or increased by any fall or sudden corporal violence. They also stated, that the mental disorder of *Thomas Smith* had increased, and corporal complaints of an alarming nature supervened, since his arrival at *Swansea*; that apoplexy or palsy would be the probable consequence of agitating either his body or mind; and that his removal from *Swansea* would be highly dangerous, if not impracticable.

The affidavit of *Mary Smith* stated, that the removal of *Thomas Smith* to *Lampeter* would bring to his view a great number of persons with whom he had, during his residence at *Olmarch*, various personal altercations and disputes, of which the occurrence had in part caused, and the recollection would aggravate, his malady.

Mr. *Hart* and Mr. *Roupel*, in support of *Mary Smith's* petition, insisted that the fact of lunacy being undisputed, the place in which the enquiry was conducted could not be material; and that no sufficient reason was alleged for endangering the life of the lunatic by removal.

Sir *Sam. Romilly* and Mr. *Wear*, for the petition of *Anne Smith*. The fact of lunacy is undisputed; the material subject of enquiry is, at what period it commenced. The proper place for such an enquiry, is the neighbourhood in which the lunatic resided during the time to which the enquiry refers. The lunatic was married in *July*; and the true object of his relatives is to invalidate that marriage.

During the argument the *Lord Chancellor* made the following observations.

The old and settled law is, that I cannot grant a commission of lunacy to be executed at any other place than the residence of the supposed lunatic. (See *Ex parte Hall*, 7 Ves. 261.) If a man resident in the city of *London* were conveyed by force into *Essex*, he would still for this purpose be resident in the city. A man cannot be said to reside in a place to which he has been carried while he had not mind enough to intend a change of residence.

The reason of the enquiry, usual at all times, from what period the lunacy commenced, is this, that when it appears that the lunacy is of some duration, and that the lunatic has performed acts, the principle on which the crown extends its protection requires that an examination shall be instituted into the circumstances of competence or incompetence under which those acts were performed.

*Jan. 15.* The *Lord Chancellor* [*Eldon*]. The object of the enquiry in this case being rather to ascertain the time at which the lunacy commenced, than the fact of lunacy, it is material that the commission should be executed among persons who knew the state of the individual prior to the accident to which, by the witnesses on one side, the lunacy is imputed. It is a practice by [7] no means uncommon in cases of lunacy (analogous to a practice very common in civil cases), that when the lunatic cannot be removed to the jury, and it is inconvenient for the jury to go to the lunatic, one or two of the jury examine the lunatic, and report their observations to the rest. I take *Cardiganshire* to be, within the meaning of this commission, the place of residence of the lunatic; nor do I find sufficient in the evidence to authorize me to direct the commission to be executed elsewhere. The real object being to ascertain the validity of the marriage, I shall not do my duty unless I take care that that question is properly investigated. The commission must be issued into *Cardiganshire*.

EVANS v. RICHARDSON. *Jan. 15, [1818].*

The Plaintiff is entitled to the production of documents referred to in the answer, and admitted to be in the custody of the Defendant, although an injunction obtained by the Plaintiff has been dissolved, on the ground, that the contract which he seeks to enforce is illegal.

The Defendant, an *English* subject, being in *America* during the war with this country, in *July 1814*, entered into an agreement with the Plaintiff, an *American* citizen, to make, on his return to *England*, a shipment of certain goods to *America*, on the joint account of himself and the Plaintiff, provided that the war should then

continue, and not otherwise. On his return to *England* the Defendant accordingly shipped goods to *America*, but not till after the signature of preliminaries of peace ; and from the Plaintiff's conduct had reason to think that for the purpose of declining any share in the adventure, he designed to avail himself of the objection that the shipment was made, contrary to the terms of the agreement, after the cessation of war. The Defendant having brought an action against the Plaintiff to recover a balance due in respect of certain other transactions, the Plaintiff filed this bill for an account of the profits of the shipment to *America*, and obtained an injunction to restrain the De[8]-fendant's proceedings in the action at law. On a former day, the *Lord Chancellor* dissolved the injunction ; considering the contract as a trading undertaken with an alien enemy, in fraud of the laws of this country, and not entitled to the aid of the court. An order having been afterwards obtained, on a motion before the *Vice-Chancellor*, for the production of certain letters and other documents referred to in the answer, the Defendant now moved to discharge that order, on the ground that the Court having declared the contract illegal, and the Plaintiff not entitled to relief in equity, no advantage could be derived from the inspection of the papers.

The *Solicitor-General* [Gifford] and Mr. *Bickersteth* in support of the motion.

The *Lord Chancellor* [Eldon]. The event of this motion must depend on the fact, whether the answer contains an admission, that the documents in question are in the custody of the defendant. When the Court orders letters and papers to be produced, it proceeds on the principle, that those documents are, by reference, incorporated in the answer, and become a part of it. Being in the office, the effect is the same as if they were stated in *hæc verba* in the answer.(1) This motion, therefore, in effect, seeks to strike out a part of the answer. The Plaintiff may amend his bill, by omitting the allegation from which the illegality of the contract appears ; and the admission remaining in the answer entitles him to the production of the papers.

(1) For the practice of the Court, with reference to the production of documents referred to by the answer, see *Gardiner v. Mason*, 4 Bro. C. C. 479. *Darwin v. Clarke*, 8 Ves. 158. *Taylor v. Milner*, 11 Ves. 41. *Atkins v. Wright*, 14 Ves. 211. *Beckford v. Wildman*, 16 Ves. 438. *Marsh v. Sibbald*, 2 Ves. & Beam. 375, and *The Princess of Wales v. The Earl of Liverpool*, 1 Swans. 114.

[9] THOMAS WILLIS, Plaintiff ; JOHN PARKINSON, and ISAAC WOOD, a Lunatic, and MARGARET FOSTER, JOHN DARCY and ELIZABETH his Wife, Committees of the said Lunatic, Defendants. Jan. 15, 1818.

On a bill by a prebendary against his lessees, for a commission to ascertain the boundaries of the prebendal lands, the prebendary is entitled to name as many commissioners as his lessees.

The Plaintiff was prebendary of *Asgarby* in *Lincolnshire* ; the Defendants were lessees of the prebendal lands, and also owners of freehold and copyhold lands, within the manor forming part of the prebend ; the bill prayed a commission to ascertain the boundaries of the prebendal lands : a decree had been made for that purpose, and the Plaintiff now moved that he might name as many commissioners as the Defendants. (See the case more fully stated, 2 Mer. 507.)

Sir Sam. Romilly in support of the motion.

Mr. Parker, for the Defendants.

The *Lord Chancellor* [Eldon]. The Plaintiff has a right to consider all the persons his lessees, as his lessees, although they have distinct freehold and copyhold estates in the manor. Subject to the same obligation not to suffer intermixture of lands, and claiming under the same lease, they constitute *quoad* the prebendal rights, one person. Each of the co-lessees is under an obligation, not only not to intermix lands, but not to suffer that intermixture by his co-lessees : an obligation attaching upon each, in respect of all. They have one interest as the lessees of the plaintiff ; and that interest is connected with a duty which rests upon them all, that each and every of them shall not bring into difficulty the title to the lands.

[10] SMITH v. ———. Jan. 15, 1818.

Notice for *Monday* the 12th *January*, being the first seal before *Hilary* term, is good notice for the first seal, though held on *Thursday* the 15th *January*.

In this cause Sir *Sam. Romilly* moved that a tenant might be ordered to pay rent to the receiver: the motion was not opposed; but he mentioned an inaccuracy in the terms of the notice of motion. The notice expressed that the Court would be moved on *Monday* the 12th day of *January*, being the first seal before *Hilary* term: the first seal was held on this day, *Thursday* the 15th of *January*. He submitted that the notice must be understood as notice for the first seal, though the day on which it was held happened to be mis-stated.

The *Lord Chancellor* [Eldon] made the order.

*Ex parte* The BANK OF ENGLAND, in the Matter of RICHARD STEPHENS, a Bankrupt.  
Jan. 16, [1818].

[S. C. 1 Wils. Ch. 295.]

Corporations may prove debts under commissions of bankruptcy, by the affidavit of a person authorized by a general power of attorney, and vote in the choice of assignees by a person authorized by a special power of attorney, under their common seal.

The petition stated, that *John Sparkes Cox*, a clerk of the Bank, being authorized by letter of attorney under the corporate seal of the Governor and Company of the Bank of *England*, to prove debts due to them under commissions of bankruptcy, attended to prove a debt of £8200, 12s. 6d. due to the Bank under the commission issued against *Richard Stephens*, and also to vote in the choice of assignees, the Governor and Company of the Bank having, by a special letter of attorney under the bank seal, authorized him to vote in the choice of assignees of the said bankrupt's estate: that an objection being made, that the debt should be proved by one of the corporation and not by a clerk, the commissioners refused to receive the proof of [11] the debt by *Cox*, conceiving that the Bank is not authorized to prove debts under commissions of bankruptcy by a clerk, without having obtained from the *Lord Chancellor* either a general order for that purpose, or a particular order for the proof of the individual debt. The petition prayed that the commissioners under the commission against *R. Stephens* might be ordered to receive the depositions of *J. S. Cox*, in proof of the petitioners' debt of £8200, 12s. 6d.; and that, in order to prevent a repetition of such objections for the proof of the petitioners' just debts under commissions of bankruptcy, it might be declared that the petitioners are in all cases entitled to prove debts under commissions of bankruptcy by any of their officers or clerks duly authorized by them for that purpose, and that the petitioners are entitled by any of their officers or clerks, or by an agent under a special power of attorney for that purpose, under their corporate seal, in each bankruptcy, to vote in the choice of assignees; evidence being produced to the commissioners, by affidavit or by the *viva voce* examination of a witness, that the seal annexed to such powers of attorney respectively is the corporate seal of the petitioners; and that the petitioners might, by the said *J. S. Cox*, be at liberty to vote in the choice of assignees under the commission against *Stephens*, by virtue of the special power of attorney to him for that purpose.

Sir *Arthur Pigott* and Mr. *Cooke* for the petition.

Mr. *Montague*, for the petitioning creditor, made no objection.

The *Lord Chancellor* [Eldon]. The Bank, like every other corporation, is entitled to prove a debt under a commission of bankruptcy, by the affidavit of a person duly authorized by a general power of attorney, and to vote in the choice of assignees by a person duly authorized by a special power of attorney, under their [12] common seal. It may be proper to make a general order relative to all corporations; but a general order cannot be made on a particular petition in a particular bankruptcy.

The following order was made: I do declare, that the said petitioners, the Governor and Company of the Bank of *England*, are by law entitled by any of their clerks

or agents competent and duly authorized for that purpose, to prove under any commission of bankrupt, any debt or debts which may be due to the said Governor and Company, from the bankrupt or bankrupts against whom such commission has been or shall be issued, and also that the said Governor and Company are entitled by law to authorize and empower any person, by letter of attorney under their corporate seal, in each separate bankruptcy, to vote in the choice of an assignee or assignees under any such commission of bankrupt as aforesaid, against any person or persons, under which commission the said Governor and Company shall prove any debt or debts; and that the person or persons so to be authorized as aforesaid, by the said Governor and Company to vote in the choice of assignees, ought to be permitted to vote in such choice accordingly, upon producing to the major part of the commissioners named in any such commission, a special power of attorney for that purpose under the corporate seal of the said Governor and Company, and proving the same to be sealed with such corporate seal by affidavit or *viva voce* before such commissioners; and I do order that the commissioners named in the said commission against the said *Richard Stephens*, or the major part of them, do receive the proof of the said debt of £8200, 12s. 6d. in the said petition mentioned, as a debt under the said commission, by the said *John Sparkes Cox* the clerk of the petitioners, without the production to the said commissioners of the authority from the petitioners to the said *John Sparkes Cox* to prove the said debt; and I do further order that the [13] said *John Sparkes Cox* be permitted to vote in the choice of assignees under the said commission against the said *Richard Stephens*, on behalf of the said petitioners, upon his producing to the said commissioners, or the major part of them, a special letter of attorney under the corporate seal of the said petitioners, authorizing him to vote in such choice of assignees, on their behalf, and proving before the said commissioners, by affidavit or *viva voce*, the seal to such letter of attorney to be the corporate seal of the said petitioners.(1)

(1) The order made on the petition of the Bank of *England* in the bankruptcy of *Bowles*, heard 16th August 1810 (1 *Rose*, 142) (for a copy of which the reporter is indebted to the kindness of Mr. *Cooke*), directed the commissioners to receive the affidavit of *J. S. Cox* as proof of the petitioner's debt, without the production of the authority from the petitioners to *Cox* to make such affidavit on behalf of the petitioners. The case reported in 18 *Ves.* 228, upon a similar petition, and which, in argument, has been represented as the same, differs in the names of the parties, and in the date.

GEORGE MURLESS and BETTY his Wife, *Plaintiffs*, and MATTHEW FRANKLIN and RICHARD FRANKLIN the Younger, *Defendants*. Jan. 17, 19, 26, [1818].

A father having purchased in the names of his sons a copyhold estate, which he afterwards demised by licence obtained subsequently to the purchase; the sons take the estate successively, as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase.

*Richard Franklin* having three sons, *Matthew* (the eldest), *John*, and *Richard*, in 1779 purchased the reversion of a copyhold tenement holden of the manor of *North Curry*, in the county of *Somerset*, expectant on the death of *Frances Wright*; and, at a court baron on the [14] 7th December 1779, took the reversion of the said tenement, "To hold the same unto the said *John Franklin*, *Matthew Franklin*, and *Richard Franklin*, sons of the said *Richard Franklin* the elder, for their lives and the life of every and either of them longest living, successively according to the custom of the said manor, immediately after the determination of an estate then subsisting on the said premises, for the life of *Frances Wright*"; and *Richard Franklin* the father, and *John*, *Matthew*, and *Richard* the son, were admitted tenants as in reversion. By the custom of the manor (as alleged in the bill), a tenant may, by licence in writing, entered in the court rolls, demise a tenement holden of the manor, whether in possession or reversion, for a term of ninety-nine years. On the 2d April 1781, a licence was given to *Richard Franklin* the elder, to demise the tenement in question, for any term of years, determinable on the deaths of his sons *John*, *Matthew*,



and *Richard* ; and by indenture bearing date 5th *May* 1781, on the marriage of *John Franklin* and *Betty Dare*, *Richard Franklin* the elder demised the said tenement to *Robert Ludwell*, his executors, administrators, and assigns, for the term of ninety-nine years (to commence from the death of *Frances Wright*), if *John*, *Matthew*, and *Richard* the son, or any of them, should so long live ; upon trust to permit the premises to be held and enjoyed by *Richard Franklin* the elder, and after his decease by *John Franklin* for his life, and after his decease by *Betty Dare* for her life, and after the death of the survivor of them, in trust for the children of *John Franklin* and *Betty Dare*, in such proportions as *John Franklin* should appoint, and in default of appointment equally ; and for default of such issue, in trust for the executors, administrators, and assigns of *John Franklin*.

The Plaintiff, *Betty Murless*, was the only issue of *John Franklin* and *Betty* his wife. *John Franklin* having survived his wife, married again, and died during the life of *Richard Franklin* the elder, without having made any appointment.

[15] By his will, dated 22d *October* 1791, duly executed and attested to pass freehold estates, *Richard Franklin* the elder devised and bequeathed to his sons *Matthew* and *Richard*, and to the widow of his son *John*, certain legacies and freehold and copyhold estates (some of which were holden of the manor of *North Curry*, in the names of his sons *Matthew*, *John*, and *Richard*), and shortly after died. *Matthew Franklin* and *Richard Franklin* the son, caused the following memorandum to be endorsed upon the probate copy of their father's will: "We hereby ratify and confirm the will of which the within is a probate copy, and the gifts, devises, and bequests therein contained, in all respects whatsoever, so far as we can or lawfully may. 16th *April* 1793." *Frances Wright*, the tenant for life, having died in 1816, *Matthew Franklin* commenced an action of ejectment to recover possession of the premises.

The bill prayed that the indenture of the 5th *May* 1781, so far as respects the demise of the said copyhold premises, may be established and confirmed, and the trusts thereof carried into execution, for the benefit of the Plaintiffs, and that *Matthew Franklin* and *Richard Franklin* the younger may be declared to be trustees of the said premises for the Plaintiffs, and to have no beneficial right or interest therein, but subject to the aforesaid indenture of settlement ; and that, in the mean time, *Matthew Franklin* may be restrained by injunction from proceeding in the said action of ejectment.

By his answer, *Matthew Franklin* denied any knowledge of the licence to lease granted to *Richard Franklin* the elder, or of the settlement made by him, till some years after their respective dates, or any assent to the settlement. He also denied the existence of a custom to enable the tenant to grant the tenement, by virtue of a licence, so as to affect the interest of the nominees, being his children, unless the licence is obtained at the same court at which the purchase is made, and the copy of the court-roll granted.

[16] The usual injunction having been obtained, and the usual order *nisi* on the filing of the answer, Sir *Samuel Romilly* now shewed cause against dissolving the injunction.

The question is, whether the father intended an advancement, or used the names of his sons as trustees for him. It must be admitted, since the case of *Dyer v. Dyer* (2 *Cox*, 92 ; *Watk. Copyh.* 216), that when a father purchases in the names of his children, the presumption is that he intends an advancement ; but this presumption arises from the nomination of children only as a circumstance of evidence, and may therefore be repelled by contrary evidence. The present case contains satisfactory evidence of the father's intention that his sons should take as trustees. In *April* 1781, only sixteen months after the purchase, he obtained a licence ; and in the ensuing month, demised the tenement in question as a provision for his son *John* on his marriage. In that settlement the eldest son acquiesced. Having notice, not before the marriage certainly, but within a few months after, he made no claim while the father lived, but by his silence entitled himself to the benefits which he derives under his will. It is fraudulent, insisting on those benefits, to dispute the settlement. The father by his will disposes of other copyhold estates purchased in the names of his sons, and that disposition the defendants have not attempted to impeach.

Mr. *Hart* and Mr. *Farrer* against the injunction. The evidence to repel the presumption, arising from the nomination of children in a purchase by a father, must

be derived from circumstances contemporaneous with the purchase; subsequent declarations by the father (whatever may be the effect of acts of the children, *Rider v. Kidder* (10 Ves. 360)), are ineffectual. *Finch v. Finch* (15 Ves. 43). This case [17] contains no such contemporaneous evidence. The circumstance that the father has taken the grant to his sons in an order different from that of their age, is strong proof that he intended an advancement. The eldest son has not acquiesced in the settlement; the tenant for life died only in 1816; on her death he has immediately asserted his rights. The Plaintiffs, on their own statement, have a defence at law. Under the custom alleged, the demise of the father by licence vested the legal estate in his lessees, *Swift v. Davis* (8 East, 354, n.); and the elder son, therefore, not being entitled to recover in ejectment, the Plaintiffs need not the aid of a Court of Equity.

Sir *Samuel Romilly*, in reply. It is admitted that the father, in repeated instances, took grants of estates in the names of his sons; estates not reversionary but immediate; that he continued till his death in the enjoyment of those estates, and then devised them from the nominees. That is evidence contemporaneous that the sons took as trustees.

The *Lord Chancellor* [Eldon]. The general rule that on a purchase by one man in the name of another, the nominee is a trustee for the purchaser, is subject to exception where the purchaser is under a species of natural obligation to provide for the nominee. The purchase in this case being *prima facie* a provision for the sons, it is necessary to repel that presumption by evidence which shows that, at the time, the father intended the purchase for his own benefit. Possession taken by the father at the time would amount to such evidence. How far transactions relative to other estates, claimed by another son, would be sufficient, requires much consideration. It seemed at first difficult to support the proposition, that the [18] Plaintiff has a defence in ejectment, but on reference, the case cited (*Swift v. Davis*, 8 East, 354, n.) appears a strong authority for that purpose. Admitting, however, the effect of that case, still the demise would leave a reversion; and the father having no estates in *North Curry* except those held in the names of his sons, a question may arise on the will, whether, if a testator having estates of two classes, neither of which he is entitled to devise, uses terms comprehending both, he can be understood as not intending to comprehend both?

*Jan. 26.* The *Lord Chancellor* [Eldon]. It is settled that though, in general cases, if A. purchases with his own money, and the conveyance is taken in the name of B., an implied trust in favour of A. arises from the payment of the purchase money; yet that doctrine has exceptions. One exception is, that if a man purchases in the name of his son, and no act is done to manifest an intention that the son shall take as trustee, that intention will not be implied from the payment of the purchase money by the father, but the purchase is *prima facie* an advancement. If the title to this estate stood on the transaction in *December 1779*, when the interest in the copyhold was purchased, *John Franklin*, not the eldest son, being first named, no doubt can be entertained after the doctrine settled in *Dyer v. Dyer*, and followed in all subsequent cases, that this would be a purchase for the benefit of the sons, to take *successive*, unless there was a custom in the manor controlling that doctrine, or contemporaneous evidence of a different intention.

In this case, the estate being reversionary, possession affords no evidence till the death of the tenant for life, which happened not till 1816.

[19] It is contended by the bill, that in this manor there is a custom that a person purchasing in the names of his sons may afterwards obtain a licence to demise the purchased estate; and it is admitted, that in some manors a custom exists, that a father so purchasing may, at the time of the purchase, take a licence to demise, and that a licence to demise so taken is evidence of his intention to dispose of the property himself; and in the argument reference has been made to the doctrine of Lord *Kenyon* in *Swift v. Davis*, that a demise under the licence will divest the legal estate. If so, the title to this property might be tried by ejectment; but it is material to observe, that the Defendant swears that no custom exists in this manor, giving such effect to a licence taken at a subsequent time; and all the cases have gone strongly to this point, that the evidence of the intention of the father must apply to the time of the purchase: subsequent acts will not enable him to convert an advancement for his sons into a beneficial purchase for himself.

It is then insisted that the devise of other estates, taken in the names of his sons, is

evidence that though in this instance the name of *John* precedes the others, it was equally the intention of the father to take a beneficial interest in this estate. I think, however, that it is impossible to qualify the effect of the original purchase of this estate, by transactions relative to other estates. The acts of *Matthew* and *Richard*, confirming the father's will, are evidence rather that without that confirmation the will was invalid, than that he had a right to make the devises which it contains.

It appears to me, that this case affords no evidence to reduce the legal effect of the grant, and repel the presumption, that the purchase was intended for the benefit of the sons.

It is then said that *Matthew* is concluded by his own acts; and cannot be permitted in equity to disturb the settlement [20] made by his father on the marriage of *John Franklin*. The mere fact of that settlement, unless the Defendant's conscience can be affected by acts done or permitted, will not impeach his title. It is difficult to maintain that, if the persons claiming as nominees in the grant have done nothing, and have been merely cognizant of the settlement, their non-interference would preclude them. But the evidence does not carry the case even to that extent. The Defendant denies that he acquiesced in the settlement; and avers that he has taken the earliest opportunity to assert his title.

The injunction must be dissolved.

JOHN HOLMES, *Plaintiff*; THOMAS WAINEWRIGHT, and JOHN RAYNER, *Defendants*.  
Jan. 27, [1818].

A party against whom a commission of bankruptcy had been maliciously obtained, and to whom, after superseding the commission, the *Lord Chancellor* had assigned the petitioning creditor's bond, having afterwards brought an action on the case against the petitioning creditor, and a rule of Court having been made by consent, referring the matters in dispute, except the bond assigned, to the award of an arbitrator, and an award having been made with an exception of the bond, an action cannot be maintained on the bond. An action on the case is a waiver of a right of action on the bond; and to restore that right the agreement of the parties must be unequivocal.

The bill stated that the Plaintiff, an ironmonger at *Leeds*, in *June* 1800 applied to the Defendant *Wainewright*, an attorney, for the loan of £150, the repayment of which he proposed to secure by a mortgage of an estate at *Holbeck*, near *Leeds*; that *Wainewright* agreed to this proposal, and undertook to prepare the proper securities; and that accordingly on the 29th of *June* 1800, the Plaintiff executed the deeds prepared by *Wainewright*, and received the sum of £150; that the Plaintiff has since discovered that the principal deed which he was so prevailed on to execute, instead of being a mortgage, was an absolute conveyance of the premises, upon trust to sell, in the event of the sum of £150 and interest not being repaid within three years from the date of the loan.

The bill farther stated, that in *December* 1800, on the petition of *Wainewright*, a commission of bankruptcy was awarded against the Plaintiff, which, on the 10th of *August* 1801, was superseded, and it was ordered that *Wainewright* should pay the costs of the *supersedeas*, and in *January* 1802, the *Lord Chancellor* assigned *Wainewright's* bond to the Plaintiff; that in 1802 the Plaintiff commenced an action on the case against *Wainewright*, in which, by reason of a formal defect in the declaration, he was nonsuited; that in *Hilary* term 1803, the Plaintiff commenced another action against *Wainewright*, and laid his damages at £5000; that the cause came on to be tried at the *Lent* assizes for the county of *York* in 1803, when, by consent, a rule of court was drawn up, ordering that a verdict should be entered for £5000 damages, but that the quantum of damages should be subject to the award of *W. L.*, to whom all matters in difference between the parties (except the bond ordered by his lordship to be assigned to the Plaintiff) were thereby referred; that the costs of the reference should be in the discretion of the arbitrator, and that the costs of *Wainewright* in the former nonsuit should be set off, and the costs in equity allowed to the Plaintiff.

The bill farther stated, that by his award, dated the 18th of *July* 1803, after noticing, that the costs of the nonsuit had been taxed at £201, and the costs in equity at £69, 10s. 10d. (the balance of which costs amounting to £131, 9s. 2d. the arbitrator

awarded to be due from the Plaintiff to *Wainwright*), and farther noticing that the principal sum of £150 advanced by *Wainwright* to the Plaintiff, and secured by mortgage made on the 29th of *June* 1800, and all interest thereon from that day still remained due, and that [22] there being no claim or matter in difference submitted to him in respect thereof, he had not taken into consideration the same, or the bond ordered by his Lordship to be assigned, the arbitrator ordered, that the cause depending between the parties, before or at the time of the submission, save the principal and interest secured by the mortgage, and the bond, should cease; and that *Wainwright* should pay to the Plaintiff the sum of £100 in full for his damages together with the costs of the action, and of the reference, for the amount of which damages and costs, when taxed, first deducting the sum of £131, 9s. 2d., the Plaintiff should be at liberty to enter up judgment.

The bill farther stated, that by the effect of the award, regard being had to the circumstance that the sum of £200 the principal money secured by the bond assigned to the Plaintiff remained unsatisfied, a balance was due from *Wainwright* to the Plaintiff, after giving credit to *Wainwright* for the costs of the nonsuit, and the principal money and interest due on the mortgage to the amount of £176, 10s., and that *Wainwright* was not entitled to make available his securities on the Plaintiff's estate; but that persisting in his legal right by virtue of the mortgage, in *July* 1803 *Wainwright* caused the estate to be put up for sale by public auction, and on the 22d of *August* following the sale was brought on, when, although the Plaintiff's solicitor attended, and made known to the persons present, and particularly to the Defendant *Rayner*, the amount of the balance which the Plaintiff claimed from *Wainwright*, yet *Rayner* became a bidder, and the premises were sold to him for the sum of £1210.

The bill prayed that the sale of the said premises might be rescinded, and that it might be declared that the trust created by the said mortgage or other deed, in favor of *Wainwright*, was then determined, and that *Wainwright* might be decreed to reconvey to the Plaintiff the said estate, and to deliver up the title deeds.

[23] The cause being heard on the 17th of *May* 1810, by the *Master of the Rolls* sitting for the *Lord Chancellor*, his Honor ordered the bill to be dismissed. A petition of re-hearing having been presented, and the cause having been argued on a former day, the *Lord Chancellor* now gave judgment.

The *Lord Chancellor* [Eldon]. This is the case of a person who, having superseded a commission of bankruptcy, established to the satisfaction of the Court that the commission was malicious; in which event the Chancellor ought to direct an assignment of the bond: recollecting, however, that the party has a different, and in some respects a better, remedy, by action on the case. Where the bond is assigned, the obligor has no defence (*Ex parte Fletcher*, 1 *Rose*, 454. *Ex parte Rimene*, 14 *Ves.* 600. *Ex parte Lane*, 11 *Ves.* 416); the commission must be taken to be malicious, but the damages cannot exceed the penalty of the bond: in the action on the case the Plaintiff must prove malice, but the damages are unlimited.

*Wainwright* having caused the mortgaged estate to be offered for sale, the Plaintiff's solicitor attended the auction, representing that *Wainwright's* claim was satisfied, and that he had no right of sale. The Plaintiff states the satisfaction of the claim thus: that the award ascertains his demand exclusive of the bond; the bond entitles him to £200, and that sum added to the amount settled by the award, is an extinction of *Wainwright's* claim in respect of the mortgage. *Wainwright* insists (and the purchaser buys on that representation) that a Court of Equity will not permit the Plaintiff to bring an action on the case, and another action on the bond; that in the action on the case, the party submits to the jury whether he is entitled to less or to more than £200: that in the action on the bond he decides that his claim is neither more nor less than the penalty [24] of £200; and that he cannot have that penalty in addition to what the jury say he is entitled to recover. The Plaintiff contends that the meaning of the reference was, that the arbitrator should decide, not the total amount of damages, but what ought to be paid omitting the bond, and leaving the benefit of that to the obligee. The *Master of the Rolls* thought the construction of *Wainwright* and the purchaser right; upon the principle that the party having brought an action which was a waiver of the bond, if the meaning of the agreement was that the action should be considered as supplemental to the relief to be obtained by enforcing the bond, it was incumbent on him to show that the agreement had

that meaning and no other : the action being *prima facie* a waiver of the right to sue on the bond (and I take it unquestionably to be a waiver), if that right was to be set up by an exposition of an award, the terms of the award must be too clear to be misunderstood. I am of the same opinion. It is a hard case, and I should not have made this award, but I think the decree right. There can be no doubt that if in an action on the case, the jury give less damages than £200, the remedy on the bond is barred.

Decree affirmed without costs.

GITTINS v. STEELE. Jan. 28, [1818].

[For subsequent proceedings see S. C. 1 Swans. 199.]

The general personal estate exempted from the payment of a particular legacy. In the event of the deficiency of a particular fund appropriated to the satisfaction of certain bequests, the Court, on the question of the exemption of the general personal estate, cannot advert to the fact of a sale of part of the testator's property subsequent to the will, by which the particular fund has become insufficient.

The question in this cause arose on the will of *Evan Evans*, dated 22d May 1809, to the following effect :

[25] "First, I do order and direct, that all my just debts, funeral expenses, and the charges of proving this my will, shall be paid and satisfied by my executors, herein after named ; also, I give and bequeath the sum of £7000 unto and equally between all my cousins (describing them) ; and I do hereby charge all my freehold and leasehold messuages or tenements, lands and hereditaments, with the payment of the said sum of £7000." The testator then bequeathed to *J. Osborn, J. Steele, and W. Spencer*, upon certain trusts, two sums of £8000 and £2000 3 per cent. stock, then standing in his name ; and after giving various pecuniary legacies out of his residuary estate thereafter mentioned, he gave and devised to *Osborn, Steele, and Spencer*, their heirs, &c., all his freehold and leasehold messuages, lands, hereditaments, &c., upon trust to sell and dispose of them ; and as to the monies arising by the sale, and the rents and profits, in trust to pay all his just debts and funeral expenses, the legacy or sum of £7000 and the expenses of the sale ; and as to the residue, in trust as after mentioned ; and proceeded in the following words : "All my monies and securities for money, stock in trade, and the residue of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever (not before disposed of)," I give, &c., to *Osborn, Steele, and Spencer*, their executors, &c., "upon trust to sell and dispose of the stock in trade, &c., and out of the money to arise from the sale, and the other monies and securities for money, to pay the legacies of £8000 stock and £2000 stock, and the several charitable donations and other legacies hereinbefore mentioned (except the legacy of £7000, which is to be considered as a charge on and paid out of the monies arising by sale of my said freehold and leasehold estates); and then as to, for, and concerning as well the residue of the monies arising by sale of my said freehold and leasehold estates, as the residue of the monies arising by sale of my said stock in trade and personal estate, and the residue of my other monies and securities for money, upon trust to place out [26] the same on government or real security, during the lives of *T. E., J. O., &c.*, and the survivor, in trust out of the dividends to pay certain weekly sums before bequeathed ; and as to the then remainder of the dividends, interest, and produce of such residuary estate, in trust to pay the same unto and equally between the several persons who, by virtue of this my will, shall become entitled to any part or share of the several legacies or sums of £7000, £8000 stock, and £2000 stock before mentioned ; and from and after the several deceases of *T. E., J. O., &c.*, as to, for, and concerning such residuary estate, and the unapplied dividends, interest, and produce thereof, in trust to pay, divide, and distribute the same unto and equally between the said several persons, who, by virtue of this my will, shall become entitled to any part or share of the said several legacies or sums of £7000, £8000 stock, and £2000 stock." The testator appointed *Osborn, Steele, and Spencer* his executors.

After making his will, the testator sold some freehold and leasehold estates, and died in May 1811.

The bill prayed that the will might be established and the trusts executed.

By his report the Master stated that the money produced by the sale of the testator's freehold and leasehold estates was insufficient to satisfy the legacy of £7000; and that the testator having charged that legacy on his freehold and leasehold estates, and excepted it in directing payment of legacies out of his personal estate, he had not allowed to the executors their payments on account of that legacy.

The cause having come on for farther directions, the *Vice-Chancellor*, by an order, dated 12th May 1817, declared that the legacy of £7000 was a charge upon the general estate of the testator, and the produce of his free-[27]-hold and leasehold estates; and ordered that the sum of £6112, 14s. 6d., paid by the executors on account of the said legacy, should be allowed to them as a proper payment.

Some of the residuary legatees having presented a petition of appeal from such part of the order as declared the legacy of £7000 a charge upon the general estate of the testator, praying that such legacy may be declared to be a charge upon the testator's freehold and leasehold estates only, the cause now came on to be argued.

Mr. Wetherell and Mr. Cross for the Appellants. The testator, after expressly charging the legacy of £7000 on his freehold and leasehold estates, expressly exempts the rest of his property. That clause is clear and decisive; nor is any passage in the will inconsistent with it, or indicative of an intention that the legacy should be payable out of the personal estate. The deficiency in the fund which the testator had provided for the payment of the legacy, was the consequence of his own act, the sale of freehold and leasehold estates. The cases of *Boole v. Blundell* (1 Mer. 193), *Hancox v. Abbey* (11 Ves. 179), and *Burton v. Knowlton* (3 Ves. 107), decide the question.

Mr. Bell, Mr. Owen, Mr. Horne, Mr. Trower, and Mr. Roupell, for different respondents. The only question in the cases cited is, what is sufficient indication of the testator's intention to exempt his personal estate from payment of debts and legacies? That is not the question in this case. This testator has distributed his estate into two funds; one, consisting of freehold and leasehold estates, he constitutes the primary fund [28] for the payment of his debts, funeral expenses, and the legacy of £7000; the other, consisting of his personalty, with the exception of the leasehold estates, he constitutes the primary fund for the payment of all other legacies; and then, contemplating a surplus of each fund, he consolidates those two residues, and disposes of the whole by a general residuary clause. His purpose in the division of the estate into two funds, was to appropriate each to the payment of certain charges, and in the event of a deficiency of either or both of the funds, to prevent contribution till after satisfaction of the charges specifically imposed on each; but it could not be his intention to exempt the residue of one fund from supplying the deficiency of the other. No benefit was designed for the residuary legatees, till after payment of the specific and pecuniary legacies. Residue, *ex vi termini*, denotes what remains after satisfaction of debts and legacies.

The *Lord Chancellor* [Eldon]. It seems to me impossible to support this decision; and I feel the less regret in differing from a judgment which an experience of more than forty years has enabled me to appreciate, in a question on which all the great men who have presided in this court have differed from each other.

The old law was (I regret that it is not law still) (*Watson v. Brickwood*, 9 Ves. 453), that the personal estate could not be exempted from the payment of debts and legacies without express words. That yielded to the doctrine of demonstration clear, and declaration plain, which is such, that in any particular case, no man knows how it will apply. We have now reached the sound rule, that for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great Judge whom we have just lost, the late *Master of the Rolls*, and was confirmed by myself in *Boole v. Blundell*.

[29] The present question is, not whether the personal estate is to be exempted from payment of debts and legacies, but, regard being had to all the parts of the will, the bequest over, and the rules of law, whether a particular legacy (whatever may be the case with other legacies, or with debts) is payable only out of the freehold and leasehold estates, or whether it is also payable out of the general personal estate, the charge on the freehold and leasehold estates being designed as an additional security. From the payment of debts the personal estate can be exempted only by the substitution of a sufficient fund, and it continues subject to the claims of creditors in the event of a deficiency in the fund provided. But legatees and

devisees, as volunteers, are not entitled to resort to any other than the particular fund which the testator, or the law, has assigned.

His Lordship then proceeded to comment minutely on the clauses of the will, and after remarking that the persons named as executors were those who in the character of trustees, in every clause of the will, whether with reference to freehold or personal estate, were to execute trusts; that the question must be decided on the same principle as if all the persons entitled to the residuary estate were strangers; and that the latter words of the will would, as latter words, control the former; concluded as follows.

Entertaining no doubt that the intention of the testator has been frustrated by a subsequent sale of a part of his estates, I am not authorized to advert to that fact as affecting the construction of the will. I am bound, as a judge, to assume that the testator supposed that he should leave at his decease freehold and leasehold estates sufficient for the payment of the legacy of £7000; and I protest against being understood to give my judgment on the ground of the subsequent sale. (See *Richardson v. Edmonds*, 7 T. R. 635. *Standen v. Standen*, 2 Ves. Jun. 593. *Bootle v. Blundell*.) My duty is to apply the funds [30] which, at his death, are applicable, by the operation of the will to the payment of this legacy. If they are insufficient, the Court, whatever may be the hardship of the case, cannot supply other funds.

I am clearly of opinion that the general personal estate is not subject to the legacy of £7000. The order therefore must be varied, but I shall not give costs.

*Ex parte* FLINT. In the Matter of G. and S. ROBINSON, Bankrupts. Jan. 28, 29, [1818].

A creditor of a partnership, having made farther advances on the security of a bill of exchange, deposited with him for that purpose by the partners, and having undertaken to receive the amount when due, and return the surplus, the bill having been dishonored and remaining in his hands unpaid, is not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill.

The petition stated, that in the year 1815 the petitioner, on the security of goods deposited with him by *George Robinson* and *Samuel Robinson* booksellers, accepted bills of exchange for their accommodation, and after payment of the acceptances and sale of the goods, a considerable balance remained due to him; that in *September* or *October* 1816 *G. and S. Robinson* applied to the petitioner to discount a bill of exchange dated 15th *May* 1816, for £650 payable six months after date; and they, having endorsed the bill in their joint names, and deposited it with him, the petitioner advanced to them £39, and was guarantee for the payment by them of £15, and accepted a bill of exchange on their account for £116; that the bill for £650 was dishonored when due, the drawer, acceptor, and indorsers, having all become bankrupt or insolvent, and is still unpaid, and a sum of £880 is due to the petitioner from *G. and S. Robinson* for money lent; that in *January* 1817 a commission of bankruptcy was issued against *G. and S. Robinson*; and that the bill remaining in the hands of the petitioner, in *April* last an action of trover was brought against him by their assignees to recover it, when on the evidence of *George Robinson* (who having obtained his certificate was examined, and stated [31] that the bill was left with the petitioner, not on the general account between the petitioner and the bankrupts, but to secure only the advance then made in money, and the bill of exchange for £116), a verdict passed in favour of the assignees for the sum of £495, being the amount of the bill, deducting £155. The petition, insisting that such verdict ought not to bind the petitioner, and that he was in equity entitled to retain the bill against the assignees until he should be fully paid what was due to him on the balance of the account between him and the bankrupts, and to set off that balance against the amount of the bill, prayed, that the assignees might be restrained from any farther proceedings on the verdict, and that the petitioner might be at liberty to retain the bill of exchange for £650, towards security for the money due to him from the bankrupts' estate, and as an indemnity against the engagements which he was under for them.

By his affidavit filed against the petition, *George Robinson* stated that one

*Jackson* the acceptor, having been declared bankrupt before the bill became due, *Robinson* applied to the petitioner for the bill, in order that an arrangement might be made with *Jackson's* nephew, when the petitioner declared that he had borrowed £300 or £400 on the bill, and could not release it before *January*; *George Robinson* farther stated that the bill was left with the petitioner, not on the general account between him and *G. and S. Robinson*, but only for the specific purpose of securing such advances as he should make on the security of the bill (which in cash and by acceptance amounted to the sum of £155 and no more), and it was understood and agreed between *George Robinson* and the petitioner that in case he assisted *G. and S. Robinson* with a sum of £120, or thereabout, which they then required, the petitioner should receive the whole amount of the bill when due, and retain it in his hands until the month of *January* 1817, when it would be wanted by *G. and S. Robinson* to pay certain promissory notes issued by them.

[32] *Sir Samuel Romilly*, *Mr. Bell*, and *Mr. Roupell*, for the petition. The bankrupts being indebted to the petitioner, deposit this bill with him as a security for farther advances. After the satisfaction of that particular purpose, had no bankruptcy intervened, they might, we admit, have recovered the bill in an action at law; but the bankruptcy brings the case within the operation of the statute 5 *G. 2*, c. 30, s. 28. By the agreement, the petitioner was not to return the bill, but to receive the amount, and retaining the whole in his hands till *January* 1817, was then to pay to the bankrupts the difference between that amount and the total of his advances on the security of the bill. Failing to make that payment, he became indebted to them, under the agreement, to the extent of the difference. Against that debt he is entitled to set off the sum previously due to him from them. These circumstances constitute a case of "mutual credit" within the terms of the act, *Smith v. Hodson* (4 *T. R.* 211), *Atkinson v. Elliott* (7 *T. R.* 378), *Olive v. Smith* (5 *Taunt.* 56; and see *Staniforth v. Fellowes*, 1 *Marsh.* 184. *Oughterlony v. Easterby*, 4 *Taunt.* 888). The demand of the assignees, though in the form of an action of trover, is in effect for the value of the bill.

*Mr. Hart* for the assignees. The question has been decided by a competent tribunal. On the subject of set off, the statute gives to the courts of law an equitable jurisdiction. There are not two species of set off, one at law, and one in equity. This is a case not of mutual credit, but of bailment of a chattel, subject to a lien on the part of the bailee, with an undertaking to return the chattel, on payment of the money to secure which it was deposited. No credit was given by the bankrupts. The form of the action is a consequence of the [33] nature of the contract, and affords a material objection to the claim of set-off. The detention of the bill is fraudulent; and the Court will not assist a claim founded in a gross breach of faith.

*Sir S. Romilly*, in reply. I admit that the question has been decided at law, and that there is no difference between set-off at law, and set-off in equity; but this Court is not bound by the opinion of the Court of Common Pleas. An engagement to pay money is not necessary to constitute a case of mutual credit within the statute; for that purpose, by repeated decisions, bailment is sufficient. *Ex parte Deeze* (1 *Atk.* 228), *French v. Fenn* (*Cooke, B. L.* 588).

*Jan. 29.* The Lord Chancellor [*Eldon*]. It is clear that the petitioner might in the first instance have proceeded by petition in bankruptcy, praying that an account should be taken, and that the bill for £650 should form an item in the account. He thinks proper to pursue another course; to make defence to the action, and try the question in the Court of Common Pleas. It is true, the only witness examined at the trial is one of the bankrupts; but that was the mode in which the petitioner chose that the question should be tried. Instead of coming here originally on petition and affidavit, he took his chance first at law. The judge who heard the cause, entertained a decided opinion that the petitioner was not entitled to the benefit of the statute. On an application for a new trial, the Court thought the case so clear that they refused a rule to shew cause. A writ of error is then brought; and in that stage the petitioner comes here. He comes to this Court as having a legal, or an equitable jurisdiction, or both. There is no ground for saying that the Court has an equitable jurisdiction, unless it arises out of the [34] statute; and it is admitted (it could not be denied), that if the petitioner could avail himself of the statute by petition, he had a defence at law. The ground of his application then is this; that the judge at *Nisi Prius*, and the Court of Common Pleas, have



mistaken the law ; and that the *Chancellor* sitting in Bankruptcy, ought to interfere, if he should understand the statute in a sense contrary to that which they have adopted. I take it now to be a principle, that under such circumstances, where the law has been distinctly stated, I must see most clearly that it has been mis-stated, before I can relieve persons who think proper first to try another tribunal.

It has long been settled, that the statute authorizes the bringing into mutual account a great variety of items, which could not be made the subject of set-off ; a doctrine which seems founded on notions of natural equity, and has been carried as far as construction can well carry it. The Judge at *Nisi Prius*, and the Court afterwards, thought that the petitioner received this bill under a contract of such a nature, that it would be contrary to natural equity for him to make that use which he now seeks to make of it, and to avail himself of the statute. On reading the affidavit of the petitioner and of the bankrupt (whether the latter brings forward the evidence which appeared at the trial is not material to the present purpose). I am of opinion that the petitioner had no right to consider this bill as an item of mutual credit, to be brought into the account ; and that the use which he seeks to make of it is contrary to natural equity.

I shall therefore dismiss the petition ; and the petitioner having come here after a failure at law, I shall dismiss it with costs.

[35] HAMMOND v. NEAME. *Rolls. Jan. 29, 1818.*

[See *Thorpe v. Owen*, 1843, 2 Hare, 612.]

Under a bequest of stock, in trust to pay the dividends to *M. H. H.*, the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said *M. H. H.* until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over in default of such issue, to the nephews and nieces of the testator living at the death of *M. H. H.* : The dividends are payable to *M. H. H.*, although she has no child.

By his will, dated 4th *January* 1812, *Austin Neame* bequeathed to *Richard Gibbs*, his executors, administrators, and assigns, the sum of £3400 3 per cent. reduced annuities, upon trust, "to pay and apply the yearly interest and dividends thereof, as the same should become due and payable, into the hands of his the said testator's niece, and his the said *R. Gibbs'* daughter, *Mary Hills Hammond*, for and towards the maintenance, education, and bringing up of all and every the child and children of the said *M. H. Hammond*, until he, she, or they shall attain the age of twenty-one years, and when and so soon as he, she, or they shall have attained that age, then upon further trust to pay, assign, and transfer the said sum of £3400 unto and equally among all and every the child and children of *M. H. Hammond*, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns ; and in default of such issue, upon trust to assign and transfer the said sum of £3400 unto all and every his the said testator's nephews and nieces, the children of his the said testator's brothers ; that is to say, the children of his brother *John Neame*, and the children of his brother *Thomas Neame* the elder, living at the decease of *M. H. Hammond*, and the child or children of such one or more of them as should be dead, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns : provided always, and he thereby declared, that the first half-year's interest on the said sum of £3400 which should become due next after his decease, should go, and he thereby bequeathed the same, unto his nephew and residuary legatee *Thomas Neame* the younger, his executors, administrators, and assigns."

[36] The testator died on the 1st of *December* 1813. The Plaintiff, *Mary Hills Hammond*, not having any children, claimed to be entitled to the dividends accrued on the sum of £3400 stock since the decease of the testator (except the first half-yearly dividend payable after his decease), and also to such as shall accrue during her life, or till she shall have a child which shall attain twenty-one.

The bill prayed a declaration of the rights of *M. H. Hammond*, payment of past

dividends, and transfer of the stock into the name of *R. Gibbs*, the trustee, on the trusts of the will.

*Mr. Hart* and *Mr. Roupell*, for the Plaintiff. This legacy is not left in the hands of the executors to be applied or not applied by them, but is an immediate gift at law in favour of *Gibbs*, separated from the bulk of the estate; a gift upon an express trust to pay the dividends to the Plaintiff. She, and not her children, of whom none are in existence, is the object of the testator's bounty; but that bounty is connected with an obligation imposed on her of maintaining her children out of the funds. Upon the construction that the Plaintiff is not entitled till the birth of a child, the gift, which is in terms absolute and immediate, becomes contingent, and may be suspended during her life. In the interval the dividends would be payable to the residuary legatee; an implied benefit inconsistent with the express gift to him of the first half-year's dividend. The bequest over is not to take effect till her death. The testator believed therefore, that during her life the dividends were disposed of; and he has given them to no person but her. A legacy bequeathed for a special purpose, on failure of the purpose, without default in the legatee, as by the death or lunacy of an infant to whom a sum is bequeathed for an apprentice fee, becomes absolute. *Barlow v. Grant* (1 Vern. 254), *Nevill v. Nevill* (2 Vern. 431), *Barton v. Cooke*, (5 Ves. 461).

[37] *Mr. Wingfield*, for the nephews and nieces of the testator.

The testator has specified a particular purpose for which the dividends are to be paid into the hands of the Plaintiff, and she is not entitled to receive them, till they can be applied for that purpose. Had he designed them for her own benefit, he would not have expressed that he gave them for the maintenance and education of her children. The birth of children, though none were born at the date of the will, might probably be expected before his death. The first half-year's dividends are given to the residuary legatee, whether the Plaintiff had or had not children; his title to the subsequent dividends is contingent on the event of her having no children. The cases cited are not applicable. A legacy for putting the legatee apprentice is a benefit to the legatee: to assume that a benefit was designed to the Plaintiff, is an assumption of the question. The bequest contains no words marking the distinction, that the dividends shall be paid to the niece for her own benefit till the birth of children, and after that event for the benefit of the children.

*Sir Arthur Pigott*, *Mr. Fonblanque*, and *Mr. Boteler*, for formal parties.

*Mr. Hart*, in reply. A legacy to be paid to the father for the maintenance of a child, is a benefit to the father, *Andrews v. Partington* (3 Bro. C. C. 60). In a recent case before the late *Master of the Rolls*, a father was held entitled to a legacy given to him for placing out his son as an apprentice, although at the testator's death, the son had passed his apprenticeship.

The *Master of the Rolls* [*Sir Thomas Plumer*]. The stock is given to *Gibbs* as a mere trustee. If the children were intended to be the only *cestuis que trust*, it [38] seems needless to direct payment by the trustee to a third person. In terms this is an immediate bequest of the dividends to the testator's niece; and it occurs in a will containing many bequests to nephews and nieces, but none other for her. The words are express to pay the dividends into her hands. If the birth of children is necessary to entitle her to payment, the legacy is conditional; but the terms are absolute. The payment is to be made into her hands; the purpose of the payment is to enable her to provide for the maintenance of the children; from her they are to derive it; by her it is to be apportioned and distributed. The children are no direct objects of bounty, but only the occasion of bounty to the niece. It is a gift to a parent who, as mother, is under no legal obligation to support her children.

The testator, her uncle, must have known that she had no children. Had he intended that she should take nothing till the birth of children, would he not, providing for the event of her death without issue, have made a bequest of the accumulated dividends? He has expressly provided for that event, and bequeathed the principal only.

The bequest of the first half-year's dividend to the residuary legatee, affords a farther argument in support of the same conclusion. The intention certainly might be to secure to him those dividends, in both events of there being or not being children; but if the testator meant that he should continue to receive the dividends till the birth of children, he would then have been led to express that meaning.

I am of opinion, therefore, that the Plaintiff *M. H. Hammond* is entitled to receive these dividends.

The costs of all parties, except the Bank, must be paid out of the general personal estate ; the costs of the Bank, who are made parties for the security of the legacy, must be paid out of the capital of the legacy.

[39] BAILEY v. WRIGHT. Jan. 31, 1818.

Under a limitation in a marriage-settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband, taking a prior partial interest, is not entitled.

This cause having come on by appeal from the judgment of the *Master of the Rolls* (18 Ves. 49), the *Lord Chancellor* confirmed the decree ; remarking, that the nature of the trust of the sum of £200 bore most strongly on the construction, and that the husband could not correspond to the description of next of kin or personal representative in the settlement, because the benefit which he claimed in that character, was one to arise after he had recovered all that was given to him as husband.

ROGERSON v. WHITTINGTON. Feb. 5, [1818].

By the order directing a party to be examined as a witness on the trial of an issue, no objection is waived, except that which arises from his being a party in the cause.

An issue *devisavit vel non*, having been directed in this case, and the time appointed for the trial having expired, Sir *Samuel Romilly* moved for an order that it might now be tried, and that the Plaintiff might be examined as a witness.

Mr. *Bell*, against the motion. Two questions are to be decided by this issue : whether the supposed testator was competent to execute a will ; and whether the will is forged. The Plaintiff is the person suspected of forgery. He is at law an incompetent witness, as Plaintiff in the cause, and as a legatee. The Court will not prevent the heir from trying the question with all the advantages which the law confers on him.

[40] The *Lord Chancellor* [Eldon]. When the Court directs a party to be examined as a witness, no objection is waived except that which arises from his being a party in the cause. I cannot attend to the suggestion of forgery ; but I am not inclined to deprive the heir of his legal advantage. The issue must be tried on payment of costs, and the Defendant must not object to the examination of *Rogerson* on the ground of his being Plaintiff in this cause.

CRAWSHAY v. COLLINS. Feb. 5, [1818].

[S. C. 3 Swan. 90. See the Arbitration Act, 1889 (52 & 53 Vict. c. 49).]

A cause having been referred to arbitration, under an order by consent, the Court will not make an order on the arbitrators to proceed. The parties having proceeded under an order made by consent for referring a cause to arbitration, whether it is competent to either to withdraw, *quære*.

On the 1st of *March* 1817, an order was made by consent, that all matters in difference between the parties in this cause, should be referred to arbitration. After seventeen meetings had been held by the arbitrators, and the counsel for the Plaintiffs had announced that he had finished his case ; at a subsequent meeting, a claim was advanced on the part of the assignees under a second commission of bankruptcy issued against *Mark Noble* (the Plaintiffs being his assignees under the first commission), when the counsel for the Defendant *Collins* declaring that he

would not assume the responsibility of advising his client to proceed in the reference unless some arrangement was made relative to that claim, the meeting was dissolved. *Collins* being desirous that the proceedings under the reference should be continued, but the Plaintiffs insisting that he had abandoned, and refusing to renew, it, he now moved that the arbitrators might proceed in the reference.

The *Solicitor-General* [Gifford], Mr. *Roupell*, and Mr. *Beames*, for the motion. The case is brought before the Court at the request of the arbitrators, in order to decide whether the transaction [41] amounted to a termination of their authority. Even conceding that it is competent to a party to withdraw from a proceeding under an order of the Court, at least he can withdraw only by formal notification, an express *retrahit*. No such step has been taken here; *Collins* positively swears that he never meant that the arbitration should cease.

The *Lord Chancellor* [Eldon]. The question whether in fact *Collins* terminated this arbitration, assumes that he had a power so to do; the other party must have a like power; then if they choose to terminate it, how are you to proceed? If it is argued whether under an order of Court referring matters to arbitration, either party can determine the reference, that is a question of law which must be decided; but I have nothing to do with the question of fact.

For the motion. This is not a reference by agreement, of a subject not in litigation; but the progress of a suit advanced towards judgment, is intercepted, for the purpose of transferring the question, under an order of the Court, to a tribunal chosen by the parties. An order obtained by consent cannot, in general, be discharged at the instance of either party without the consent of the other.

Sir *S. Romilly*, Mr. *Hart* and Mr. *Stephen*, against the motion. It is not clear whether the motion (in either case unprecedented) is, that the arbitrators may be at liberty, or that they may be ordered, to proceed. An application for the first purpose is nugatory; and an order to proceed is unnecessary, if this authority is not determined, and if it is cannot be made without consent. It is for the arbitrators to decide whether their authority is, or is not, determined; [42] they must exercise their discretion of proceeding *ex parte* (*Wood v. Leake*, 12 *Ves.* 412), but are not entitled to the opinion of the Court.

The *Solicitor-General* [Gifford], in reply. The Court possesses jurisdiction to direct the proceedings of persons who have undertaken the office of judge, to which it has appointed them. At law, the parties may revoke an agreement that the submission to refer should be made a rule of Court; but a submission which has been made a rule of Court, it would be a contempt to revoke. (*Milne v. Gratrix*, 7 *East*, 608.) In no case has it been held that parties, having actually proceeded with an arbitration under an order obtained by consent, may retract that consent, and withdraw from the control of the Court.

The *Lord Chancellor* [Eldon]. The object of this motion is to ascertain to the satisfaction of the arbitrators, whether *Collins* has terminated this reference. Supposing that I were to decide that he did not terminate it, the very hypothesis on which you come here to ascertain that fact, entitles the Plaintiff to say, if he is dissatisfied with my judgment, that he will determine it.

With regard to the question, whether the parties are at liberty to withdraw, in many cases it has been argued that arbitrators under an order of the Court, stand in the place of the Master; but in what former instance has it ever been contended that this Court can make an order on them to proceed? If they have proceeded and made their award, much controversy has arisen whether exceptions may be taken to the award; and on that subject it may be sufficient to refer to the case of *Dick v. Milligan* (4 *Bro. C. C.* 117, 536; 2 *Ves. Jun.* 23); but an order on arbitrators to proceed is what I never before heard of. [43] The short way would be for them to give notice to the Plaintiff that they will proceed, unless he applies to the Court to stay proceedings; but I wish the arbitrators to consider what must be the state of the Court, if whenever any difficulty arises before them, they are to come here and take its opinion.

Motion refused.

Sir MARK WOOD, Bart. v. EDMUND GRIFFITH. Feb. 10, 11, 12, [1818].

[S. C. 1 Wils. Ch. 34. See *James v. Kerr*, 1889, 40 Ch. D. 457.]

The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous agreement between the parties : and although the illegality of the acts of which it directs the execution will afford a ground for refusing to decree the performance, the Court, considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable.

By articles of agreement, dated 15th *November* 1797, *Michael Hicks Beach*, with the consent of other persons interested, agreed to sell to *Edmund Griffith*, for £23,000, an estate called the *East Mark* estate ; and by an indorsement on the articles, Mr. *Griffith* declared that the purchase was made for the equal benefit of Sir *Mark Wood* and himself. In the same year possession was taken under the contract, and £5000 were paid by Sir *Mark Wood*, on account of the purchase-money : in 1799 a farther sum of £2000 was paid by him ; and in 1800 a lease of the estate was executed by Sir *Mark Wood* and *Griffith* to *George Webb Hall*, for a term of twenty-one years, at a rent of £1170. On the 24th of *January* 1806, *Beach* and the other vendors filed a bill in the Court of Exchequer against Sir *Mark Wood*, *Griffith*, and *Hall*, praying the specific performance of the contract for the purchase of the estate ; and in that cause the Court directed the usual reference to the Deputy Remembrancer to inquire whether the Plaintiffs could make a good title. Disputes having arisen between Sir *Mark Wood* and *Griffith* concerning the management of the estate, and their respective rights and interests therein, and various suits having been instituted by them against each other, on the 4th of *July* 1806, by an [44] order made in a cause then depending between them in the Court of King's Bench, all matters in difference between the parties were referred to arbitration.

By his award, dated the 9th of *March* 1809, the arbitrator, after declaring, among other things, that a sum of £1250 was due from Mr. *Griffith* to Sir *Mark Wood*, and directing payment thereof on the 15th of *June* next, unless it should have been previously paid, out of *Griffith's* share of "the purchase-money to arise by the sale of the said estate thereafter directed to be sold," proceeded in the following words :

"I further declare and award, that all the right, title, and interest of the said Sir *Mark Wood* and *Edmund Griffith* in the said *East Mark* estate ought to be forthwith sold, and that the said Sir *Mark Wood* and *Edmund Griffith* are to be equally interested in and liable to all benefit or loss which may ultimately arise or happen from such sale. And inasmuch as the said *Michael Hicks Beach* and *Henrietta Maria* his wife, *Richard Messiter*, and *Joseph Pitt* have, by their bill filed in the Court of Exchequer as hereinbefore mentioned prayed that in default of immediate payment by the said Sir *Mark Wood* and *Edmund Griffith* of what should be found due to the said *Richard Messiter* and *Joseph Pitt*, for principal and interest on the residue of the said sum of £23,000, the said estate, or a competent part thereof, might be immediately sold under the decree of the said Court, to raise the amount of what should be found due : I do further award and direct, that the said Sir *Mark Wood* do, some time in the course of the first six days of *Easter* term next, or so soon afterwards as the said Court shall think fit to hear the application, cause a motion to be made, praying the said Court to direct a sale of the said *East Mark* estate in one lot, by public auction, before the Deputy Remembrancer, at such time as the said Court shall think proper under the circumstances of the [45] case ; but with liberty for the said Sir *Mark Wood* and *Edmund Griffith* respectively to bid for the same at such sale. And I direct the said *Edmund Griffith* to consent to such application ; or, in case the said Plaintiffs in the said suit shall in the mean time apply to the said Court to direct such sale, I award and direct the said Sir *Mark Wood* and *Edmund Griffith* respectively to consent thereto ; and in either of the said cases, I direct them the said Sir *Mark Wood* and *Edmund Griffith* respectively to consent, that if he shall be declared the purchaser of the said premises at such sale, he will accept such title thereto as the said *Michael Hicks Beach* and *Henrietta Maria* his wife, *Richard Messiter*, and *Joseph Pitt*, shall be able to make thereto ; and that he shall pay his purchase-money and complete his purchase forthwith."

The arbitrator then directed the distribution of the purchase-money, in case the Court of Exchequer should order such sale, first in satisfaction of the sum due to the vendors, then of the advances made by Sir *Mark Wood*, and afterwards in equal moieties between Sir *Mark Wood* and *Griffith*, and continued as follows :

" But in case the said Court of Exchequer upon such application as aforesaid, shall not think fit to direct a sale of the said estate, then I direct that they the said Sir *Mark Wood* and *Edmund Griffith* shall, within fourteen days after the said Court shall have signified such its determination thereon, join in giving a proper authority in writing, for Messrs. *Hoggart* and *Phillips* of *Broad-street*, in the city of *London*, auctioneers, to sell all the estate, right, title, and interest of them the said Sir *Mark Wood* and *Edmund Griffith* to and in the said premises by public auction, within six months after such authority shall be given, at which sale they the said Sir *Mark Wood* and *Edmund Griffith* respectively are to be at liberty to be bidders : and the monies for which such estate, right, title, and interest to and in the said [46] premises shall be sold at such sale, shall, after payment of all incidental expences, be applied in the same manner as is hereinbefore directed respecting the surplus of the purchase money of the said estate, if sold under the directions of the Court of Exchequer, after satisfying the payments which the said Court shall direct to be made thereof as aforesaid. And in either of the cases aforesaid, I award and direct that they the said Sir *Mark Wood* and *Edmund Griffith* respectively do execute all proper and necessary conveyances of the said premises, and every part thereof, and of their respective rights and interests in and to the same, to the purchaser or purchasers thereof, and do all acts necessary to carry such sale into effect. But if in either of the cases aforesaid it shall appear, that the said *Michael Hicks Beach*, and *Henrietta Maria* his wife, *Richard Messiter*, and *Joseph Pitt*, cannot make a good and sufficient title to the said premises, or any part thereof, or if for any other reason the said contract for the sale of the said estate, as between the said last-mentioned parties and the said Sir *Mark Wood* and *Edmund Griffith*, cannot be carried into execution, then, inasmuch as the said *Michael Hicks Beach*, and *Henrietta Maria* his wife, and their trustees, are not parties to this reference, it does not appear to me that I can make any specific award concerning the said *East Mark* estate : But I award and direct, that if upon the completion of any sale of the said estate, or of the interest of the said Sir *Mark Wood* and *Edmund Griffith* therein, as hereinbefore directed, or upon the vacating or rescinding the said purchase contract, for want of a good title, or otherwise as aforesaid, the said Sir *Mark Wood* shall not receive from the net produce of such sale, or from the said *M. H. Beach*, or the said trustees, or out of the said Court of Exchequer, or otherwise, the whole of the said sums of £5000, and £2000, so advanced by him as aforesaid, with such interest as aforesaid, then and in that case the said *Edmund Griffith* shall make good and pay to the said Sir *Mark Wood* one moiety of the deficiency of the said two [47] principal sums and interest ; and if in either of the said last-mentioned cases, the sum or sums to be received by the said Sir *Mark Wood* shall exceed the said sums of £5000, and £2000, and interest as aforesaid, then I award and direct that the said *Edmund Griffith* shall be entitled to one moiety of such excess, and the said Sir *Mark Wood* to the other part thereof."

Within the first six days of *Easter* term after the date of the award, Sir *Mark Wood* accordingly, with the consent of *Griffith*, moved in the cause depending in the Exchequer, that a sale might be directed of the *East Mark* estate ; but the Plaintiffs in the Exchequer opposing the motion, it was, on the 12th of *February* 1811, refused.

Within fourteen days after the refusal of that application Sir *Mark Wood* gave written notice to *Griffith* of his readiness to join in authorizing a sale of all the estate, right, title, and interest of himself and *Griffith* in the *East Mark* estate, pursuant to the award, and tendered to *Griffith* for his signature, which he refused, an authority to the auctioneers for making such sale.

The bill, filed by Sir *Mark Wood*, stating these facts, prayed that *Griffith* might be directed specifically to perform the award so far as relates to the sale of all the estate, right, title, and interest of the Plaintiff and the Defendant to and in the *East Mark* estate, and forthwith to sign the authority before set forth to enable the auctioneers to make such sale, or that it might be referred to the Master to settle a proper authority for that purpose, and that the Defendant might be directed to

sign the same when so settled ; and that he might be directed to do all other necessary acts for perfecting such sale on his part, and that the monies to arise from such sale might be applied according to the directions of the award.

[48] The Defendant, by his answer, insisted that he was not bound to execute an authority for the sale of the estate, it being uncertain whether the vendors could convey a good title ; and the arbitrator having declared that in case of their inability so to do, it did not appear to him that he could make a specific award concerning the estate, and in the event of the rescinding that contract for want of a good title or otherwise, having given directions for the settlement of the business between the Plaintiff and the Defendant.

The answer further represented, that in *Trinity* term 1811, the Plaintiff, by means of a partial and unfair statement of the award, procured a writ of attachment against the Defendant for an alleged contempt of Court in not giving an authority for the sale of the estate ; when the Defendant, having in his answer to the interrogatories exhibited to him, stated that it did not appear that the vendors could make a good title, he was reported not in contempt, and the writ of attachment was quashed : and the answer insisted on those proceedings as confirming the Defendant's construction of the award.

The answer also stated, that the Defendant had advanced large sums of money in the management and concerns of the estate, and that a compulsory sale with a defective title, as required by the Plaintiff, would be attended with great detriment to him.

The decree made by the *Master of the Rolls* on the 22d of *March* 1814 declared, that the Defendant was bound to perform his part of the award, by joining with the Plaintiff in the sale of all the estate, right, title, and interest of the Plaintiff and Defendant to and in the *East Mark* estate ; and ordered, that the Defendant should join the Plaintiff in signing an authority to Messrs. *Hoggart* and *Phillips*, to sell all such estate, right, title, and interest, pursuant to the award accordingly ; and in case the parties differed [49] about the form of such authority, that it should be referred to the Master to settle the same ; and that the Plaintiff and Defendant should duly sign such authority when so settled ; and after such sale should have been made, that the Plaintiff and the Defendant should respectively execute all proper and necessary conveyances of their respective rights and interests in and to the *East Mark* estate to the purchaser or purchasers at such sale, and do all acts necessary to carry such sale into effect ; and that the monies for which the said estate, right, title, and interest should be sold, after payment of all incidental expenses, should be paid and applied in such manner as in the award directed.

On the 23d of *May* 1815 an order was made by consent, for a reference to the Master to settle and approve a particular and conditions for the sale of all the estate, right, title, and interest of the Plaintiff and Defendant to and in the *East Mark* estate. On the 15th of *September* 1815 the sale took place, and Mr. *Farquhar* became the purchaser at the price of £10,100 ; and by an order of the 22d of *January* 1816, it was referred to the Master to approve a proper conveyance. Before the sale the Defendant presented a petition of appeal from the decree at the *Rolls* ; and having been attached for refusing to execute the deed of conveyance approved by the Master, he was on the 11th of *July* 1817 discharged, on executing the deed as an escrow, to be deposited in the Master's office, and abide the event of the appeal.

The appeal having been argued on a former day by Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Cooke*, for the Plaintiff ; and by Mr. *Hart*, and Mr. *Spranger*, for the Defendant, the Lord Chancellor now gave judgment.

[50] The Lord Chancellor [Eldon]. This case presents four questions.

1st. What is the meaning of the award ? It is contended on the part of Sir *Mark Wood*, that the Court of Exchequer having refused his application made in obedience to the award, for an order for the sale of the estate, inasmuch as that attempt to dispose of the estate became ineffectual, the interest of himself and *Griffith* under the contract, must be put up to sale. On the other hand it is urged, that till, by the report confirmed, it appears that a good title can be made, it was not the meaning of the award that the equitable interest, which might be more, or less, or nothing, should be sold.

2d. (A question to which I have given much consideration), supposing the meaning of the award ascertained, and considering an award being founded in an

agreement to refer, as an agreement of the parties, of which the specific performance may be enforced, whether the award may not be in its nature so unreasonable, that a court of equity will lend no assistance to its execution? A doubt founded in this instance on the circumstance that, according to the Plaintiff's construction, the arbitrator orders a sale before it is known that a good title can be made, and when the period during which the reference of inquiry into the title has been pending, must depreciate the property.

3d. Whether the award can be carried into effect? It is insisted by Mr. *Griffith*, that, supposing the meaning of the award such as the Plaintiff contends, it requires the parties to do acts which would amount to champerty or maintenance.

4th. Whether the construction on the award has been already determined; the Court of King's [51] Bench having dismissed the application of Sir *Mark Wood*, for an attachment against *Griffith*, on the report of its officer that *Griffith* had not been guilty of a breach of the award?

On the decision of these questions depends the general question, Whether, under the circumstances, the decree of the *Master of the Rolls* ought to be affirmed or reversed?

The decree declares, that the Defendant is bound to perform his part of the award, by joining with the Plaintiff in the sale of all their estate, right, title, and interest, to and in the *East Mark* estate. On that principle the decree proceeds; and the subsequent ordering part is calculated only to carry it into effect. The circumstance of the case are these: In 1797 the vendors entered into a contract with *Griffith* and *Wood*, for the sale of the estate, at the price of £23,000; in the same year possession was taken; and the history of this case may, I think, amount to a demonstration that the Court acts with something like justice, when, as in later times, it insists that purchasers taking possession of the estate shall not retain the price. The purchase-money was not put into a neutral estate between the parties, as perhaps in all cases of possession by the purchaser it ought to be; but Sir *Mark Wood* paid on account of the joint contract, in 1797 £5000, and in 1799 £2000, and in 1800 he executed a lease, by which he incurred an obligation to maintain the lessee in the enjoyment of the estate, for no less a term than twenty-one years. In 1806 the vendors filed a bill in the Exchequer to compel performance of the contract; and the Defendants in that suit putting in question not the contract, but the title, the Court of Exchequer had only to refer it to the Remembrancer to inquire whether a good title could be made. It must be admitted that the case is not without difficulty; for the reference was directed in 1807, and the Remembrancer has not yet resolved that single question. It ap-[52]-pears that previously to 1809, *Griffith* and *Wood* had unfortunately engaged with each other in various suits at law and in equity, all which were referred to the decision of the arbitrator, and decided by his award. The question on the appeal is, whether the *Master of the Rolls* has rightly construed that award?

It is extremely clear that every award must be certain and final; but it has, particularly in more modern times, been considered the duty of the Court, in construing an award, to find that it is certain and final; and instead of leaning to a construction, which in effect would destroy nine-tenths of the awards made, if possible to put one consistent sense on all the terms. In considering the meaning of this award relative to the sale of the estate, it must be recollected that the business of the arbitrator was to settle the differences between *Griffith* and *Wood*; and that the Court of Exchequer, or the vendors, Plaintiffs in that Court, might not consent to the sale of the interest, such as it was, or that property so circumstanced might not meet with a buyer; and that notwithstanding the direction to sell, the estate might thus remain unsold.

The direction for the sale of the right, title, &c., is, according to its incontrovertible meaning, a direction that all the right, title, and interest in the estate (those words never having been before used in the award) should be forthwith sold. The arbitrator seems to have intended a sale not only of the right, title, and interest, but of the estate itself, if it could be brought to sale. The direction is express that *Wood* and *Griffith* shall consent to a sale, and shall, if either of them becomes the purchaser, accept such title as the Plaintiffs in the Exchequer can make. Attending to the constant language and practice of this Court, where it is repeatedly held that a party has by his acts rendered it impossible for him to object to a title, and coupling that with this express direction, it cannot be doubted that if the [53] Plaintiff or Defendant



bought the estate, they must take such title as could be made. The arbitrator though he could compel them to consent to the sale, yet could make no such effectual order on the vendors, who were not parties to the reference. He foresaw that they might choose to retain the estate, notwithstanding the objections to the title, rather than carry it to sale subject to the depreciation arising from those objections. Providing for the event of their withholding their consent, he says, that in case the Court of Exchequer should not think fit to direct a sale, *Griffith* and *Wood* shall give authority to sell, not the estate, but all the right, title, and interest. Here is no qualification, no direction that the sale shall depend on the Remembrancer's report that the title is good.

Then comes the clause on which so much difficulty has arisen :—" But if in either of the cases aforesaid it shall appear, that the said *M. H. Beach, &c.*, cannot make a good title, &c., it does not appear to me that I can make any specific award concerning the said *East Mark* estate." (See the clause, 1 Swans. 46.) It occurred to the arbitrator, that it might finally appear that a title could not be made to this estate, that the purchasers would not be obliged to take it, and that therefore in certain events which might happen he could not make a specific award respecting the estate itself. Does that render the award less final and certain with respect to *Griffith* and *Wood*? Being, as I say they were, the owners of the estate in equity, they had a right, subject to considerations of law to which I shall presently advert, to sell such right, title, and interest as they had. It is impossible on a fair exposition to contend, that the arbitrator meant by this clause to defeat all the prior clauses. In the construction of an award the Court is bound, so far as the terms will admit, to give to it such a meaning as shall render it conclusive; and not by the construction of [54] one part to defeat another. That is my opinion on the first point.

It is said that this opinion clashes with the judgment of the Court of King's Bench; I think not; but were it otherwise, if upon investigation I become convinced that their judgment is wrong, I should violate my duty by adopting it in preference to that which I think right.

One difficulty which I confess I felt, I shall now state, together with the grounds on which I have at length overcome it. That a bill will lie for the specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then the bill calls only for a specific performance of an agreement in another shape: but the Court has always exercised the discretion of withholding its assistance for the performance of unreasonable agreements. I was much struck with the consideration of this as an agreement to sell an estate under the circumstances in which the arbitrator has directed a sale; the very fact that the title is in dispute in the Court of Exchequer, must throw a damp on the proceedings and depreciate the property.

No one will dispute this proposition, that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term for 100 years, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term, and this Court will [55] arrange the equities between the parties. But the present agreement is to be regarded as an agreement embodied in an award; and the question is, what is the effect of an agreement coming into a court of equity in that shape: and that question must be considered with reference to the cases in which Courts have determined, that they will conform to the opinion of judges chosen by the parties. If judges so chosen erroneously decide a question of law, the Court will abide by that decision.(1) Upon that principle I am of opinion that the objection of the unreasonableness of this award cannot be sustained.

It is then contended that the performance of the award will involve the parties in the guilt of champerty and maintenance. It must be admitted, that neither this Court nor any other will enforce an agreement by which, if carried into execution, the parties would be compelled under the process of a court of justice, to do that which in the view of justice is criminal. In many of the proceedings relative to this award; on motions for rules for an attachment, and to discharge rules

&c., this objection might have been urged; but without advertg to that circumstance, let us now consider the foundation of the objection according to the settled practice of the Court. I have referred to a class of cases in which this Court has been in the habit of declaring, that a party who contracts for the purchase of an estate in fee simple, is entitled to what the vendor can give. It is extremely clear that an equitable interest under a contract of purchase, may be the subject of sale. A [56] person claiming under that contract, becomes in equity a trustee for the persons with whom he afterwards contracts; without entering into any covenants for that purpose, they are obliged to indemnify him from the consequence of all acts which he must execute for their benefit; and a court of equity not only allows, but actually compels, him to permit them to use his name, in all proceedings for obtaining the benefit of their contract. Assuming that the award directs the sale of the estate, right, title, &c., before the determination of the suit in the Exchequer, what is that but what happens every day? If *Griffith and Wood*, during the pendency of the suit in the Exchequer, sold the estate to *A. B.*, he would have a right in a court of equity, to insist, as purchaser of the estate, that they should convey to him the fee simple, or such title as they had. So insisting, he claims no more than they would be entitled to claim, if they had not sold their equitable interest; having sold, they become trustees of that equitable interest: their vendee acquires the same right which they had; that is, a right to call on the original vendors, indemnifying them against all costs and charges, for the use of their names to enable them to execute the subcontract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this Court, which has always given to parties entering into a subcontract, the benefit which the vendors derived from the primary contract.

I think that the opinion of the Court of King's Bench was not against the contract; but if it were, it would be my duty as a Judge, with all respect to their authority, to express my own judgment. The opinion of that Court on an attachment, is in truth little more than the opinion of their officer. It is a consolation to me, that if I am wrong [57] in this case, my error may be corrected elsewhere; but I have taken great pains to be right.

The decree must be affirmed.

*March 14.* On this day *Mr. Cooke* moved, on the part of the Plaintiff, that the conveyance executed by the Defendant, might be delivered out of the Master's office, to be executed by the Plaintiff, and delivered to *Farquhar*, the purchaser.

The *Lord Chancellor* [Eldon]. The suit originated in a bill filed by *Sir Mark Wood*, praying the specific performance of the award. The late *Master of the Rolls* thought, that by their agreement so ascertained, the parties bound themselves to bring to sale their interest in the estate, the title to which had not yet been shown to be good, and during the pendency of a suit in the Exchequer between them and the vendors, and of a reference in that suit to the officer of the Court to examine the title. He held that the parties had agreed, if the estate itself could not be sold, to a sale of their right, title, and interest; a species of property which must be carried to market surrounded by difficulties and embarrassments. The purchaser of their interest in the contract might certainly, if a good title could not be made, compel repayment from the original vendors of the sums advanced by *Wood*; and he would probably be considered as having a lien on the estate to that amount; but it might be found that those vendors had no interest in the estate, and in that case the purchaser would have only a personal demand against the individuals who received the money.

I repeat that I proceeded to the confirmation of this judgment most unwillingly; because it occurred to me that it was next to impossible that such an interest could be [58] sold otherwise than to the loss and disadvantage of one, at least, of the persons who had entered into the contract. I took pains to persuade myself that the award had not the meaning imputed to it by the *Master of the Rolls*; but being finally of opinion that such was its meaning, I could not refuse to decree the specific performance of the award, considered as an agreement between the parties. The objections of the Defendant appeared to me untenable. I thought it impossible to maintain, that the Court, in enforcing the performance of an agree-

ment embodied in an award, applies exactly the same principles as in the case of a common agreement between A. and B. Having submitted to a judge chosen by themselves, the parties give to his acts an authority which the Court would not allow to their own. If the objection that the acts which the award directs amount to champerty or maintenance can be sustained, I am satisfied that this Court has almost daily decreed a violation of the law.

The order must be made, but I shall give no costs.

(1) On the question in what cases a mistake in law vitiates an award, see *Campbell v. Twemlow*, 1 Price, 81. *Steff v. Andrews*, 2 Madd. 6. *Wohlenberg v. Lageman*, 6 Taunt. 255. *Chace v. Westmore*, 13 East, 357. *Young v. Walter*, 9 Ves. 364. *Kent v. Elstob*, 3 East, 13. *Ainsley v. Goff*, *Caldwell on Arbitration*, p. 53. *Ching v. Ching*, 6 Ves. 282, and the authorities there cited. On the effect of unreasonableness, see *Ives v. Metcalfe*, 1 Atk. 64, and the cases collected in *Caldwell on Arbitration*, p. 108, 109.

HOULDITCH v. HOULDITCH. Feb. 5, [1818].

[S. C. 1 Wils. Ch. 17.]

After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before a report, and no measures having been taken for continuing the taxation, his administratrix proceeding at law against the client, was held not to have committed a contempt.

On the 13th of June 1816, an order was made, on the petition of the Defendant, for a reference to the Master to tax the bill of his solicitor, the Defendant submitting to pay what should appear due on such taxation; and the order directed that all proceedings at law against the petitioner on account of the bill should be stayed until after the Master had made his report. On the 7th of April 1817, before a report had been made, the solicitor died intestate; and on the 15th of January last, his administratrix caused [59] the defendant to be arrested and held to bail for the amount of the bill of costs. On this day the Defendant moved that the administratrix and her solicitor might be committed for a contempt.

Sir Samuel Romilly and Mr. Wakefield, for the motion. The taxation may proceed without a fresh order, notwithstanding the death of the solicitor; the Defendants undertaking to pay the amount when ascertained, is binding on him in favour of the representatives.

Mr. Wingfield, against the motion. The death of the solicitor terminated the proceedings under the order; nor is any explanation given of the Defendant's delay, in suffering the interval between the death in April 1817, and the commencement of the action at law in January, to elapse without any attempt to revive the order.

The Lord Chancellor [Eldon]. It is impossible to visit this proceeding as a contempt.

Motion refused, with costs; the administratrix consenting to an order for the Master to proceed on the taxation, and the Defendant undertaking to pay to her what on such taxation shall appear due, with a stay of all proceedings at law.—Reg. Lib. A. 1817, fo. 552.

[60] *Ex parte* GREENHOUSE. Rolls. Feb. 9, 1818.

On a reference in a petition under Stat. 52 Geo. 3, c. 101, the Master may receive affidavits in evidence.

In November 1815, on a petition presented under the act providing a summary remedy in cases of abuses of trusts created for charitable purposes (stat. 52 Geo. 3, c. 101), an order was made directing certain inquiries before the Master (1 Madd. 92). In proceeding on the reference the Master received affidavits in evidence; and having made his report, a petition was presented by the original petitioners to confirm it and carry it into execution. A counter petition was then presented,

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insisting that the proceeding of the Master, in receiving affidavits in evidence, was contrary to the established usage of the Master's office, and to the practice of the Court, and that he ought to have made his report upon the evidence of witnesses examined before him, or before commissioners upon interrogatories; and therefore praying that the Master might be directed to review his report, and to take the evidence relative to the matters referred to him by interrogatories.

Mr. *Hart* and Mr. *Phillimore*, in support of the second petition. The Master has erred in persisting, against the protest of the petitioners, to receive affidavits. No clause in the statute on which these proceedings are founded, authorizes such a departure from the established usage, or excludes the parties from that right of cross-examination which could not have been denied to them under an information. The statute declares, that it shall be lawful for the distinguished persons whom it enumerates, to hear petitions "in a summary way, and upon affidavits or such other evidence as shall be produced upon such hearing, to determine the [61] same"; but it contains no regulation relative to the proceedings in the Master's office, and introduces no innovation in the practice there. That practice is founded on the incontrovertible principle, that the purposes of justice are better attained by examination on interrogatories, with the opportunity of cross-examination, than by affidavits, in which the deponent, instead of being sworn to divulge the whole truth, swears only to the truth of what he states; a statement in which the person who prepares it, is careful to insert nothing unfavourable to his case. The inexpediency of a deviation from that practice is strongly evinced in the present instance, by the loose and general expressions in the affidavits on which the Master has founded his report. On former occasions the Court has held itself bound to a strict construction of the act (*Ex parte Rees*, 3 *Ves. & Beames*, 10; *Ex parte Brown*, *Coop.* 295); and in the spirit of those decisions will refuse to interpret it as authorizing, in the absence of an express direction, by implication and inference, so dangerous an innovation in the rules of evidence.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Heald*. The Masters have generally understood, that on references in causes, they may proceed on affidavits or interrogatories at their discretion; but in this case the Master has no choice; it is not competent to him to examine on interrogatories. The legislature has created a new tribunal, to which a jurisdiction is committed in certain specified cases; neither the court so constituted, nor the Master acting as its organ, has any authority to proceed otherwise than as directed by the act. The express direction is to proceed in a summary way, and by affidavit. It is vain to insist on the conveyance of cross-examination; the Court has no power to exhibit interrogatories. It has been argued on the other side that no evidence can be good against a person who has not an opportunity of cross-[62]-examination; but that argument is confronted by whole classes of cases. In bankruptcy, in lunacy, on interlocutory applications in courts of law as well as equity, on motions to set aside judgments, and for delivery of annuity deeds; in all these instances evidence is taken on affidavit. The examination of the party on interrogatories, proceeds on very different principles, from the examination of a witness; and is only a mode of compelling that discovery to which his opponent is entitled. Under this statute neither the Court nor the Master has any authority to enforce the attendance of witnesses.

Mr. *Hart*, in reply. There is no ground for contending that the legislature meant to abolish the ordinary course of proceeding. The order under which we are now arguing, directs that the parties shall be examined on interrogatories; on what principle can the Court, retaining that power, hold itself excluded from the regular examination of witnesses?

The *Master of the Rolls* [Sir Thomas Plumer]. I shall not finally dispose of the general question, but at present I am strongly of opinion that the proceeding of the Master is right. The question is not whether the Master has drawn a correct conclusion from the evidence, but whether he ought to have received affidavits, or to have directed examination on interrogatories? Whether the proper mode of proceeding under the statute, is by analogy to the proceedings in causes? The statute creates a new tribunal, to decide in a summary way, on petition, by a mode of proceeding quite new in all its parts. A petition presented by any two or more persons, on the subject of certain trusts, is to be heard and determined on affidavit, or such other evidence as shall be produced. Unquestionably had the same points

arisen before the Court, no objection could have been made if they had been decided on affidavits. [63] The question is, whether the Master is to observe a mode of proceeding different from the Court? The act does not in terms direct a reference to the Master; but why, when the case comes before him, is he to be guided by the analogy of a cause, to which, in every other stage, the proceedings are not analogous? The objection that difficult questions are unfit to be decided by affidavit, is an objection to the act. The Court clearly may proceed by affidavit. Can the Master originate a mode of proceeding different from that prescribed by the act? Is he, instead of applying to the Court for direction, himself to institute a new course? The Master may properly ask what power he has to issue a commission. This is a summary jurisdiction, and must be exercised strictly in the mode appointed. Had it been intended that, in the ulterior proceedings, a course should be pursued different from that originally prescribed to the Court, would not the legislature have specified that course? With respect to analogy, in causes, you have the analogy of proceeding in the manner contended for by the petitioners; on petitions in bankruptcy, lunacy, &c., you have the analogy of proceeding by affidavit. Why on a petition, is the Master to adopt the analogy of proceedings in a cause? a course which the legislature lays aside, and for which it substitutes petition; a summary proceeding by petition and affidavit. In cases of petition it is the established practice to decide difficult questions on affidavit. The court might direct a different mode of proceeding; but the question is, whether the Master can himself institute a new course? I cannot say that the Master did wrong in proceeding on affidavit.

Feb. 16. On this day his Honour said, that he retained the opinion which he had before expressed, and dismissed the counter-petition.

[64] CARTER v. DEAN. *Rolls. Jan. 27, Feb. 5, 1818.*

A cowkeeper, all his transactions of buying and selling being incidental to the occupation of farmer, grazier or drover, is exempted from the operation of the bankrupt laws, by Stat. 5 Geo. 2, c. 30, § 40.

The bill in this case, filed by one of the executors of *Edward Pillbeam*, deceased, against his co-executors, and the persons interested in the real estates of the testator, stated, that in consequence of devastavits committed by his co-executors, judgments at law had been obtained by the creditors of the testator against the plaintiff personally; and charging that the testator was, at the time of his decease, a trader within the meaning of some of the laws in force against bankrupts (by Stat. 47 Geo. 3, c. 74, the real estates of traders are assets for the payment of all their debts), prayed an account of the personal estate, and a declaration that the freehold estate was subject to make good the deficiency of the personal estate, and if necessary, a sale for that purpose.

The testator, at the time of his death, carried on the business of a cowkeeper. It appeared in evidence, that the business consisted in buying and selling cows and calves, and selling milk; that the testator bought cows for the purpose of making a profit by selling the milk, and when they became dry and yielded no milk, fattened and sold them; that he kept a stock of 20 or 30 cows, and bought grains, hay, and distillers' wash, as food for them; that he occupied about 38 acres of meadow land, the better to enable him to carry on the business of a cowkeeper, grazing his cows thereon, and making hay for them; that he did not carry on the business of a farmer, by ploughing land, and sowing, reaping, and selling corn; that the place at which his business was conducted, was separate from any other of his concerns, and exclusively appropriated to the business of a cowkeeper; and that he exercised no other trade.

[65] Mr. *Hart* and Mr. *Abercromby*, for the Plaintiff.

Mr. *Agar* and Mr. *Parker*, for the Defendants, in addition to the printed authorities, cited *Ex parte Ledyard*, from a note of Mr. *Montague*. ("Cow-keeping, by grazing the cows and selling the milk, seems not to be a trade. 17th August 1800.")

The *Master of the Rolls* [Sir Thomas Plumer]. In order to entitle the Plaintiff to an account of the real estate, it must appear that the testator was a trader within the meaning of the bankrupt laws. The facts are, that the testator was a cowkeeper, occupying 38 acres of pasture land; that he purchased large quantities

of cows, and keeping them while a profit could be made by selling the milk, when they became unfit for that purpose, fattened and sold them. I am clearly of opinion, that such transactions amount not to a trading within the meaning of the bankrupt laws. The cases of *Mills v. Hughes* (Willes, 588), and *Bolton v. Sowerby* (11 East, 274), exclusive of *Ex parte Ledyard*, decide the question. Farmers, graziers, and drovers, are expressly exempted from the operation of the bankrupt laws (5 Geo. 2, c. 30, § 40, made perpetual by 37 Geo. 3, c. 124); and the term drover denotes, not a driver, but a dealer in droves, of cattle. All the transactions of buying and selling in which the testator was engaged, are referable to some one of these three characters; as the occupier of pasture land, he was a farmer and grazier; as a dealer in cattle, a drover; and "a person cannot be less exempt from the operation of the bankrupt laws, because he is exempted partly as a farmer, partly as a grazier, and partly as a drover, for the several acts done by him in those respective characters." (Per Lord *Ellenborough*, 11 East, 277.)

[66] The bill therefore, so far as it seeks an account of the real estate, must be dismissed with costs.

JONES v. CURRY. *Rolls.* Feb. 10, 13, 16, [1818].

[S. C. 1 Wils. Ch. 24. See *Parker v. Marchant*, 1842, 1 Y. & C. C. C. 312; *Innes v. Sayer*, 1851, 3 Mac. & G. 617; *In re Mills*, 1886, 34 Ch. D. 190.]

The will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates, and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate," is not an execution of the power. Parol evidence is not admissible to show the inadequacy of the personal estate of the testatrix to satisfy the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass realty appeared on the will.

*William Browne*, by his will, dated 17th January 1810, gave, devised, and bequeathed unto *Thomas Curry* and *Edward Drury*, and the survivor of them, and the heirs, executors, and administrators of such survivor for ever, a moiety of certain freehold hereditaments, and also all his household furniture, beds, bedding, plate, linen, and china, and all his stock in trade, money, and securities for money, debts, and all the residue of his real and personal estate and effects, upon trust to permit *Isabella Common*, the wife of *Robert Common*, to have the free use and enjoyment of his household furniture, beds, bedding, plate, linen, and china, during her life; and after her decease, upon trust to divide and distribute the same household furniture, beds, bedding, plate, linen, china, or the monies arising from the sale thereof, in case the same should be sold, unto and equally among the issue, child, or children of *Isabella Common*, and to the issue, child, or children of such of them as should be then dead, and in default of any such issue, child, or children, or in case of any such issue, child, or children, who should die before attaining the age of 21 years, without leaving lawful issue who should attain that age, and be living at the death of *Isabella Common*, then the testator directed that his said household furniture, beds, bedding, plate, linen, and china, should go unto such person or persons to whom *Isabella Common* should, by her last will and testament, notwithstanding her coverture, give and bequeath the same; and the testator farther directed his trustees to sell and dispose of his stock in trade, and get in all his outstanding estate [67] and effects, and place out the monies arising therefrom upon government or real securities, and to pay all the rents, interest, dividends, and proceeds of his said freehold premises, and of the residue of all his personal estate and effects whatsoever, unto *Isabella Common* for her life, and after her decease, to convey, assign, transfer, &c., all his said freehold premises, and all the residue of his personal estate, unto and equally among all and every her issue, child, or children, and to the issue, child, or children of such of them as should be then dead, at their respective age or ages of 21 years; and in default of any such issue, child, or children, or in case of any such issue, child, or children, who should all die before attaining the age of 21 years, without leaving lawful issue who should attain that

age, and be living at the decease of *Isabella Common*, then he directed that his said freehold premises, and all the said residue of his real and personal estate and effects whatsoever, should go unto such person or persons to whom she should, by her last will and testament, notwithstanding her coverture, give, devise, and bequeath the same.

*William Browne* died on the 27th of *April* 1811, in the life of *Isabella Common*, who having survived her husband, died on the 5th of *March* 1815, without issue. Her will, dated the 25th of *September* 1812, executed and attested so as to pass real estates, was in the following words: "I give and bequeath unto my father and mother, *Thomas* and *Ann*, all my estate and effects of whatsoever denomination, except the sum of £10 *per annum* unto my sister *Mary* until she marries, with half of my trinkets and clothes, the other half unto my sister *Ann Pearson*, with the sum of £100, to be paid six months after my decease, and the same sum unto my sister *Mary* after her marriage; but in case she should not marry, the £10 *per annum* to be regularly paid every half year: at the decease of my father and mother, the property to be equally divided between my brothers and sisters, share and share alike: and in case *Ann Pearson* [68] dies before she receives her legacy, the sum to be the property of *Thomas*, son of *Thomas* and *Ann Pearson*; likewise my household furniture, with linen and plate, to be equally divided between *Ann* and *Mary*, my sisters; an inventory to be taken as soon as my decease, and not to be divided until the decease of my father and mother. I give and bequeath the sum of £50 unto *John Common*, son of *Robert Common* deceased, to be paid when he shall arrive at the age of 21 years; but if he dies before that time, it must sink into the residue of my estate and effects." The will concluded with a bequest of a gold ring to be purchased.

The bill, filed by the father and mother, and brothers and sisters of *Isabella Common*, stated, that exclusively of a mortgage debt of £100, and of a sum of £100 due from the Plaintiff *Thomas Jones*, which she considered as lost, *Isabella Common* was not, at the time of making her will, or at her death, possessed of or entitled to any household furniture, plate, linen, or china, or any real or personal estate whatsoever, which had not belonged to the testator, *William Browne*, or come to her possession under or by virtue of his will: and insisting that *Isabella Common* had an absolute interest in the case of her dying without issue, in the real and personal estates of *William Browne*, or at least that his real and personal estates, subjected to her disposal and appointment, were well appointed and disposed by her will, prayed a declaration to that effect, and a conveyance and account.

By the parol evidence offered on the part of the Plaintiffs it appeared, that the household furniture, plate, and linen of the testator *Browne*, instead of being sold on his death, were removed to the residence of *Isabella Common*, and possessed by her during her life; that her husband died insolvent, and that she had no property beyond what she derived under the will of *Browne*, except the [69] sums mentioned in the bill, and three sets of window curtains.

Mr. *Trower* and Mr. *Mathews*, for the Plaintiffs, having declined to argue the point made by the will, that *Isabella Common* took an absolute interest under the will of *Browne*, and admitting that she took only an interest for life with a power of disposition, contended that her will was a valid execution of the power. It has long been settled that an express reference to the power is not necessary. *Probert v. Morgan* (1 Atk. 440). But see the case stated from the Register's Book, *Sugden on Powers*, p. 282), *Andrews v. Emmot* (2 Bro. C. C. 297), *Bennet v. Aburrow* (8 Ves. 616). Any instrument (having the prescribed formalities), by which the party intended to execute the power, of whatever nature, or in whatever terms expressed, will amount to a valid execution. The only question is, whether it contains evidence of that intention. In the case of *Bennett v. Aburrow* (8 Ves. 616), the late *Master of the Rolls* says, "This is always a question of intention, whether the party meant to execute the power or not. Formerly it was sometimes required, that there should be an express reference to the power. But that is not necessary now. The intention may be collected from other circumstances; as that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power." That is the doctrine which must decide this case. The testatrix had no personal property sufficient to satisfy the purposes of her will; having no more

than the sum of £100, she bequeaths two sums of that amount, and an annuity of £10; having no household furniture, plate, or linen, she makes a general bequest of all her property of those descriptions; her will therefore, unless considered as an execution of the power, [70] remains inoperative. The attestation of her will by three witnesses, is a demonstration that she designed it as an execution of the power. No motive can be assigned for that form of attestation, but an intention to pass real estate; and she could pass none except by virtue of her power. That circumstance brings this case within the authority of *Standen v. Standen* (2 Ves. Jun. 589, affirmed on appeal, *Standen v. Macnab*, 6 Bro. P. C. by Toml. 193), sanctioned by *Bradly v. Westcot* (13 Ves. 453). That the words of the will, "all my estate and effects," are sufficient to pass the absolute interest in real property, is too clear for argument. *Barnes v. Patch* (8 Ves. 604). *Doe v. Langlands* (14 East, 370).

Mr. Hart and Mr. Parker, for the Defendants. Admitting that a direct reference to the power is no longer required, at least the intention to execute the power must appear by necessary implication on the face of the instrument, which must be incapable of rational explanation, except as an exercise of the power. The question in this case is not whether the testatrix intended to execute the power, but whether, on the face of the will, she has given sufficient evidence of that intention? The Court cannot receive as evidence the circumstances of her personal estate. A will of personalty is ambulatory during the life of the testator, and speaks not from the date, but from the death. The inadequacy of a testator's personal property at the date of the will, to satisfy the bequests which it contains, affords no proof of an intention to dispose of a fund over which he possesses a power, because he may calculate on an accession of fortune; nor can a like inadequacy at the death, when the will operates, be evidence of his intention at the antecedent period of its date. To that fact therefore the Court cannot advert. *Nannock* [71] v. *Horton* (7 Ves. 391), *Jones v. Tucker* (2 Mer. 533). The will contains nothing which evinces a design to exercise the power. The words may be sufficient to pass realty, but do not necessarily denote that intention; nor can it be collected from the form of attestation. *Doe v. Rout* (7 Taunt. 77, S. C.; 2 Marsh. 397). The will not only contains no reference to the power, but is in terms expressly confined to the property of the testatrix.

Feb. 16. The *Master of the Rolls* [Sir Thomas Plumer]. The first point originally made by the Plaintiffs in this case, that *Isabella Common*, under the will of *Broune*, took an absolute estate in the event of her dying without issue, has been very properly abandoned. It is clear that she took only an interest for her life with a power of disposition. The Plaintiffs' case is therefore reduced to the second point, that her will is a valid execution of the power.

The first question is, whether the Court can collect, on the face of the will, so far as respects personalty, an intention in the testatrix to pass this property; I say on the face of the will, because it is now clear that the Court cannot look beyond the will. Whatever is the inadequacy of a testator's property to satisfy the terms of the will, and whatever may be the conviction of the Court of his intention to execute the power, the state of his personalty, at the time of the will or of the death, cannot be examined for the purpose of collecting evidence of his intention. In *Jones v. Tucker*, as strong a case as can be stated, the testatrix had given the precise sum of £100, of which she was empowered to dispose, having, as was alleged, no other fund to satisfy that bequest; yet the *Master of the Rolls*, although he declared his private opinion that she designed to dispose of the fund, which was the subject of her power, [72] refused an inquiry into the circumstances of her personal estate. In the present case, so far as respects personal property, it is clear that nothing on the face of the will denotes an intent to dispose of this fund. The will purports to pass the property of the testatrix, in terms appropriate for that purpose; without reference to the power, or to any thing which is the subject of it. On this instrument the judgment of the Court must be founded; nor can I, consistently with the principles to which I have adverted, receive the evidence that has been offered of the insufficiency of the testatrix's personal property to satisfy the purposes of her will.

The only remaining question (and but for that the case would hardly be open to argument) is, whether so far as the real estate is concerned, an intention to exercise her power can be collected from the will, and from the extrinsic evidence,



to which on the subject of realty the Court is permitted to resort. On that point there is a shade of novelty in this case; but, notwithstanding an anxiety to support the will, I should not feel justified in pronouncing a judicial opinion that the testatrix designed to pass this real property. The case of *Standen v. Standen* has established that with regard to real estate, the Court may examine whether the circumstances of the testator's property are such as to give effect to the will; and if this will had contained an unequivocal devise of realty, the Court, under the authority of that decision, must, in order to give operation to an instrument, which would otherwise be inoperative, have resorted to the fund the subject of the power. But this will contains no words which will be without operation unless referred to the power. On the contrary, the testatrix uses terms of generality, "all my estate and effects of whatever denomination." That clause would embrace all her real and personal property, but would it go beyond that? Can it extend to what is not the property of the testatrix? The words are not a specific [73] description of any estate, or of any species of interest; but adapted to comprehend every thing which was, and to exclude every thing which was not, a part of her property. In order to apply them to property not her's, we must reject the pronoun "my," and say, that by the phrase, my estate and effects, she meant to give what was not her own; that would be not to construe, but to contradict the words of the will. The distinction, notwithstanding some expressions of Lord Rosslyn in *Standen v. Standen*, being now established between property and power, these words, containing no direct reference to any particular fund, nothing in description to enable the Court to collect her intention to exercise her power, are not sufficient to designate with due certainty, property not her own, but of which she was empowered to dispose. Though she had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that.

I am bound therefore by the doctrine of the Court, to consider the will of *Isabella Common* as confined to her property, and not comprehending the fund over which she had a power.

Bill dismissed, without costs except as against the trustees.

[74] DAVIS v. The Duke of MARLBOROUGH. Jan. 15, 29, March 4, 1818.

The estates which by stat. 5 Ann. c. 3, for perpetuating the memory of the great actions performed by the Duke of M., are limited to the then Duke for life, remainder to S. his Duchess for life, remainder to the heirs male of the body of the Duke, remainder to all and every his daughters, in such manner as the titles are therein-before limited, in order that they may always "go along and be enjoyed with the titles and dignities," with a proviso restraining alienation to the prejudice of the persons in remainder, are not inalienable, and the rents and profits may be effectually aliened by the person in possession, as against himself. The pension granted by stat. 5 Ann. c. 4, "for the more honourable support of the dignities" of the Duke of M., and his posterity, payable out of the revenues of the Post-Office, to such person severally and successively to whom the same should come by virtue of that act, with a proviso that the acquaintance of every such person should be a sufficient discharge, is inalienable. A motion for a receiver therefore, by an annuitant, to secure whose annuity the Duke had executed an indenture for conveying the estates and the pension to a trustee, was granted as to the estates, and refused as to the pension.

By letters patent of the 5th of May 1705, Queen Anne having been enabled by stat. 3 & 4 Anne, c. 6), granted the honour and manor of *Woodstock*, and the hundred of *Wootton*, to John Duke of *Marlborough*, his heirs and assigns for ever. By stat. 5 Anne, c. 3 (entitled "an act for the settling of the honours and dignities of John Duke of *Marlborough* upon his posterity, and annexing the honour and manor of *Woodstock*, and house of *Blenheim*, to go along with the said honours"), for perpetuating the memory of the great actions performed by the Duke, after enacting that the titles and dignities which had been granted to him and the heirs male of his body, should on failure of issue male, be vested in his daughters successively, in a course of devolution therein particularly described, it was enacted, to the intent that the honour, manor, and park of *Woodstock*, and the house then erecting there

called *Blenheim*, and the hundred of *Wootton*, should always go along and be enjoyed with the titles and dignities aforesaid, that the Duke should be seized of the said honour, manor, &c., for life; and that after his decease the same should remain to *Sarah* his Duchess for life; and after her decease to the heirs male of the body of the Duke; and for default of such issue to all and every the daughters of the Duke, in such manner as the titles were [75] therein-before limited. By the fourth section of the act, a power of leasing was given to the then Duke and Duchess; and the fifth section contained the following proviso: "That neither the said Duke of *Marlborough*, or the heirs male of his body, nor any of his daughters, or the heirs male of their bodies, or any other person to whom the premises shall come or descend by virtue of the limitations aforesaid, shall have any power by fine or recovery, or any other act, assurance, or conveyance in the law, to hinder, bar, or disinherit any the person or persons to or upon whom the said manors, house, lands, tenements, hereditaments, or premises, are hereby vested or limited, from holding or enjoying the same, according to the limitations before in this act mentioned, other than and except such leases as the said Duke and Duchess may make, by virtue of the powers herein-before mentioned, and such other leases as tenants in tail may and are enabled to make, by virtue of the statute made in the two-and-thirtieth year of the reign of King *Henry* the Eighth, and grants of lands or tenements held by copy of Court Roll, according to the customs of the respective manors aforesaid; but all such fines, recoveries, act, assurances, and conveyances, other than such leases and grants by copy as aforesaid, shall be, and are hereby declared and enacted to be void."

By stat. 5 *Anne*, c. 4 (entitled, "an act for settling upon *John* Duke of *Marlborough*, and his posterity, a pension of £5000 *per annum*, for the more honourable support of their dignities, in like manner as his honours and dignities, and the honour and manor of *Woodstock*, and house of *Blenheim*, are already limited and settled"), reciting among other things the preceding statute, and the wish of the House of Commons to make some provision for the more honourable support of the Duke's dignities in his posterity, a pension of £5000 (issuing out of the revenues of the Post Office) was granted to the Duke for life, and after his decease to *Sarah*, his Duchess, for life, and after her de-[76]-cease to such persons severally and successively to whom, and in such manner as, the title, honours, and dignities, are by the preceding act limited. After directing that the annuity should be paid by the post-masters, &c., to *John* Duke of *Marlborough*, and "to all others severally and successively to whom the same should, after the decease of the said Duke, come, descend, remain, or belong by virtue of this act"; and that the acquittances of the Duke, and of every such other person, should be a sufficient discharge, the act contains a proviso, "that neither the said Duke of *Marlborough*, or any person to whom the said annuity or yearly pension of £5000 hereby enacted to be paid as aforesaid, shall come, descend, remain, or belong, by virtue of the limitations aforesaid, shall have power by any act, assurance, or conveyance in the law whatsoever, to hinder, bar, or disinherit any the person or persons, to whom the said annuity or yearly pension is, by virtue of this act, limited or appointed to come, descend, or remain, from holding, enjoying, receiving, or taking the same, according to the limitations thereof made by this act, but that every such act, assurance, or conveyance shall be, and is hereby declared and enacted to be, void."

The bill stated, that by indenture of the 21st of *March* 1811, *George* Duke of *Marlborough*, then Marquis of *Blandford*, in consideration of the sum of £999, granted to the Plaintiff an annuity of £155 for the term of 99 years, if the Duke should so long live, and for securing payment of the annuity, conveyed to a trustee the manors and hereditaments comprised in the act of *Anne*, and the pension of £5000 *per annum*, for a term of 500 years, to commence from the death of the then Duke of *Marlborough*, together with certain other estates for the residue of the respective terms to which the Duke was entitled therein (subject to certain annuities), upon trust among other things, if the annuity should be in arrear 50 days, by the rents and profits of the estates, or by felling timber, or by sale of underwood or [77] fixtures on the premises, to raise sums for payment of the arrears, with power of sale if the annuity should be in arrear for three months; and, by the same indenture, the Duke assigned the pension of £5000 (from the decease of the then Duke) to the same trustee, upon trust to secure the Plaintiff's annuity; and nominated the

trustee his attorney to demand and receive the pension ; and the Duke and the trustee appointed *Robert Withy* their receiver of the rents and profits of the premises conveyed, with a proviso that *Withy* should not act unless the annuity should be in arrear for six months.

After farther stating the death of the late Duke of *Marlborough* on the 30th of *January* 1817, and that the annuity had been unpaid and in arrear since the 21st of *September* 1815, the bill charged that the Duke of *Marlborough* had confessed judgments to divers persons, alleged to be creditors of the Duke, for divers sums, whose names, and the particulars of whose demands, the Plaintiff was unable to set forth, but whom he believed not to be *bona fide* creditors of the Duke, and that they had sued out and executed writs of *elegit* against the hereditaments, estates, and premises comprized in the indenture of the 21st of *March* 1811, and were then in possession of the said estates, and that by reason of the prior incumbrances affecting the said estates, and particularly of a term of 500 years created by an indenture of the 18th of *March* 1811, to secure an annuity of £155 granted by the Duke to one *Philips*, the Plaintiff was deprived of his legal remedies against the same.

The bill prayed an account of the arrears of the Plaintiff's annuity, and payment (according to its priority) of the amount, by sale or mortgage of the premises comprized in the indenture of 21st *March* 1811, a provision for the security of the future payments, and the appointment of a receiver of the rents and profits of the estates, and of the pension of £5000.

[78] On this day Mr. *Hart* and Mr. *Seton*, for the Plaintiff, moved that it might be referred to the Master to approve a proper person to be the receiver of the rents and profits of *Blenheim House* and *Woodstock Park*, and of the pension of £5000 *per annum*.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Hampson*, against the motion. An order for a receiver cannot be granted in the absence of judgment creditors who are in possession of the estates under writs of *elegit*. Before the Court will entertain the application, they must be made parties to the suit. But independently on this preliminary difficulty, an insuperable objection arises from the nature of the property.

The pension payable out of the revenues of the Post Office, granted (according to the express terms of the act) (Stat. 5 Ann. c. 4) as a provision for maintaining the dignity of the dukedom in perpetual memorial of the eminent services of which it was the reward, is inalienable. The law qualifies the rights of ownership by reference to the purpose for which they were conferred. The precise point in this case is laid down in an early authority in *Dyer* ; (1) and an argument *a fortiori* may be deduced from the decisions that the future pay of a military officer is not assignable at law (2) or in equity. (*Stone v. Lidderdale*, 2 Anstr. 533, and see *M'Carthy v. Goold*, 1 Ball & Beatty, 387.) The design of the grant would be defeated by alienation. It might as reasonably be contended [79] that the judges may assign their salaries, given for the support of the dignity of their office.

The inalienability of the pension is farther evinced by the provision in the act (5 Ann. c. 4, § 2, 3), which renders the remedy for the recovery, and the acquittance for the receipt, personal to the Duke and his posterity. Can the order of this Court, or the receipt of the receiver, be a discharge to the post-masters in passing their accounts ?

From the same principles which thus establish that the pension is inalienable, it follows, that the Duke possesses no power of alienation over the estates ; estates expressly limited to go along and be enjoyed with the titles. (5 Ann. c. 3, § 3.)

The counsel for the Plaintiff not having expected opposition to the motion for a receiver on the ground taken, desired time to refer to the authorities.

The Lord Chancellor [Eldon]. A case involving so many important questions certainly requires full discussion.

A pension for past services may be aliened ; but a pension for supporting the grantee in the performance of future duties, is inalienable. Can it be contended that the Lord Chancellor could alien his pension, payable out of the revenue of the Post Office, granted for sustaining the dignity of the office ?

This case differs from that of a grant to the grantee and his assigns (see *M'Carthy v. Goold*, 1 Ball & Beatty, 389) ; the pension being granted to the individual, in what mode can the assignee recover out of funds which are not accessible by the common forms of law ? If a [80] subject gives land to A. for his life, he gives to A.

and his assigns ; but where property is granted by a warrant from the crown, does it follow that the warrant extends to a person who is in no way described in that instrument ?

Considering the many important doctrines on the effect of grants by warrant, and by sign manual, regard being had to the funds out of which the grant is made, I must be cautious not to confound the law on a point of so much moment.

*Jan. 29.* On this day the case was mentioned again by Mr. *Hart* and Mr. *Selon*, in support of the motion for a receiver.

If there were any principles of public policy by which the alienation of this property would be restrained, what was the necessity for the introduction of the restrictive clauses in the acts of parliament ? The introduction of those clauses shows, that independently on the acts no such restriction existed, and that notwithstanding the acts no such restriction exists, except in the cases to which those clauses apply ; and these are admitted to be such alienations only by which the limitations in remainder would be defeated.

The same conclusion is derived from the statute, by which recoveries suffered by tenants in tail of lands granted by the crown for services, were made void. (Stat. 34 & 35 *Hen.* 8, c. 20.) If in the case of a Peer there was any principle of public policy, by which such a recovery would have been avoided, what was the necessity for the act ? Yet nobles are expressly included in it ; and the preamble states the policy of those grants to be, the encouragement thereby given to posterity to emulate the services of their ancestors.

[81] The cases of the pay of a military officer, or the salaries of the judges, are clearly distinguishable. The Courts of Law have held the half-pay of officers to be in the nature of a retainer for future services. *Flarty v. Odum* (3 *T. R.* 681), *Stone v. Lidderdale* (3 *Anstr.* 533). The salaries of the judges are of the same description. They are granted not merely to support the dignity of the office, but to secure to the state the performance of important duties.

It is held that an annuity, *pro consilio impendendo*, cannot be assigned ; but that an annuity *pro consilio impenso*, may. (See 1 *Dyer*, 2 a, n.) This is precisely the distinction which applies to the present case ; and while it restrains the alienation of the half-pay of officers, and the salaries of the judges, being provisions for future services, permits alienation in the instance of a grant like that to the Duke of *Marlborough*, designed as a reward for past services.

The same principle is recognized in the modern acts of parliament, by which pensions have been conferred on persons ennobled for services ; and in particular in the late acts by which the honours and estates of the Duke of *Wellington* are settled. (Stat. 41 *Geo.* 3, c. 59, s. 6 ; 42 *Geo.* 3, c. 113, s. 6 ; 54 *Geo.* 3, c. 161, s. 28.) The restrictive clauses in those acts expressly apply to alienation "other than those for the lives of the parties aliening" ; not thereby enabling the persons in possession to alien for their own lives, but by restraining, recognizing, the general power of alienation, which, independently on the acts, they possessed.

If, however, the Court should entertain any doubt as to the pension, there can be none as to the estates. The original grant of the estate was to the Duke in fee. [82] The original grant of the title was in tail. (Stat. 5 *Ann.* c. 3, s. 1 & 3.) It cannot therefore be contended, that originally the grant of the estates was in support of the dignity. Then what was the effect of the statute of *Anne* ? That statute proceeded upon the request of the Duke, that the estates, of which he was then seized in fee, as absolute owner, might be settled so as to accompany the title. (See the preamble.) He was competent to make such a settlement himself, but any settlement made by him might be defeated by the recovery of a tenant in tail : all therefore that he asked of the legislature was, that it would give the same protection to his grant, that the statute of *Henry VIII.* had given to the grant of the crown. This was accordingly done by the statute of *Anne*, and in nearly the same terms used by the statute of *Henry*. There is not a word in the statute of *Anne* of the estates being limited for the support of the dignity ; and any such expression would have been improper. This was the grant not of the crown or of the legislature, but of a subject, the Duke himself, who being at the time of the grant seized in fee of the estates, consented that for a particular purpose restrictions should be imposed upon his inheritance. The legislature has accordingly imposed restrictions in terms which it considered adequate to that purpose ; and the Court in determining

the effect of this contract, will not extend these restrictions beyond the terms. If the legislature had any further object, it is sufficient for the Plaintiff to say that it is not expressed.

The *dictum* from *Dyer*, on which so much reliance has been placed, is really inapplicable. It relates to what is called "creation money"; a grant which, when dignities ceased to be territorial, was substituted for the grant of territory, by which dignity was originally conferred. (See *Cruise on Dignities*, ch. 3, s. 62, p. 87; Co. Litt. 83 b; and *Hargrave's note*, 5. *Madox's Baronia Anglica*, p. 141, note.) An annuity of that description was therefore inherent in [83] the creation of the dignity, not, as in this case, arbitrarily annexed to it.

The *Lord Chancellor* [Eldon]. The decision on the question, Whether a receiver shall be appointed, will determine much of the rights of the parties. These grants were made for services performed, and for the support of dignities then created. The act (5 Ann. c. 3) converts the Duke into a tenant in tail of estates of which he was then tenant in fee. If the legislature intended that the rents and profits should be enjoyed by the Duke for the time being, that conclusion will depend, I think, more on policy than on the terms of the act. Confining the construction to those terms, I am of opinion that the legislature has not used words sufficient to prevent alienation of the rents and profits. If such was the intention, *quod voluit non dixit*.

If on the construction of this statute creditors may have execution by writs of *elegit* against the estate, it must be competent to this Court to grant a receiver. But creditors can have no execution at law against the pension, and analogy to the law therefore will not support their claim in the instance of the pension, as of the land.

The clause specifying the acquittance of the Duke for the time being as the proper discharge, is introduced into the act in order to apprise the officer what voucher he is to produce when he passes his account; and also to subject him to an action for refusal of payment on tender of such acquittance; but if an assignee claimed to receive the pension, and the officer refused payment without the acquittance of the Duke, would he be subject to an action?

[84] On this day, the *Lord Chancellor*, without farther observation, granted the order for a receiver as to the estates (without prejudice to the rights of the judgment creditors in possession), but refused it as to the pension.

(1) "If a man were created Duke, and, for the maintenance of his dignity, the King granted him £20 as an annuity, he could not grant that to any other, for it is incidental to his dignity." *Dyer*, 2 a.

(2) *Flarty v. Odum*, 3 T. R. 681. *Lidderdale v. The Duke of Montrose*, 4 T. R. 248. *Barwick v. Reade*, 1 H. Bl. 627, and see *Ardbuckle v. Cowtan*, 3 B. & P. 321. *Priddy v. Rose*, 3 Mer. 86.

REDFEARN v. SOWERBY. BOLTON v. TATE. Feb. 12, [1818].

[S. C. 1 Wils. Ch. 96.]

The Court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill. It seems that the summary jurisdiction of the Court extends to the representatives of a solicitor.

The solicitor of the plaintiff having died, and his widow and administratrix refusing to deliver to the new solicitor the papers relating to the cause, unless security was given for the payment of the costs incurred, a motion was made, that the administratrix might be ordered, in a fortnight after notice, to deliver to the solicitor of *George Gibson*, the assignee of the Plaintiff under the insolvent debtor's act, all deeds, papers, and writings, in her custody or power, relating to this cause, or to any other suit or business of the plaintiff. The assignee and his solicitor undertaking to return all such deeds, papers, and writings to the administratrix, or to abide the order of the Court.

Mr. Hart in support of the motion.

Mr. Joseph Martin for the administratrix.

The *Lord Chancellor* [Eldon]. I recollect no instance of such a motion. If a

party chuses that his solicitor shall not proceed, it would be vain for him to insist on taking the papers out of the solicitor's hands, till what is due to him has been paid. Here the disability arises by the act of God, and we are to consider the [85] effect of that disability on the rights of the representative. You cannot take the papers from the administratrix without giving her security that her lien shall be discharged. The question is, Whether she is bound to facilitate the progress of the cause, unless that personal liability is satisfied, the proceedings being stayed, not by the default of any party, but by the act of God? I should regret to hold that I have no jurisdiction over the representatives of a solicitor, or that a suit in equity or an action is necessary; but I feel a difficulty in saying, that you can have the papers without discharging the lien.

Motion refused.

WILLIAM AKHURST and EDWARD BARR DUDDING, Assignees of JOHN PHILIPS, a Bankrupt, *Plaintiffs*, and THOMAS JACKSON and JAMES HEUSTER, *Defendants*. *Rolls*. Feb. 16, [1818].

[See *Atwood v. Maude*, 1868, L. R. 3 Ch. 372.]

A sole trader having agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of 18 years, and having become bankrupt five months after the commencement of the partnership, when only one instalment was due, his assignees are entitled, at the respective periods, to receive the remaining instalments.

In June 1812, *Jackson* and *Heuster*, and the bankrupt *Philips*, by indenture of that date, mutually covenanted that they would be partners in the trade of a fishmonger, then carried on by *Philips* in *Bond-street*; the partnership to commence on the 29th day of that month, and continue during a period of 18 years, with a money capital of £2000, £1000 to be contributed by *Philips*, and £500 by each of the Defendants; the partners being interested in the partnership stock, in proportion to their respective contributions of money-capital. In consideration of being ad-[86]-mitted into the business, the Defendants agreed to pay to *Philips* £3500, of which £700 were to be allowed to the defendant *Heuster*, for the good-will and stock of the trade then carried on by him as a fishmonger; £1000 were to be paid on the 29th of September 1812; £1000 on the 25th of December 1812; and the remaining £800 on the 25th of March 1813.

The partnership between *Philips* and the Defendants accordingly commenced on the 29th of June 1812. In November following *Philips*, having committed an act of bankruptcy in the preceding month, was declared a bankrupt. The defendants had in the mean time paid £704 on account of the sum of £3500.

The bill filed by the assignees of *Philips* prayed an account of the effects and debts of the partnership, and of the balance due in respect of the sum of £3500, and a declaration that the Plaintiffs were entitled to such balance.

The Defendants by their answer admitted that when they agreed to become partners with *Philips*, they had been informed, and believed, that he was in a state of embarrassment, for want of a present sum of money to answer the demands of his creditors; but they denied that they had been informed by *Philips*, or knew, or believed, or had any reason to believe, that he was wholly insolvent, or unable to satisfy his creditors, except as aforesaid; on the contrary, they were informed by *Philips*, and had every reason to believe, that by the assistance of the money agreed to be paid him, as a consideration for the partnership, he would be able to extricate himself from his difficulties. They admitted that *Philips* did not at any time represent to them that he was in good circumstances, or that his affairs were not involved to such extent as before-mentioned.

[87] The Defendants insisted, that as the consideration for the sum of £3500 totally failed by the bankruptcy of *Philips*, or at least such a proportion of the consideration so failed as was more than equivalent to the amount of the instalments which had not then become payable, the Plaintiffs, being unable to perform the contract for the performance of which the sum of £3500 was to be paid, were not entitled to the instalments unpaid at the time of the bankruptcy

Mr. *Roupel* for the Plaintiffs. The contract has been executed by the bankrupt, and his assignees are entitled to receive what remains unpaid of the price. The Defendants have had the benefit for which they contracted; they purchased the right of becoming the partners of *Philips*, and he admitted them into partnership. That partnership was in its nature subject to be determined by various contingencies, and among others by the bankruptcy of any of the partners. The Defendants cannot pretend that they purchased with an express guarantee against bankruptcy, or for the duration of the partnership during the full term of 18 years; they might as reasonably insist on a guarantee that the trade should be profitable. They purchased an uncertainty, and the mere fact that the event has been unfavourable affords them no title to be relieved in equity from the performance of their part of a contract which is admitted to be binding at law. The principle is familiar to the courts, and has prevailed in cases much stronger than the present. *Capper v. Mortimer* (1 Bro. C. C. 156), *Lever v. Jackson* (3 Bro. C. C. 605, and see *Coles v. Trecothick*, 9 Ves. 246). The case of *Ex parte Broome* (1 Rose, 69) is a decision, that as between the parties, against fraud, the court will relieve; but the fair inference from that decision is, that relief is confined to the instance of fraud. In this [88] transaction fraud is no ingredient; the Defendants admit that they knew *Philips* to be in a state of pecuniary embarrassment; they concluded the agreement on the calculation that if he could be relieved from that embarrassment, they would become partners in a profitable business, but with the knowledge, that his bankruptcy was an event not altogether improbable. The contract would not be vitiated by his insolvency at the time, if such were the fact. *Ex parte Peake* (1 Madd. 346).

Mr. *Bell* and Mr. *Wilbraham* for the Defendants. Admitting that the covenants in this case are independent; and that the sum of £3500 being payable at a time long prior to the expiration of the partnership term, the Plaintiffs might recover at law without averring performance of the covenants on the part of *Philips*, (1) the question is, Whether a court of equity will enforce a contract against a purchaser who cannot have the subject of his purchase. *Philips*, by implication at least, represented himself as a person capable of transferring the good-will of the trade annexed to his person; for that purpose he agreed to become a partner during the term of 18 years; within a few months after that agreement, by his own act, an act of bankruptcy, he dissolved the partnership, and disqualified himself for carrying on the business. Will the Court in such circumstances compel payment of the whole consideration? In equity, can any thing more be due than a proportion of the profits during the co-partnership? Had the money been paid, the remedy of the Defendants would have been by action at law for breach of covenant; but the whole question being now before a Court of Equity in taking the account, on what principle are they to be de-[89]-prived of the advantage arising from possession of the money, and compelled to complete the contract on their part, when it has become impossible for the bankrupt to perform it on his? Suppose that a trader who had sold the lease of a trade carried on in leasehold premises, before the last instalment of the purchase money became due, surrendered the lease, would equity permit him to enforce payment. There is no case exactly in point, but the principle seems clear.

The *Master of the Rolls* [Sir Thomas Plumer]. The absence of authorities is a strong circumstance. In almost all partnerships a loss follows the bankruptcy of any of the partners; a thousand instances must have occurred of loss by bankruptcy in circumstances similar to the present, yet no precedent is produced of the interposition of a Court of Equity. The reason is evident. The loss is not a breach of the contract, but a contingency subject to which the parties purchased. The Defendants bought the right of becoming partners; they became partners; the partnership ended by an event by which it was, in its nature, liable to be determined. It cannot be pretended that *Philips* contracted that the partnership should continue during 18 years with a positive stipulation against bankruptcy, death, &c. For those events the parties might have provided by their agreement; but no such provision is made. I cannot venture to originate the doctrine that a Court of Equity ought to interpose to stop the payment of instalments conformably to the contract, because after the contract has been performed by admission to the partnership, that partnership is determined by bankruptcy. Upon admission, the whole price became, according to the terms of the agreement, *debitum in presenti*, although *solvendum in futuro*. In equity, as well as at law, the contract has been performed,

and the consideration must be paid. There is no proof of fraud ; the Defendants had notice of [90] *Philips'* embarrassment. The Plaintiffs are entitled to a decree, but this is not a case for costs.

(1) The cases on this subject are collected in *Selwyn*, N. P. v. 1, p. 480-491, 105-114, and in Serjeant *Williams'* edition of *Saunders*, v. 1, p. 320, n. 4 ; v. 2, p. 352, n. 3.

BELL v. FREE. *Rolls. Feb. 17, 20, [1818].*

[S. C. 1 Wils. Ch. 51. Disapproved, *M'Kewan's Case*, 1877, 6 Ch. D. 455.]

Two persons having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against all "actions, suits, costs, charges, damages, demands, sums of money, and expenses," which might be incurred by reason of the non-payment thereof, one who on the insolvency of the other had made payments on account of his moiety, is not entitled to interest on such payments.

*George Clark and Thomas Plummer* having jointly and severally covenanted to pay to *Frances du Puy* an annuity of £300 for her life, executed mutual covenants that each would pay one moiety of the annuity, and indemnify the other against "all and all manner of action and actions, suit and suits, costs, charges, damages, demands, sum and sums of money and expenses whatsoever, which might be incurred by reason of the non-payment thereof, or of any part thereof, in the manner covenanted.

*Clark* having died intestate and insolvent, a bill was filed for the administration of his estate ; and the master reported the sum of £1200 to be due from *Clark's* estate to *Plummer*, for payments made by *Plummer* on account of the intestate's moiety of the annuity. On this report *Plummer* presented a petition that he might be allowed the sum of £183, 11s. 9d., being the amount of interest on such payments at 4 per cent. per annum.

*Mr. Heald* and *Mr. Stephen* for *Plummer*.

*Sir Arthur Pigott*, *Mr. Hart* and *Mr. Winthrop*, against the petition.

*Feb. 20.* The Master of the Rolls [*Sir Thomas Plumer*]. The question is. Whether, under the terms of this covenant of indemnity, the petitioner is entitled to interest on the sums advanced by him in discharge of the moiety of the annuity payable by the intestate ; not whether interest [91] might have been given by a jury (in the form of damages), or by the court, but whether it can be allowed by the master in the distribution of an insolvent estate. It is clear, by the course of practice, that the Master has no such authority. He is to compute interest on debts which carry interest, but he cannot allow it in the shape of damages. The case of a promissory note is a solitary exception, and as it seems, of recent introduction. I think that the petitioner would not be entitled to interest at law. As between the parties, although the contract is to pay the money and damages, there is no express contract to pay interest, nor any course of dealing from which such a contract can be implied. The case therefore is not within the rule proposed by Lord *Ellenborough* in *Havilland v. Bowerbank* (1 *Campb.* 50), and confirmed by the Court of King's Bench in *De Bernales v. Fuller* (2 *Campb.* 426). In a subsequent case at law, *Gordon v. Swan* (12 *East*, 419), which I mention to show the course of proceeding on this subject, the Court refused interest for delay of payment ; Lord *Ellenborough* repeating his opinion, that the allowance of interest should be confined to bills of exchange and the like instruments, and to agreements reserving interest. I shall mention only one other case, that of *Rigby v. Macnamara* (2 *Cox*, 415), which is extremely similar to the present. There *Powell* and *Rigby* being jointly bound for payment of £90,000 to Messrs. *Drummond*, *Rigby* executed a counter-bond to *Powell*, in the penalty of £180,000, conditioned for indemnifying *Powell*, his executors, &c., against all costs, charges, damages, &c., which he or they might sustain on account of the non-payment of the sum of £90,000 and interest, or by reason of *Powell* having executed the joint-bond, in any wise howsoever. *Powell's* executors having paid large sums for principal and interest of the £90,000, Lord *Thurlow* held that against *Rigby's* estate, they could claim no more than [92] Messrs. *Drummond*, and were



therefore entitled to interest on the payments on account of principal only, but not on the payments on account of interest. In that case the general words of indemnity were held not to entitle the surety to interest, although secured by a penalty. The concluding passage of the judgment (p. 420) seems to imply, that it was not then the practice for the Master to compute interest on promissory notes.

On these authorities it is extremely clear that the Master was right in refusing interest, and that part of the petition must be dismissed.

COOPER v. THORPE. *Rolls. Feb. 18, 23, [1818].*

Under an act for inclosing lands in the townships of A., S., and W., directing the commissioners to allot to the rector of the parish of W., in lieu of the tithes of the townships of S. and W., so much of the lands to be enclosed in the township of S., and of the titheable parts of the township of W., as should, quantity, quality, and situation considered, contain or be equal in value to two-fifteenth parts of the titheable places thereof, and to make to the rector of W. and the vicar of B., in lieu of the tithes of a part of the lands in the townships of S. and A., to which they were entitled, a like allotment, equal to two-fifteenth parts of such lands, and declaring that after the enrolment of the award of the commissioners, all tithes arising within the lands enclosed should cease, an award by which the commissioners allotted to the rector of W., "in lieu of the tithes of S. and A.," lands more in quantity than two-fifteenth parts of the lands enclosed in S. and A., but less than two-fifteenth parts of the lands enclosed in S., A., and W., without any allotment in lieu of the tithes of W., is a bar to the claim of tithes in W. The award would not be vitiated by error in the allotment. The act having directed the commissioners, in estimating the proportion, to have regard to quality and situation, deficiency in quantity is not proof of error.

By an act of parliament 9 Geo. 3, c. 51, "for dividing and enclosing certain open fields, lands, and grounds, in the several townships of *Atterby*, *Snitterby*, and *Waddingham*, in the county of *Lincoln*," reciting among other things, that within the township of *Atterby*, in the parish of *Bishop Norton*, and within the townships of *Snitterby* and *Waddingham*, in the parish of *Waddingham*, were several open and uninclosed arable fields, common pastures, carrs, and waste grounds, or other open and common lands and grounds, distinguished by several names, containing in the whole [93] 3000 acres, or thereabout; that *Robert Carter*, clerk, was rector of the parish of *Waddingham cum Snitterby*, and as such seized of certain glebe lands in the said open fields and grounds, and entitled to all the tithes, great and small, arising within the titheable places of that parish, and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Atterby*; and that *George Jolland*, clerk, was vicar of *Bishop Norton*, and as such seized of certain glebe lands in the said open fields and grounds, and entitled to all the rest of the tithes, great and small, arising within the titheable places of the township of *Atterby*, and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Snitterby*; it was enacted, "that all the said open arable fields, common pastures, carrs, and waste grounds, or other open and common grounds in the said several townships, should be divided, set out, and allotted," by certain commissioners, in manner after declared; that such person as the commissioners should appoint should at or before a time fixed, take, and lay before the commissioners, a survey and admeasurement of the lands directed to be inclosed within the townships of *Atterby*, *Snitterby*, and *Waddingham*, and also of the ancient enclosed lands within the townships of *Atterby* and *Snitterby*, containing the number of acres, roods, and perches, in the said several townships, and of each proprietor's respective share thereof; that the commissioners and surveyor should have power to enter upon, survey, and admeasure, the lands to be enclosed within the townships of *Atterby*, *Snitterby*, and *Waddingham*, and the ancient inclosed lands in the townships of *Atterby* and *Snitterby*, but not any ancient enclosed lands in the township of *Waddingham*: that in case any doubt should arise concerning the claim of any of the proprietors, or any dispute between them concerning their respective shares, rights, and interests in the lands to be enclosed, or the tithes arising upon the same, or the shares which they ought to have upon the intended division, the commissioners should, by [94] examination of wit-

nesses, upon oath, and upon other proper and sufficient evidence, inquiry, and satisfaction, hear and determine the same; and such determination should be binding and conclusive to all parties.

The act then directed the commissioners, within six months after such survey should have been laid before them, or as soon after as conveniently might be, in the first place to allot to *Carter* and his successors, rectors of the parish of *Waddingham cum Snitterby*, such parcels of the arable fields common pastures, and carrs, within the township of *Snitterby* (except the common pasture called the *Carr side*), directed to be enclosed, as should, in their judgment, be equal in value to, and a full satisfaction for the present glebe lands, of the rector within the last-mentioned lands to be enclosed; and then to allot to *Carter* and his successors, rectors as aforesaid, such parcel or parcels of the residue of the same arable fields, common pastures, and carrs in *Snitterby*, and also of the titheable parts of the township of *Waddingham*, as should (quantity, quality, and situation considered) contain, or be equal in value to two-fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full compensation for all the tithes, dues, duties, and payments whatsoever, belonging to the said rector, and arising within the same lands and grounds; and further to allot to *Carter* and his successors (rectors as aforesaid) such parcel or parcels of the arable fields of *Snitterby* as the commissioners should (quantity, quality, and situation considered) adjudge to be equal in value to the tithes of the ancient inclosed lands in *Snitterby*; and then to allot to *Jolland* and his successors, vicars of *Bishop Norton*, such parcels of the arable fields, common pastures, and carrs, within the township of *Atterby*, directed to be enclosed (except the common pasture called the *Carr side*), as should, in the judgment of the Commissioners, be equal in value to, and a full satisfaction for, the present glebe lands of the said vicar, in the last-mentioned [95] lands; and also to allot to *Jolland* and his successors, vicars as aforesaid, such parcels of the residue of the same arable fields, common pastures, and carrs in *Atterby*, as should (quantity, quality, and situation considered) contain, or be equal in value to, two-fifteenth parts of the same fields, and in lieu of, and as a compensation for, all the tithes, &c., whatsoever arising within the arable fields, common pastures, and carrs of *Atterby* (except as before excepted); and then to allot to *Jolland*, and his successors, vicars as aforesaid, such parcels of the last-mentioned arable fields as the commissioners should (quantity, quality, and situation considered) adjudge to be equal in value to the tithes of the ancient enclosed lands in *Atterby*; and further to allot to *Carter* (rector as aforesaid), and *Jolland* (vicar as aforesaid), such parcels of the common pasture called the *Carr side* pasture, as (quantity, quality, and situation considered) should contain, or be equal in value to, two-fifteenth parts of the titheable grounds therein contained, in lieu of, and as a full compensation for, all tithes, &c., arising within the said *Carr side* pasture, and respectively belonging to the rector and vicar as aforesaid; which last-mentioned two-fifteenth parts should be divided between the rector and vicar and their successors respectively, in such manner, and in such proportion as the commissioners should adjudge to be adequate in value to their respective shares and interests in the last-mentioned tithes; and moreover to allot to the said rector and vicar, and their successors, such parcels of the residue of the arable fields of *Atterby* and *Snitterby*, as in the judgment of the commissioners should (quantity, quality, and situation considered) contain, or be equal in value to, two-fifteenth parts of the lands lying dispersed in the arable fields of *Atterby* and *Snitterby*, the tithes whereof respectively belonged to the said rector and vicar, in lieu of, and as a compensation for, the last-mentioned tithes; which lands so to be allotted, as last expressed, should be divided between the rector and vicar, and their successors respectively, in such manner and proportion as the com-[96]-missioners should adjudge to be adequate in value to their respective shares and interests in the same tithes.

After prescribing the mode of allotting the residue of the lands among the persons interested, the act directed, that the commissioners, in making the several allotments of such parts of the lands as were lying within the *Carrs* belonging to the respective townships, should have regard more especially to the quantity, quality, and species of the lands belonging to each proprietor or party interested therein, and to the state and condition of such lands with respect to drainage, at the time of making such allotments, by reason of the charge to which such allotments would be subject by the annual rate or assessment directed to be laid thereupon by an act of parliament.

7 Geo. 3, for draining the lands lying within the level of *Ancholme* (of which the lands within the carrs are part), and the allotments so to be made to each proprietor or party interested in the carrs should contain, as near as the circumstances of the case would admit, the same quantity or proportion of dry land not liable to be flooded, and of such other species of land respectively as such proprietor or party interested was possessed of or entitled to at the time of making such allotments, and as near as might be, in the same state, quality, and condition, so that the several shares of the proprietors of, or persons interested in, the lands within the carrs, might not, after such allotments, be subject to the said annual rate or assessment in any greater or less proportion with respect to the value of each of the said shares than the same were subject to at the time of passing the act; and that the commissioners in making the several allotments of the residue of the lands to be enclosed should have regard to the situation and quality, as well as quantity, of the lands belonging to each person interested, and to the right of common and other property of every such person, and also to the situation and quality, as well as quantity, of the lands to be allotted in lieu thereof; and the share or shares to be allotted [97] to each of the proprietors of the said residue of the lands, should be allotted as near as conveniently might be to the messuages, cottages, or other lands or tenements belonging to the parties respectively.

The act then provided, that within six months after the commissioners had completed the allotments, or as soon after as conveniently might be, they should draw up an award or instrument in writing, which should express distinctly, and separately, the quantity of acres, roods, and perches, contained in the arable fields, common pastures, carrs, and waste grounds, and the quantity and contents, situation, buttals, and boundaries of the several parcels and allotments respectively by them set out and assigned by virtue of the act, and also the situation, buttals, and boundaries of the respective townships of *Atterby*, *Snitterby*, and *Waddingham*, which award or instrument should be engrossed on parchment, and signed and sealed by the commissioners, and should, within six months after the execution thereof, be enrolled by the clerk of the peace for the division of *Lindsey*; and the several allotments and divisions, and all orders, directions, regulations, and determinations made as aforesaid, and declared in the award, should be binding and conclusive upon all the parties interested; and "immediately after the enrolment of the said award, all manner of tithes, ecclesiastical dues, duties, and payments, of what nature or kind soever, arising, renewing, encreasing, payable, or happening within or out of the lands and grounds thereby directed to be enclosed, or within the said ancient enclosed lands or grounds, or otherwise howsoever, shall cease and for ever be extinguished."

A subsequent clause provided, that any person who should think himself aggrieved by any thing done in pursuance of the act (other than and except such orders and determinations of the commissioners, which were declared [98] to be final), might appeal to the next general quarter session of the peace for the division of *Lindsey*; and the determination of the justices should be conclusive.

By their award duly enrolled, the commissioners allotted to the rector of *Waddingham* 326 acres within the parish; namely, 33 acres, 3 roods, and 32 perches, as a compensation for the glebe land and right of common; 223 acres, 1 rood, and 32 perches, "in lieu of and as a compensation for all the tithes, dues, duties, and payments belonging to him within the open fields, common pastures, and carrs of the townships of *Snitterby* and *Atterby*;" 17 acres and 2 perches for the tithes of the ancient enclosed lands in *Snitterby*; and 51 acres, 1 rood, and 33 perches, for the ancient glebe lands and rights of common in the north *Carr*, south *Carr*, *Carr* side, and the acre field in *Waddingham*.

The lands enclosed under the act were, in *Snitterby* 1532 acres, 3 roods, and 34 perches, and in *Waddingham* 1279 acres and 39 perches. Of the lands enclosed in *Snitterby*, after deducting the allotment for glebe and rights of common, two-fifteenths amount to about 200 acres; and of the lands enclosed in *Waddingham*, after deducting the like allotment, two-fifteenths amount to about 160 acres.

The bill was filed by the rector of *Waddingham cum Snitterby*, against occupiers of lands within the township of *Waddingham*, for an account and payment of tithes. The Defendants, by their answer, stated the act of parliament and the award, and insisted, that although the allotment in lieu of tithes was not expressed

to be made in respect of lands enclosed under the act in the township of *Waddingham*, yet those lands were exempted by the award; the allotment being designed by the commissioners as a com-[99]pensation for the tithes of all the lands within the operation of the act, and greatly exceeding what the rector was entitled to in respect of the tithes of the townships of *Snitterby* and *Atterby* only.

Mr. *Bell* and Mr. *Shadwell* for the Plaintiff. The allotment in lieu of tithe having been expressly made for the tithes of the townships of *Atterby* and *Snitterby* only, is not a bar to the rector's claim for the tithes of *Waddingham*. The allotment of land in *Waddingham* is expressed to be in compensation of glebe and right of common only. The award, therefore, not containing a compensation for the whole tithe is not such as the act required. An award must conform to the submission. If a person carrying on business as a merchant, engages in working a lead mine, and in a colliery, and has accounts in each of those concerns with the same individual, on a reference of the question what is due, should the arbitrators award a sum due on the mercantile account, another sum on the mine account, and omit to state what is due on the colliery account, the award is void. The question here is, Whether, when the commissioners make an allotment in lieu of the tithes of A. and of B., but make no allotment in lieu of the tithes of C., the Court will consider their award as a bar to the tithes of C. It cannot be contended that the commissioners designed the allotment as a compensation for the tithes of *Waddingham*, for they have expressly declared it to be a compensation for the tithes of *Snitterby* and *Atterby*. No such award therefore exists as is required by the act; and the existence of such an award is a condition precedent to the operation of the act in extinguishment of the right to tithes.

Mr. *Hart* and Mr. *Stephen* for the Defendants, insisted on the express terms of the act as constituting the award a [100] bar to the claim of tithes for every part of the lands within its operation.

*Feb. 23.* The *Master of the Rolls* [Sir Thomas Plumer]. The Plaintiff having substantiated his character of rector, and the occupation by the Defendants of lands within the parish from which titheable matters arise, has established a *prima facie* title to the tithes. The defence is, a local act of parliament passed in 1769 for the enclosure of lands in three townships, two within the parish of *Waddingham*, and the third contiguous. The Defendants offer this as a complete bar to the rector's claim; insisting, that from the enrolment of the award of the commissioners, tithes are to cease on the lands enclosed, and that the execution and enrolment of the award, and the situation of the lands in question, within the operation of the act, being proved, by its distinct and positive terms, the right to tithes is extinguished.

The words on which they rely are, that "immediately after the enrolment of the award, all manner of tithes arising, &c., within or out of the lands directed to be enclosed, shall cease and for ever be extinguished." (See the clause, 1 *Swans*. 97.) That is offered as a parliamentary exemption of the lands in question; and such it certainly appears, on production of the award, and proof that the lands are within the operation of the act. It is then alleged by the rector (not disputing that the award would be a bar, were it such as the act proposed, that is, had the allotments been such as were prescribed), that to render the award a bar to the right of tithes, it must provide a satisfactory compensation for that right, and by the terms of the act, that satisfactory compensation is ascertained to be two-fifteenths of the land in [101] the different townships; and he insists that the award not containing allotments in value or quantity conformable to that description, cannot operate in extinguishment of his rectorial claim. The case thus presents three distinct questions: 1. Whether it is competent to the rector now to inquire into the propriety of the allotments? 2. Whether he has proved that the award is not such as the act proposed, that is, that the allotments are not such as the rector was entitled to receive? 3. Whether, if he establishes both those propositions, the consequence is that the award is invalid?

It is not necessary to examine the first question. Admitting for the present the competence of the rector to inquire into the propriety of the allotments, has he shown sufficient to impeach the judgment of the commissioners? It appears that they entered on their duty; that an allotment of about 300 acres was made to the then rector, was accepted by him, and has been enjoyed by his successors ever since; and that the quantity of that allotment was the subject of inquiry and adjudication

by the commissioners. A Court reviewing the judgment of any legitimate tribunal, is bound to presume *omnia rite acta*, much more when that review is undertaken after the lapse of half a century. It is sufficient for those who rely on the judgment to produce it; it cannot be impeached without clear and indisputable evidence of error. The subject of adjudication in the present case happens to be involved in considerable obscurity. The rectory was peculiarly circumstanced. The parish of *Waddingham cum Snitterby* being contiguous to the township of *Atterby*, within the parish of *Bishop Norton*, the vicar of *Bishop Norton*, and the rector of *Waddingham*, both possessed interchangeably rights in the lands of *Atterby* and *Snitterby*. The act therefore of necessity provided, in the first instance, an united compensation (which it fixed at two-fifteenths), and then a division of that compensation. In the description of the lands also, [102] an obscurity appears, some part of the parish of *Waddingham* not being titheable. It is clear that all the ancient enclosed lands of *Waddingham* were to remain untouched. In directing surveys of ancient enclosed lands, the act expressly excepts those in the township of *Waddingham*. Whatever belonged to them, as to which there is no evidence, they are constantly omitted, and cannot be included. Nor were all the unenclosed lands of *Waddingham* to be comprehended within the operation of the act. The allotment of two-fifteenths is directed to be made of the titheable parts of the township of *Waddingham*. (See the clause, 1 *Swans*. 94.) Having first therefore excluded the ancient enclosed lands of *Waddingham*, the act subjoins a further qualification, that the allotment should be made of the titheable parts only of the unenclosed lands, leaving it of necessity to the tribunal which it has constituted, to determine what fall under one description, and what under the other. The commissioners, therefore, laying out of the question all the enclosed lands, and all about to be enclosed which they should find to be not titheable, were to set out two-fifteenth parts of the remainder; but in the estimation of that proportion the act expressly directs that quality and situation, as well as quantity, should be considered; and seeming to contemplate a district, the parts of which, some being subject to floods and to a drainage tax, were of very unequal value, studiously calls the attention of the commissioners to those circumstances in a distinct section for that purpose. This complex question then of the adequacy of the allotment was submitted to the consideration of the commissioners; and, I think, submitted without appeal. By the express terms of the act, all disputes concerning rights in the lands to be enclosed, or the tithes arising from them, are to be determined by the commissioners, and their determination is to be final. The subsequent clause, which gives a right of appeal to the quarter sessions, contain-[103]-ing an exception of cases in which the award is conclusive, cannot extend to the allotments. The commissioners are authorized to adjudicate finally on the subject of quantity, quality, liability to tithe; those points they must have considered had they duly exercised their power; and I am bound to suppose them so to have done, and to give them credit for a just adjudication. Nor can it be supposed that the rector failed to submit to their consideration whatever was required for enabling them to assign to him a proper allotment.

But it is said that the impropriety of the allotment is in proof: first, by computation it is found to be deficient in quantity, to the extent of about 140 acres; secondly, in the award no reference is made to the tithes of *Waddingham*, and if any lands there were titheable, no compensation having been given for them, the rector has not received the indemnity provided by the act. I have anxiously considered whether it is possible now to determine that the rector had or had not a due allotment. In description, on the face of the award there is no reference to the tithes of *Waddingham*; it cannot however be said that no regard was had to that township, for an allotment is expressly made of lands enclosed there, in respect of the *Carr* side pasture, &c. But in quantity there seems a deficiency. The allotment to the rector was more than two-fifteenths of the whole, omitting *Waddingham*, but less than two-fifteenths, including that township. If quantity is the criterion, therefore, there is error; but how does it appear that the deficiency in quantity was not compensated by superiority in value? Or, how can it be known what evidence was produced to shew which of the lands included were titheable, and which not? If the larger, or a considerable, part of the unenclosed lands in *Waddingham* was not titheable, as to which we have no evidence, undoubtedly there would be great error in undertaking to determine, by comparison of quantity

alone, the adequacy or inadequacy of the allot-[104]-ment. Supposing the error only in description, and that an allotment of two-fifteenth parts was made to the rector, such error in description, more especially in a parish so circumstanced, would not vitiate an award, under which, the rector having had his full compensation, quantity and value considered, no injustice would be done. At this distant period, we examine the transaction with very imperfect materials; the lapse of time occasions great difficulty in determining what were the data or principles which guided the commissioners. On that subject we can only conjecture; but this we know, that the allotment was made, was accepted by the rector, and has been constantly acquiesced in since without dispute, till the institution of the present suit. If, as is said, it has in point of enjoyment been departed from, no complaint was ever made that the commissioners failed in their duty. On this question, then, I am obliged to say, that the rector has not, by clear and satisfactory evidence, impeached the judgment of the commissioners, and shown error in the award.

Had it depended on that point, a question might arise what course should be pursued; but I have never entertained a doubt, that under this claim there is no necessity for adverting to that part of the case, being clearly of opinion that if an error were proved, in the omission of a proper allotment, yet on the construction of the act, the bar which it creates is insuperable. It is an independent substantive bar to the claim of tithes in kind for ever; not conditional, but positive. The legislature has declared that after a certain event tithes shall cease; what is that event? The enrolment of the award. From that time the tithes are extinguished. The proposition of the rector is, that the bar does not arise if he can show error in the award. That argument confounds two things perfectly distinct; the existence, and the justice, of the award. The act designed not to leave to the parties the right, at any future time, to question the adjudication of the commis-[105]-sioners, but declared it final and conclusive. Consider the consequence of a contrary decision. Under the act the award cannot be bad as to the rector, and good as to others. In order to succeed, he must show that there is no award enrolled; for if there is, his case fails. His argument is, that because there is an error in the allotment, it ceases to be an award. Then there is nothing to determine the interest in these 3000 acres: the incumbent has a title to tithes on all the lands, and the rights stand as if the act had not been passed. On that principle, if any one proprietor can show error in respect to him, one, perhaps, of 300 or 400 claimants, and whether he brought forward his claim or not, the moment it appears that there is a right not compensated which it was intended to compensate, there is no award; so that this instrument, which was to be the *lex loci*, to determine every man's right and title, the binding rule to govern the property for ever, with a positive direction that the decisions which it records should be conclusive, is at an end, because there is error. The consequences of such doctrine refute it; but the terms of the act are clear. The commissioners are directed to allot to different individuals, and having finished the allotments, to draw up their award, which is an instrument recording their judgments antecedently pronounced, good or bad; if the instrument contains that, it is the award; on the enrolment of that instrument the tithes cease. Is not this the award? and has it not been enrolled? The vice of the argument consists in the assumption, that because error can be proved in an allotment there is no award. The act intending to terminate all litigation, to define interests, and to extinguish rights to common and to tithes, on that event, directly puts an end to the claim to tithes. It is quite clear that whatever error there might be in the previous allotments, the existence of the award concludes the question. On this ground, it appears to me, that the defendants have completely succeeded in establishing an imperative and decisive bar to the rector's claim.

[106] I think, then, that it is not competent, at this distance of time, to examine the propriety of the award; that the rector has not clearly established the existence of error; and that the error alleged, error in the allotment, rather than in the award, would not defeat the bar. The bill must be dismissed, but without costs. The apparent deficiency of quantity, and the former submission of the defendants to pay tithes in kind, justified the rector in the institution of this suit.

MARIE SEBASTIENE SOPHIE BATTERSBEE, Widow, *Plaintiff*, and HENRY FARRINGTON, EDWARD VERNON, THOMAS BATTERSBEE, PHILIP CODD, JAMES TILSON, and SYLVESTER DOUGLAS WILSON, and SOPHIA, his Wife, *Defendants*. *Rolls*. Feb. 24, [1818].

[S. C. 1 Wils. Ch. 88. See *In re Holland*, [1902] 2 Ch. 380.]

A voluntary settlement without fraud, by a husband not indebted, in favour of his wife and children, is valid against subsequent creditors. On a bill by the wife, the Court established the settlement, no creditor attempting to impeach it, and there being no allegation that the husband was indebted at the time, without directing an inquiry on that subject. It seems that a recital in a settlement after marriage is not evidence against creditors of articles before marriage.

The bill filed in *May* 1813 stated, that by articles of agreement, dated 1st *October* 1793, made in contemplation of marriage between the Plaintiff and *Edmund Battersbee* deceased, and executed by *Edmund Battersbee*, the Plaintiff, and *William Sanford*, *Edmund Battersbee* covenanted with *Sanford*, that in case the marriage should take effect, he would, within three months after the solemnization thereof, assure to, or to the use of, the Plaintiff (in case she should survive him), an annuity of £500 for her life, to commence from the day of his death; and the Plaintiff agreed that the said annuity should be in bar of dower, and of all claim to any part of the personal estate of *Edmund Battersbee*, under the statute of distribution or [107] otherwise; that in 1793, shortly after the date of the articles, the marriage was solemnized, and after the solemnization, in performance of the articles, *Edmund Battersbee*, by an indenture executed on the 31st *December* 1793, between himself, the Plaintiff, and *Sanford*, reciting the articles, in pursuance and performance thereof, and in consideration of the marriage, covenanted with *Sanford*, that he, *Edmund Battersbee*, in his life-time, or his heirs, executors, and administrators, within four months after his decease, in case the Plaintiff survived him, would transfer into the joint names of trustees, so much Government, or India stock, or annuities, or otherwise convey such lands or hereditaments, as would secure to the Plaintiff, in case she survived him, an annuity of £500 for her life, in bar of dower, and all other claim which she might have as his widow, upon his estate, either real or personal; that in or about *September* 1809, *Edmund Battersbee* being seised of certain freehold, and possessed of certain leasehold, estates, determined to perform the articles of agreement and indenture of covenants, by conveying certain estates to trustees upon the trusts mentioned in the articles and indenture; that upon search being made for the purpose of preparing the necessary deeds, the articles and indenture appeared to have been mislaid, and neither of them could be found; that *Edmund Battersbee* having forgotten what were the provisions contained in the articles and indenture, and conceiving that the agreement entered into by him was to assure the yearly sum of £400 to the Plaintiff (in case of her surviving him) during her widowhood, instead of £500 for her life, accordingly gave directions for preparing the necessary deeds to carry into effect the articles and indenture, according to the erroneous idea which he entertained thereof; and thereupon indentures of lease and release were executed on or about the 13th of *September* 1809, by which *Edmund Battersbee* conveyed to *Henry Farrington* and *Edward Vernon*, certain freehold and leasehold estates upon trust, during the life [108] of *Edmund Battersbee*, at his request, and after his decease at any time during the widowhood of the Plaintiff, in case she should survive him, at her request, and after the decease, or the next marriage of the Plaintiff, which should first happen, then, at their discretion, to raise by sale, or mortgage of the said premises, such sum or sums as the persons by whose request the sale or mortgage was thereby authorized to be made, should think proper; and to stand possessed thereof upon the trusts declared by another indenture of the same date; and upon trust in the mean time to permit *Edmund Battersbee* to receive the rents during his life; and after his decease to pay to the Plaintiff, in case she should survive him, an annuity of £400 during her widowhood, and subject thereto to stand possessed of the rents and profits in trust for the persons entitled under the other indenture of the same date,

to the interest of the trust monies therein mentioned ; that by the deed referred to in the last indenture of the same date, *Edmund Battersbee* directed *Farrington* and *Vernon* to stand possessed of the monies to be produced by the sale or mortgage before mentioned (after certain deductions), upon trust to invest the same in Government or real securities, and permit *Edmund Battersbee*, during his life, to receive the dividends and interest ; and after his decease, in case the Plaintiff should survive him, to appropriate so much of the trust monies as would produce the clear yearly sum of £400, and pay the income thereof unto the Plaintiff during her widowhood, in lieu of the annuity of £400 provided for her by the indentures of lease and release before mentioned, and to pay and assign the residue of the trust monies, and also after the decease or next marriage of the Plaintiff, such part as should be appropriated as aforesaid, to his son, *Thomas Battersbee*, to be vested when he should attain the age of 21 years, if he should survive his father ; and in case of his death under that age, or in the life of his father, then to *Sophia Battersbee*, his daughter, to be vested when she should attain the age of 21 years ; and in [109] case of her death under that age, or in her father's life, then upon such trusts as *Edmund Battersbee* should appoint.

The bill farther stated the will of *Edmund Battersbee*, dated 24th September 1809, and executed and attested so as to pass real estates, by which, after directing that all his debts should be paid as soon as conveniently might be, and confirming the settlement made for the benefit of the Plaintiff and of his children, by the two deeds of the 12th and 13th of September then instant, and after giving, among other legacies, £1000 to the Plaintiff, and £5000 in trust for his daughter, he gave all the residue of his personal estate, over which he had any power of appointment or disposition, to his son, *Thomas Battersbee*, if and when he should attain the age of 21 years ; but in case he should die under that age, then to his daughter *Sophia*, if and when she should attain the age of 21 years, or be married with the consent of her guardians ; and in case she should die under that age, and before she should be married with such consent, then he gave his residuary estate to *Henry Farrington* ; and he appointed the Plaintiff, and *Henry Farrington*, and *Edward Vernon*, executrix and executors of his will.

The bill then stated, that after the execution of the several deeds, and the will before mentioned, the indenture of covenants of the 31st of December 1793 was found, but the articles of agreement, in pursuance of which the same was made, were never found ; that upon looking into the said indenture, *Edmund Battersbee* having discovered that the lease and release, and declaration of trust before mentioned, were not a performance of the articles, determined to execute a new deed conformable thereto ; and accordingly by an indenture executed on the 25th of March 1812, it was, in pursuance and performance of the articles, declared to be their true intent and meaning, and *Edmund Battersbee* directed and appointed, that *Farrington* and *Ver*[110]-*non* should be seised and possessed of the said hereditaments and premises, subject to the trust for sale or mortgage, and in the mean time to the trust declared for the benefit of *Edmund Battersbee* during his life, upon trust, after the decease of *Edmund Battersbee*, and during the life of the Plaintiff, in case she should survive him, and whether she should continue his widow or not, out of the rents and profits, or by sale or mortgage of the estates, to pay to the Plaintiff an annuity of £500 in lieu of the annuity of £400, and in satisfaction of the annuity mentioned in the articles ; and the trustees were directed, in case the Plaintiff should survive *Edmund Battersbee*, to appropriate so much of the trust monies as would produce an annuity of £500, and pay the income thereof to the Plaintiff for her life, in lieu of the annuity of £500 thereinbefore provided for her.

The bill farther stated, that in November 1812 *Edmund Battersbee* died, leaving the Defendant, *Thomas Battersbee*, an infant, his heir at law, and leaving his daughter *Sophia*, who had, previously to his death, and with his consent, married the Defendant *Sylvester Douglas Wilson* (*Edmund Battersbee*, by the marriage settlement, having covenanted to bequeath £5000 in trust for his daughter, her husband, and their children) ; and that at the respective times of making his will and of his death, *Edmund Battersbee* was seised in fee of real estates, beside those comprized in the trust deeds before mentioned, which descended to his heir at law.

The bill, after stating that *Farrington* and *Vernon* had, with the concurrence



of the Plaintiff, contracted to sell the trust estates before mentioned, charged, that the testator was a trader within the meaning of the bankrupt laws at the time of his death, and that his real estates were therefore in his life-time subject to the payment of his debts as well by simple contract as by specialty, and were legal assets for that purpose.

[111] The prayer of the bill was, that an account might be taken, of the real and personal estates of the testator *Edmund Battersbee* (distinguishing the estates conveyed in trust, as before mentioned, from his general estate) and of his debts and legacies; that the real estates descended upon the Defendant *Thomas Battersbee*, might be declared to be subject to the debts of the testator by reason of his having been a trader at the time of his decease, and that the assets might be marshalled; that the Plaintiff might be declared entitled out of the money to arise from the sale of the trust premises to have one annuity of £500 raised and paid to her, and in case the interest and dividends of such money when invested in the funds should not be sufficient, that a part of such money might be laid out in the purchase of such an annuity as, together with the interest of the residue of the money, would make up the yearly sum of £500; that she might be declared to have a specific lien as a specialty creditor upon the trust estates, and the money arising from the sale thereof, to the extent of £500 *per annum*; and that the rights of the claimants under the will might be ascertained, and the trusts carried into effect.

The Defendants, *Farrington* and *Vernon*, by their answer stated, that they knew not whether any articles had been executed before the marriage of the Plaintiff with the testator, as alleged in the bill; and that the testator's personal estate was not sufficient for the payment of his debts, funeral expenses, and legacies; and they admitted that they had contracted for the sale of the real estates.

Sir *S. Romilly*, Mr. *Cooke*, and Mr. *Collinson*, for the Plaintiff. The settlements subsequent to the marriage, being executed in pursuance of previous articles, are supported by a good consideration. Of the existence of those articles, though not now to be found, the recital in the settlement is [112] conclusive evidence. *Anon. Pre. in Cha.* (p. 101), *Dundas v. Dutens* (1 *Ves. Jun.* 196. *Cordwell v. Mackrill*, *Amb.* 515, and *Holmes v. Ailsbie*, 1 *Madd.* 551, were also cited).

Without reference to the articles, the settlement possesses intrinsic validity. It is not proved that the settler was indebted at the time, and it is fully established that a voluntary settlement by a husband after marriage without fraud is not within the statute (13 *Eliz. c. 5*), and cannot be impeached by subsequent creditors. *Stephens v. Olive* (2 *Bro. C. C.* 90), *Lush v. Wilkinson* (5 *Ves.* 384), *Montague v. Sandwich* (cited 12 *Ves.* 148), *Kidney v. Coussmaker* (12 *Ves.* 136), *Holloway v. Millard* (1 *Madd.* 414, and in *Partridge v. Gopp*, 1 *Eden*, 163, the decree proceeded on the ground that the party was largely indebted at the time of the gift.)

Under the favourable circumstances of this case, and in the absence of a suggestion that the settler was indebted at the time, the Court will not direct an inquiry into that fact, but at once establish the settlement.

Mr. *Horne* and Mr. *Temple*, for Mr. and Mrs. *Wilson*. The settlement cannot be questioned except in a suit by creditors. On this record nothing appears to impeach it. In the absence of proof, or even allegation, of the existence of debts at the date of the deed, the Court will not proceed conjecturally on the mere possibility of debt.

Mr. *Rose*, for the Defendants *Codd* and *Tilson*, trustees in the marriage settlement of Mr. and Mrs. *Wilson*.

Mr. *Hart* and Mr. *Wilbraham*, for the trustees and executors.

[113] The trustees offer no opposition to the claim of the Plaintiffs, but are desirous that the Court shall be apprized of the facts of the case before it pronounces a decree. No evidence is adduced of the execution of the articles. On the supposition of their existence, the deed of 31st *December* 1793, which recites them, is nugatory, and does no more than had already been done by them. The deed of 1809, executed after so long an interval, and conveying recently before his death a large portion of his property in trust for sale, affords a presumption that the settlor was indebted at that time. The trustees submit the propriety of ascertaining that fact by an inquiry before the Master. A voluntary bond cannot prevail against

a simple contract debt (*Lechmere v. Earl of Carlisle*, 3 P. W. 222) ; on what principle can greater effect be given to a voluntary settlement ?

The *Master of the Rolls* [Sir Thomas Plumer]. No doubt can be entertained on this case, if the settlor was not indebted at the date of the deed. A voluntary conveyance by a person not indebted, is clearly good against future creditors. That constitutes the distinction between the two statutes. (13 *Eliz.* c. 5 ; 27 *Eliz.* c. 4. See *Lord Townshend v. Windham*, 2 *Ves. Sen.* 11.) Fraud vitiates the transaction ; but a settlement not fraudulent, by a party not indebted, is valid, though voluntary. On the first question (which I am not now to decide), the distinction, I apprehend, is, that against all persons claiming under the settlor the recital is conclusive (see *Ford v. Grey*, 1 *Salk.* 285. *Marchioness of Annandale v. Harris*, 2 P. W. 432. *Shelly v. Wright*, *Willes*, 11, 12) ; but it would be difficult to maintain, that a recital in a post-nuptial settlement of ante-nuptial articles, of the existence of which there is no distinct proof, would be binding on creditors. Such a doctrine would give to every trader a power of excluding his creditors by a recital in a [114] deed to which they are not parties. In this instance there appears no motive for the recital if untrue ; a recital in a deed executed before the party engaged in trade, when he was not indebted, and twenty years prior to his death. The trustees and executors knowing, as they must, the affairs of the testator, have not suggested that he was indebted at the time of the settlement, nor has any creditor attempted to impeach it. I am bound therefore to declare it valid.

The Princess of WALES v. The Earl of LIVERPOOL and Count MUNSTER. March 7, 10, 17, [1818].

S. C. 1 Swans. 580 ; 3 Swans. 567 ; 1 *Wils. Ch.* 113. *Prioleau v. United States*, 1866, L. R. 2 *Eq.* 665 ; *Kennedy v. Wakefield*, 1870, 39 L. J. Ch. 829.]

In a bill against executors, the Plaintiff having stated two promissory notes of the same date, one for £15,000 sterling, the other for £15,000 French *louis*, given by the testator for securing a sum of £15,000, on an affidavit by one of the executors, that he had inspected the first note, and observed on the face of it circumstances tending to impeach its authenticity ; that he was informed, and believed, that the second note had been produced by the Plaintiff for payment in a foreign country ; and that he was advised and believed that it was necessary in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note, it was ordered, that the Defendants should not be compelled to answer, till a fortnight after production of the second note.

The bill filed by Her Royal Highness *Caroline Augusta*, Princess of Wales, by *Antony Buller St. Leger*, Esq. her next friend, stated, that in or about the month of August 1814, *William Duke of Brunswick Oels* deceased, for the purpose of securing the sum of £15,000 sterling to the separate use of Her Royal Highness, signed and delivered to her a certain promissory note, or instrument in writing, bearing date the 24th day of August 1814, whereby he assured to her the repayment in the year 1816, of the sum of £15,000 sterling, with interest in the mean time ; and also, for the same purpose, signed and delivered to her another promissory note, or instrument in writing, bearing date the same 24th day of August 1814, whereby he assured to her payment in the month of August 1816, of the sum of 15,000 French *louis*, at the rate of 24 French *livres* each, together with interest for the same in the mean time.

[115] The bill then stated, that the Duke died in June 1815, having made a will, and appointed the Defendants executors, who proved the will, and possessed themselves of his personal estate to an amount more than sufficient to satisfy his debts ; and that the principal sums secured by the two notes, together with interest from the 24th of August 1814, was due to the Plaintiff for her separate use.

The bill contained the following interrogatories : " Whether, in or about the month of August 1814, or when, the said *William* late Duke of *Brunswick Oels*, for the purpose of securing the sum of £15,000 sterling to the separate use of Her said Royal Highness, did not sign and deliver to her two promissory notes of such

date respectively, and of such tenor and effect, as hereinbefore in that behalf mentioned, or of any and what other date respectively, or of any and what other tenor and effect respectively ? and Whether the said principal sum secured by the said notes or instruments, together with interest on the said sum from the 24th of August 1814, is not now wholly due and owing to Her said Royal Highness ? ”

The bill prayed, that the Defendants might either admit assets of the Duke, sufficient to pay the principal sum of £15,000 and interest, or that an account might be taken of his personal estate, in the usual manner, and that the same might be applied in a due course of administration, and that, if necessary, an account might be taken of what was due upon the said notes, and that the amount thereof might be paid to the Plaintiff for her separate use.

A motion was made by the Defendants, “ that the Plaintiff might produce, and leave with her clerk in Court for the usual purposes, a certain promissory note, or instrument in writing, in the bill mentioned to bear date the 24th day of August 1814, whereby it is in the bill alleged, that *William Duke of Brunswick* deceased assured to the [116] Plaintiff payment in the month of August 1816, of the sum of 15,000 French *louis* at the rate of 24 French *livres* each, together with interest for the same in the mean time ; and that the Defendants might have a fortnight’s time to answer the bill, after such instrument should have been so produced.”

In support of the motion an affidavit was made by Count *Munster*, that he was advised and believed that an inspection of the note described in the notice of motion might afford to him and the other Defendant, the Earl of *Liverpool*, material information for their defence ; and that the note had never been shewn to him, nor, as he was informed and believed, to the Earl of *Liverpool*.

The *Solicitor General* [Gifford] and Sir *Arthur Piggott* in support of the motion. In an action at law, the Plaintiff could not compel the Defendant to plead, until a copy had been delivered of the written instrument on which the action is founded. When the instrument is under seal, the Plaintiff must make *profert*, and the Defendant may crave *oyer* ; and by analogy to those cases, the modern practice, in actions on written instruments, though not under seal, as bills of exchange and policies of insurance, entitles the Defendant to a copy for the purposes of his defence. It cannot be supposed that a court of equity rejects that equitable principle which is thus adopted by the courts of law. By a cross bill, it is admitted, the Defendants might compel production of the instrument, and compel it for the purpose of defence to the original suit ; admitting that, can we consistently deny to the Court a power to order the production, in that suit in which alone the production is required ? Inspection of the instruments is in this case necessary to enable the Defendants to make that answer which the Plaintiff seeks. The bill contains interrogatories whether the promissory [117] notes were not signed by the Duke of *Brunswick*, and whether the sum secured by them is not still due. Supposing a doubt of the authenticity of the instrument (which I put only hypothetically, but on which so put I am entitled to argue), of the signature of the Duke for example, is it not obvious, that inspection is necessary to enable the Defendants to answer with correctness and safety ? Where the Duke now living, and a Defendant, it might be contended that he could answer from his own knowledge these questions relative to his own acts ; but by what means can the Defendants, his executors, no parties to the transaction, without a view of the instrument, answer to its authenticity ? The statement in the bill is, that two securities were given for the same sum, payable in different currencies, and at different dates. What assurance has the Court, that while one of these instruments is put in suit here, the other may not be enforced against the Duke’s assets in a foreign state ?

Sir *Samuel Romilly*, Mr. *Martin*, Mr. *Bell*, and Mr. *Shadwell* against the motion. If the Defendants are entitled to succeed, the motion must be quite of course ; the case of a creditor filing a bill for payment of a sum, due on a security, is one of daily occurrence ; yet no precedent has been produced of such an order. The analogy suggested between the practice at law and in this Court is unfounded. It is true, that in an action on a bond the Plaintiff must make *profert* ; but it is equally true, that the practice here is different. In a case in which a Plaintiff had stated the substance of a deed in his bill, and referred to it for greater certainty, Your Lordship decided that the Defendant could not compel production on motion, but must proceed by a cross bill. What is there in this case to entitle the Defendants

to a course of practice quite new? The difficulty in the way of their answering is altogether imaginary. What difficulty can [118] they find, if such is the fact, in stating that they have no knowledge of the transaction, and leaving the Plaintiff to make proof of every part of her case? The statement in the bill, that two securities were given for the same sum, is to the disadvantage of the Plaintiff; before a decree can be obtained, both must be proved and delivered up. The motion is opposed by two decisive objections: according to the uniform practice of the Court, a Defendant cannot obtain discovery except by a cross-bill; and even by a cross-bill discovery can be obtained of those matters only which are material to the defence. In this instance, the Defendants seek by motion, production of an instrument constituting not their defence, but the Plaintiff's title. It is a ground of demurrer to a bill of discovery, that it requires a disclosure of a part of the opponent's case. The evidence of one party may certainly be material to support the case of the other; in a deed for instance, which is the foundation of the title of the Plaintiff at law, the recitals may serve to establish the pedigree of the Defendant, and he may, for that reason, be entitled to the production of that deed; but entitled to it still on the same principle, as constituting a part of his own case. A reference to this principle evinces the necessity of adhering to the rule, that a discovery can be obtained only by filing a bill, which imposes on the party the duty of stating his case, and affords to his antagonist the opportunity of controverting it. Suppose to a bill for a discovery of a deed as containing matter important to the Plaintiff's case, an answer were put in denying that the deed contained such matter, would the Court, in opposition to that answer, on a mere allegation in the bill enforce discovery? If such an attempt can succeed, what will become of pleas of purchase for valuable consideration, to bills for discovery of deeds? In seeking a production of this document, their object is to destroy its effect. The Court will not try the question of their right to inspection on this summary application, but by restricting the Defendants to the ordinary course by bill, will enable the Plaintiff to make a defence.

[119] The *Lord Chancellor* [Eldon]. It is a circumstance, in my opinion, of considerable importance to the practice, that the bill does not state this note to be in the custody of the Plaintiff. If a cross-bill had been filed, and the answer had not admitted possession of the document, would the Court, on that record, have ordered the production?

Against the motion. That alone is a decisive objection to the application. But admitting, for the purpose of the argument, that in certain excepted cases, production may be obtained by a Defendant on motion, at least the materiality of the discovery must be distinctly and positively averred. The affidavit on which this application is founded, states only that the deponent has been advised, that from inspection of the instrument something may arise material to the defence. Such an affidavit would not be sufficient to extend the common injunction to stay trial.

The *Lord Chancellor* [Eldon]. On a case of so much importance to the practice of the Court, I will not at once give final judgment.

It has been the practice for ages in courts of law, to insist on a *profert* of specialties; but it is within my own recollection, that where an instrument is lost, of which *profert* should otherwise be made, those Courts, adopting a special mode of proceeding, have assumed a jurisdiction which was formerly exercised exclusively by courts of equity. They have done so on the supposition that they were doing what courts of equity did; but I believe it will be difficult to admit, that in the exercise of that jurisdiction, they have acted between the parties as this Court would act. That however is the principle on which they have since proceeded, in compelling, on motion, the production of bills of exchange or promissory notes, the sub-[120]jects of an action; and I believe that Lord *Mansfield* first adopted that rule, on the supposition that he did no more than was constantly done in courts of equity. Speaking with all the deference due to Lord *Mansfield*, it does not appear to me that he exactly recollected what a court of equity would do in such a case; because there is a mighty difference between simply producing an instrument, and producing it in answer to a bill of discovery, where the Defendant has an opportunity of accompanying the production with a statement of every thing which is necessary to protect him from its consequences. On the present case we must refer to the practice of this Court; and admitting that there may be exceptions to the rule of practice,

we must also admit that great care must be taken in each particular instance, to ascertain that the case of exception actually exists. It becomes therefore necessary to consider the case, with reference to all our rules for compelling production of instruments, whether instruments mentioned in the bill, or in the answer; recollecting what those rules require the Plaintiff in the one case, and the Defendant in the other, to admit relative to the possession of the instruments. The Bill states the existence of a double security for the same sum; we must see what is alleged with regard to the possession of that security in the bill, and (no answer having yet been filed) in the affidavit; observing that from whomsoever the affidavit may proceed, it must, if to be made the foundation of an exception to the rule, contain a statement of the circumstances constituting the case of exception. I will look into my own notes of the practice before I give judgment.

*March 10.* On this day the *Lord Chancellor* [Eldon], after stating the case, pronounced judgment as follows:

[121] For the purpose of illustrating what I shall say presently, I observe here that this bill does not represent the notes as in the custody or power of the Plaintiff; and it would be a consideration worthy of attention, regard being had to what is settled by the Court with reference to the production of instruments by Defendants, how far that circumstance is material. It would be contended on the one hand, supposing that the production can be compelled on motion, that if the Plaintiff has not stated that the instruments are in his possession, custody, or power, he does not afford the same case for an order of production, as a Defendant must, against whom the order is never granted, except on the statement that the instruments are in his custody or power; a statement which, according to the modern doctrine, he is not understood to make, when he only refers to the instruments. In *Bettison v. Farrington* (3 P. W. 363), to a bill for relief, the defence was, that a recovery had been suffered which barred the Plaintiff's right, and the answer referred to a lease and release making a tenant to the *præcipe*, and leading the uses of the recovery; on motion, Lord *Talbot* ordered the production of the deed, merely on the ground of that reference in the answer, assigning as his reason, that as it must be produced at the hearing, it ought to be produced on motion. Subsequent cases appear to question that doctrine on both its points. In *Lady Shaftesbury v. Arrowsmith* (4 Ves. 66), and in *Burton v. Neville* (2 Cox, 242, cited 4 Ves. 67), the Court held that a Plaintiff has a right to call for the instruments creating the estate-tail under which he claims, but expressed great doubt whether he can call for the instrument on which the Defendant frames his title; and later decisions seem to have established that it is not the mere reference that makes the documents part of the answer for the purpose of production; (1) though by [122] amending the bill and addressing farther questions, the Plaintiff, may, perhaps, compel the Defendant to make those documents part of the answer for that purpose. On the other hand, a question may be made, Whether, on a bill framed like the present, the Court would not assume that the documents on which the Plaintiff comes here to make his demand, are such as he can proffer to the Court? Whether, if a Plaintiff, not stating that certain written instruments are in his custody, yet founds a claim on those instruments, the Court will not infer that he has possession of them, unless an affidavit is made to the contrary? On that point I give no opinion.

The answer now called for is an answer which is to apply itself to the interrogatories with respect to these two notes; and it has been observed that there is a singularity in this case, arising from the circumstance, that though the date of the bills is stated, no mention is made of the period at which they were actually framed: two notes are given, apparently of the same date, for payment of the same sum; and where it is obviously clear, therefore, that if the demand can be substantiated at all against the Defendants, they possess an unquestionable right to have both the securities delivered up, and to call on the Court to take care that while the Plaintiff is enforcing payment against the assets of the Duke of *Brunswick*, justice is done by protecting those assets against all possibility of farther suit in respect of both these documents. The motion is made on a supposition that the instruments can be so dealt with by the Court, and for the purpose of framing an answer to the interrogatories which I have stated.

The general doctrine of the Court, as now settled, I take to be this; that when a bill is filed, it will depend entirely on the manner in which the Defendant expresses

himself with respect to any instrument for which the Plaintiff may have a right to call, Whether the Plaintiff can [123] compel from that Defendant production on mere motion? If the Defendant states in his answer that there was such a deed, though the Plaintiff may have an interest in its production, it seems of late settled that that is not enough, but that he must in some way fix the Defendant with possession of the deed. I understand that practice to have proceeded on this consideration, that if an order for production were made, and the Defendant refused to produce the instrument, the Court would find itself unable to apply its process for enforcing obedience, because no *constat* appears on the pleadings that the instrument is in possession of the Defendant, and that he has the power to obey. It is therefore usual to amend the bill, and by introducing an allegation that the instrument is in the possession of the Defendant, to call for such an admission in the answer as will authorize the order. On the other hand it is stated, that if the Defendant wants production of deeds from a Plaintiff who has not said, what by his bill he may say, that he has left the instruments in the hands of his clerk in Court, in order that the Defendant may inspect them, nor prayed, as our ancient bills used to pray, that after inspection the Defendant may answer the interrogatories applied to that subject, the general rule of the Court has been this: that the Defendant must file a cross bill in order to obtain discovery of those deeds. In the argument it has been said that courts of common law do, what unless I misunderstand their modern practice, they certainly would do for asking; namely, that where a Plaintiff in the declaration founds his demand on a written instrument, as a promissory note, those courts would give to the Defendant inspection of that instrument, in order that he might see by whom it was written, whether on a stamp, and with the other requisites. I believe that that doctrine originated in courts of law, on the notion that there was no reason why they should not do what is done by courts of equity; and the same principle has introduced their modern practice of dispensing with *profert* in cases of lost instru-[124]-ments. (See *Read v. Brookman*, 3 T. R. 151. *Hendy v. Stephenson*, 10 East, 55.) When I entered *Westminster-hall* the doctrine was, that where the rules of law required *profert* the party must come into equity. I state it as the opinion of that great man Lord *Hardwicke*, as I have repeatedly seen it in his handwriting, among his manuscripts, that no such thing could be done at law. (2) Many doctrines have been introduced into courts of law on a supposed analogy to the practice in equity, but without the guards with which equity surrounds the case; as in the instance of dispensing with *profert*, no man can enter this court without guarding his entrance by sanctions which the courts of law cannot impose; and it happens whimsically enough, that there are cases in which courts of law, proceeding on the principle of giving a remedy because one might be obtained in equity, have compelled the party to resort to equity for protection against that practice at law. When courts of law held that because the production of promissory notes might be obtained in equity, they would compel the Plaintiff to produce them, they forgot that in equity, if the promissory note will not, on the face of it, furnish explanation, the Defendant to the cross-bill accompanies the production with an explanation by his answer of all the circumstances; and that the mere compulsory production would deprive him of the safeguards which this practice affords. On the other hand, the party cannot have an answer to a cross bill till he has himself answered the original bill. If there is a necessity, therefore, that he should have production before answer, a necessity founded on special circumstances clearly manifested, the rule of this Court would work injustice unless it admitted relaxation and exception. That such an exception was long ago contemplated, is clear from a [125] passage in the original text of the *Practical Register* (p. 161, of Mr. *Wyatt's* edition) (a book of considerable authority), in which it is said, "Where a deed in the Plaintiff's hands mentioned in the Plaintiff's bill was necessary to the Defendant's making in his defence a full answer, the Court ordered the Plaintiff should give him a copy of it;" and it seems to me that if no authority could be produced, the obvious justice of such a position would well authorize the Court to make a precedent upon the subject. There is no general rule with respect to the practice of this Court that will not yield to the demands of justice. In the case of *Beckford v. Wildman* (17 Ves. 438), where something more was sought than that the Defendant should produce and give a copy of the instrument, namely, that the instrument should be kept in the custody of the Court till the hearing, because if not then produced, the justice

arising out of variations between that deed and another with which it was to be compared, would be defeated, it was laid down that the general rule would, under circumstances, yield so as to admit an exception; and though in that instance the Court, not thinking that the circumstances required it, refused to go beyond the general practice, it referred to former examples, in which the strict rule had been sacrificed to the justice of a particular case.

Such is, in my opinion, the general doctrine on this question; but it appears to me, I confess, very clear, that the affidavit on which this motion has been made, falls short of establishing the existence of that necessity which can alone justify a deviation from the practice. It is obvious that it may be material that these instruments should be seen, in order to ascertain whether they have reference to each other as duplicates; whether they contain important variations; whether they are written on stamps; and it must not be forgotten that the Defendants will be entitled to have them [126] delivered up at the hearing; for I cannot agree that the Court will be content with an indemnity against the consequences of their not being delivered up; at least that proposition is extremely questionable. But the affidavit amounts only to this (as a negative inference I take it that Count *Munster* must have seen one of these notes; Lord *Liverpool* makes no affidavit, knowing probably less of the matter; but for any thing that I judicially know he may have seen both): the statement is, that Count *Munster* is advised that an inspection of the instrument may afford to the Defendants material information for their defence; that is, it may, or may not, afford it. How can it be said that this expression "may afford," points out the necessity alluded to in the passage which I have quoted? It appears to me impossible. This motion requires an affidavit stating more strongly the necessity, and in some measure the grounds on which the necessity arises. Unless those grounds are to a certain extent stated, it is impossible to be sure that the Court is not compelling a production which the circumstances do not require. It seems to me that the right mode of disposing of this case is to dismiss the motion, unless the Defendants produce an affidavit of special circumstances.

By a farther affidavit, Count *Munster* stated, that he was informed and believed that, near the end of the year 1816, the Plaintiff sent to one of the executors of the Duke of *Brunswick*, who had not proved the will, two instruments in writing, one in the *German* and the other in the *French* language, both dated 24th August 1814, purporting to be engagements on the part of the Duke to pay to the Plaintiff in two years £15,000 sterling, with interest; that upon inspection of those instruments by the deponent in *February* last, the hand-writing, construction, and spelling appeared not equal to those of the late Duke, and the sig-[127]-nature was "*Brunswick* and *D'Oels*," which had not been used by the Duke since his return to his dominions in 1813; that he was informed and believed that in *April* 1817 the Plaintiff caused the instrument stated in the bill for repayment of 15,000 *louis de France*, to be produced for payment in *Brunswick*; and that he was advised and believed, that previous to putting in his answer to the bill, it was necessary, in order that his answer might fully meet the case, that he should have inspection of the last-mentioned instrument.

*March 17.* The Lord Chancellor [*Eldon*]. I have read the affidavit, and it is enough to say that it lays a sufficient ground for deciding that the Defendants are entitled to a production of the instrument before answer. The Plaintiff is at liberty to come at any time in reply to this affidavit; it being understood that in the mean time, the Defendants shall not be called on to answer till a fortnight after this note has been produced. I take that to be the proper rule of the Court.(3)

(1) See *Evans v. Richardson*, 1 *Swans*. 7, and the cases there cited; to which may be added, *Earl of Salisbury v. Cecil*, 1 *Cox*, 277. *Smith v. Duke of Northumberland*, 1 *Cox*, 363. *Erskine v. Bize*, 2 *Cox*, 226. *Campbell v. French*, 2 *Cox*, 286.

(2) See *Whitfield v. Fausset*, 1 *Ves. Sen.* 387. *Earl of Chesterfield v. Jansen*, 1 *Atk.* 345. *Anon.* 2 *Atk.* 61. *Snellgrove v. Bailey*, 3 *Atk.* 214. *Walmsley v. Child*, 1 *Ves. Sen.* 345. *Glynn v. The Bank of England*, 2 *Ves. Sen.* 41. Lord *Thurlow* appears to have entertained the same opinion, *Atkinson v. Leonard*, 3 *Bro. C. C.* 224.

(3) In an anonymous case to be found in 2 *Dick.* 778, Lord *Thurlow* is reported to have said, "Did you ever know an instance of a Defendant's applying against a

Plaintiff, even to produce deeds? There cannot be any; it hath been denied. If you want it, you must file a cross-bill for the purpose."

[129] JOHN DAVIS and MARY BRADFORD his wife, *Plaintiffs*, and ANN UPHILL Widow, JOHN UPHILL, BENJAMIN BRADFORD UPHILL, and THOMAS UPHILL, *Defendants*. Jan. 22, 1817; March 24, 1818.

An estate being limited under her marriage settlement to A. for life, with remainder to her children by her deceased husband in such manner as she should appoint, remainder in default of appointment to all the children as tenants in common, an agreement by the children that on her joining in suffering a recovery, the first use to which the recovery should enure should be to A. for life, *without impeachment of waste*, is, it seems, valid in equity; and the Court therefore refused to continue an injunction to restrain her from cutting timber, unless security was given to her for the value of all which she might cut during her life.

The case as it appeared on the pleadings was as follows:

By settlement made on the marriage of *Thomas Uphill*, deceased, and the Defendant *Ann*, dated the 9th and 10th of *December* 1759, the lands in question in this cause were limited to the use of the husband for life without impeachment of waste, with remainder to Trustees and their heirs to preserve contingent remainders, remainder to the use of the wife for life in part of her jointure, remainder to the use of such child and children of the body of the husband on the body of the wife to be begotten, for such interest and [130] estate, and in such manner as the husband and wife should, during their joint lives, by any deed or deeds in writing under their hands and seals duly executed, and attested by two or more credible witnesses, direct or appoint; in default of such appointment to the use of such child or children for such interests and estates, and in such manner, as the survivor should by any deed or deeds in writing, or by will, executed in the presence of and attested by three or more credible witnesses, give, devise, or appoint; and in default of such appointment, to all the children equally as tenants in common.

A settlement of the same date was also made of other lands to the same uses.

The issue of the marriage were, the Plaintiff *Mary Bradford Davis*, *Robert Uphill*, who died leaving the Defendant *Benjamin Bradford Uphill*, his eldest son and heir at law, and the Defendants *Thomas Uphill* and *John Uphill*.

*Thomas Uphill* the father having died without exercising his power of appointment, by settlement dated the 16th and 17th of *June* 1789, made previous to the marriage of the Plaintiffs, and in contemplation thereof, reciting the indentures of the 9th and 10th of *December* 1759, and the facts before mentioned, it was witnessed, that *Ann Uphill*, the widow (party to the settlement), in consideration of the marriage, and by virtue of the power contained in the deed of 1759, granted, released, and appointed to *John Uphill* and *Morgan Davis* and their heirs, certain parts of the estates comprised in that deed, to certain uses therein expressed in favor of the Plaintiffs and the children of the intended marriage.

Sometime after the marriage of the Plaintiffs it was discovered that the settlement (so far as regarded the appointment thereby intended to be made by *Ann Uphill*), was defective and void, both as not being attested in conformity with the provisions, and as comprehending objects (the [131] husband and children of the marriage) not within the limits, of the power; whereupon, by Deed-Poll dated the 30th of *May* 1814, duly executed according to the terms of the power, after reciting the defect in the settlement, and that the Defendant *Ann Uphill* had therefore consented to execute the present appointment, conformably to the directions of the deed of *December* 1759, by which the power was created, and thereby not only to confirm the settlement of *June* 1789, so far as she lawfully might, but also to make some farther provision for her daughter the Plaintiff, *Mary Bradford Davis*, and that being in like manner desirous to provide for her two remaining children, the Defendants *John* and *Thomas*, by settling upon them one equal fourth part of the estates over which her power extended so far as she could compute the same, she had by two deeds of appointment of the same date, appointed as to certain parts of the said estates, according to such intention, to the Defendants *John* and *Thomas* respectively in fee; and that she was also desirous to provide for the issue of her



deceased son *Robert*, by settling on the Defendant *Benjamin Bradford Uphill* one equal fourth part of the said estates, but, inasmuch as her power did not extend to grandchildren she was unable to make such appointment thereof, and therefore left one equal fourth part unappointed, earnestly recommending her two sons and her daughter to release to the Trustees of the said *Benjamin Bradford Uphill's* marriage settlement, such equal fourth part; it was witnessed, that *Ann Uphill*, in consideration of natural love and affection for her daughter *Mary Bradford Davis*, and in execution of the said power, thereby appointed that all such parts of the said estates as were therein particularly described should thenceforth go and remain to the only use of the Plaintiff *Mary Bradford Davis*, her heirs and assigns forever, to the end that she and her husband might convey and assure the same to the Trustees in the settlement of *June 1789*, upon the uses and trusts thereby declared.

The Bill, stating these transactions, and that the Plain-[132]-tiffs had ever since their marriage been in possession of a part of the premises contained in the last-mentioned deed of appointment, but that the Defendant *Ann Uphill* had continued and still was in possession of the residue thereof, and being instigated thereto by her said sons and grandson the Defendants, *John, Benjamin Bradford*, and *Robert*, had, together with them, cut down considerable quantities of timber, and committed various other acts of waste on the last-mentioned part of the said estates, prayed an account of the timber so cut, and the amount of the damage so committed, and an injunction.

The answer, put in by all the Defendants, stated that about the time of the execution of the last-mentioned deed of appointment in favor of the Plaintiffs, it was agreed between all the parties, that the premises of which *Ann Uphill* continued in possession should be limited to her use for her life, without impeachment of waste, and that the Plaintiff *John Davis* and the Defendant *John Uphill* accordingly signed a memorandum in writing, in the following words:—" *June 25, 1814*, We the undersigned do hereby agree to execute a deed declaring the uses of a Recovery by which all *Ann Uphill's* settled estates are to be limited to her for life, without impeachment of waste—part of the estate at *S.* to be assured to *John*—part of the estate at *E. L.* to be assured to *Thomas Uphill*—and the estate at *B.* and part of the estate at *H. S.* and *E.* to be assured to *Mary Bradford Davis*; and to do all other things necessary to give effect to the arrangement made by Messrs. *G.*, the persons appointed to value and divide the estate: and until such arrangement is made and completed, it is declared that certain deeds of appointment dated the 30th of *May* last shall be considered inoperative and of no effect." The answer farther stated, that in pursuance of such agreement, an indenture of bargain and sale dated the 21st of *June 1814* was executed between the Plaintiffs and Defendants and other parties, and a Recovery suffered, whereby all the premises comprised in the deed of 1814 (except those of which possession [133] had been given to the Plaintiffs) were limited to the use of *Ann Uphill* for life, without impeachment of waste, with remainder (as to the part appointed in favor of the Plaintiff *Mary Bradford Davis*) to the use of the said Plaintiff, her heirs and assigns. The answer insisted that under this Indenture and Recovery the Defendant *Ann Uphill* was tenant for life, without impeachment of waste, and therefore that the injunction, which had been obtained upon the statement in the Bill by the suppression of those facts, should be dissolved.

The indenture of the 21st of *June 1814*, executed by the Defendant *Ann Uphill*, *Thomas Uphill*, the Defendant *John Uphill*, the Plaintiffs, the Defendant *Benjamin B. Uphill* and *Ann*, his wife, *John Swarbuck* and *Oliver Kingsward*, recited, among other things, in addition to the deeds stated in the pleadings, articles of agreement of the 12th of *February 1810*, by which, after reciting that, in contemplation of the intended marriage of the defendant *Benjamin B. Uphill* and *Ann Hayward*, it was proposed and agreed that, as no legal limitation could, under the powers given to *Ann Uphill* by the indenture of *December 1759*, be made by her in favour of her grandson, the said Defendant *Benjamin B. Uphill*, she should release all power of appointment given to her by the said indenture, to the end that certain hereditaments therein particularly described, might, on her death, be divided among all her children by her said late husband, according to the direction of the said indenture, and reciting that, on the treaty for the marriage, it was agreed that *Benjamin B.*

*Uphill* should enter into a covenant for suffering a recovery of that part of the estates in question to which he would be entitled in right of his father on the death of the Defendant *Ann Uphill*, without exercising her power of appointment, and settling the same to the uses expressed in his marriage settlement; *Ann Uphill* covenanted not to execute any appointment of such part of the estates in question, therein described, and released to trustees all her power of appointing the same. The [134] indenture of *June* 1814, farther recited, that since the execution of the articles of the 12th of *February* 1810, *Ann Uphill* having been advised that she could not properly release her power, in regard the same was not releasable in equity, had proposed that on being discharged from all liability to which she might be subject in respect of her covenant to release, she would relinquish all power over the unappointed part of the estates, by joining in the recovery to be suffered thereof; and after a release from the covenantees to *Ann Uphill*, of all the covenants so entered into by her in the articles of *February* 1810; and a release from the Plaintiffs, and the Defendants *John Uphill* and *Thomas Uphill*, to *Benjamin B. Uphill* of the unappointed part of the estates; and a farther recital that for as much as *Ann Uphill* would, by joining in the recovery, forfeit her own life-estate in the premises mentioned in the deed of *December* 1759, it had been agreed that the first use to which the said recovery should enure should be as to all the said premises, to *Ann Uphill* for life, without impeachment of waste; all the lands mentioned in the pleadings were conveyed to a trustee, to the intent that he might become a tenant to the *præcipe*; and it was declared that the recovery should enure as to all the said premises, to the use of the Defendant, *Ann Uphill*, and her assigns, for her life, without impeachment of waste; and after the determination of that estate as to each fourth part of the said premises, to the uses expressed thereof respectively.

*Jan.* 22, 1817. An injunction having been granted by the *Vice-Chancellor*, on this day the Defendants moved to dissolve it.

Sir *Samuel Romilly* and Mr. *Shadwell* for the motion, insisted on the right of the Defendant, *Ann Uphill*, as tenant for life, without impeachment of waste, by virtue of an agreement to which the Plaintiffs were parties.

Mr. *Leach* and Mr. *Wray* in support of the injunction. The agreement on which the Defendants rely is such as a [135] court of equity will not support;—a benefit obtained as the condition of an execution of the power, in favor of the party exercising it, and at the expense of its objects.

*March* 24, 1818. The *Lord Chancellor* [Eldon]. If I understand the very complicated deed which has been left with me, the Defendant, *Ann Uphill*, is in law tenant for life without impeachment of waste, as to the premises with respect to which she is now enjoined from committing waste. The injunction can stand only upon a principle of equity that would disable her from taking a benefit to herself under the execution of her power, and from so executing it as to convert her estate, which was an estate impeachable of waste, into an estate not impeachable of waste. But this case, which is found upon inspection of the deed much more complicated than it appears in these pleadings, may furnish considerable arguments for contending that it does not fall within the principle adverted to. All the other parts of the family are parties to the deed which changes the quality of her estate for life. The estate had become, by the various instruments recited in the deed, partly appointed, partly not appointed, and partly the subject of appointments the validity of which was questionable; and her powers had been released by instruments, the validity of which was also questionable. If the final arrangement by the deed to lead the uses of the recovery can be considered as an execution of the powers she had, and can be considered in that light only, there seems to me considerable reason for contending that the arrangement might be supported. But it further appears, that the parties found their estates involved in so much uncertainty, partly by reason of the state of the family, and partly by the effect of all the deeds that had been executed, and the difficulty of ascertaining their operation, that they were advised and thought it best to deal with the estates as if they stood limited to the original uses, and to suffer recoveries of their estates tail in remainder, *Ann Uphill* [136] joining to enable them to do so; and if the title is to stand upon the recovery she enabled them to suffer, and not upon execution of power, there seems no valid objection in equity to her bargaining as to the terms on which she would join in a recovery; and, indeed, the same observation may apply, if it is to be con-

sidered as a mixed transaction of execution of power and recovery, as it seems to me that if her joining in a recovery was required by the family to ascertain their own rights, she might be allowed to judge on what terms she would join. If I do not misunderstand the long deed left with me, and the pleadings, I apprehend she also parted with the possession of some of the premises of which she was tenant for life. I have not met with any case where, in an arrangement settling the interests of all the branches of a family, it has been held, that children may not contract with each other to give to a parent, who had a power to distribute property among them, some advantage which the parent, without their contract with each other, could not have. This, however, is by no means simply the case of execution of a power; but it is a strange mixture of the execution of a power, and of conveyance by record of the estates of both the parent and the children. Upon the whole, I incline to think this injunction should be dissolved; but that, in all events, *Ann Uphill* should not be restrained from cutting timber, unless security is given to her for the full value of all she might cut in her lifetime, to the intent that she may not be a sufferer by an injunction, which, at the hearing of the cause, may not be thought sustainable.(1)

The following order was made: "That the Plaintiffs do, within four months from the date hereof, give security, to [137] be approved of by Mr. Cox one of the Masters of this court, for paying to the Defendant, *Ann Uphill*, and representatives, the full value of the timber (such value to be settled by the Master in case the parties differ about the same) which she might have cut, in case, at the hearing of this cause, it shall appear that she is entitled to cut it; and in default of the Plaintiff's giving such security as aforesaid, the injunction granted in this cause be dissolved."

Reg. Lib. A. 1817, fol. 1482.

(1) For the doctrine of Courts of Equity on the question, whether the execution of a power is avoided by the reservation of a benefit to the party executing, see *M'Queen v. Farquhar*, 11 Ves. 467; *Aleyn v. Bouchier*, 1 Eden, 132; *Sugd. on Powers*, App. p. 677; *Palmer v. Wheeler*, 2 Ball & Beat. 18; *Daubeny v. Cockburn*, 1 Mer. 626, and the cases collected by Mr. Sugden on Powers, p. 400, *et seq.*

DANIEL DUNNAGE and ELIZABETH, his Wife, and ELIZABETH DUNNAGE, the Younger, Plaintiffs, and THOMAS WHITE, JOHN LETTS, WILLIAM PERKS (Heir and Executor of MARY NELL), ABIGAIL LEWIS, JOHN ATWELL the Elder, and MARGARET his Wife, JOHN ATWELL the Younger, and DAVID ATWELL, Defendants. Rolls. Feb. 3, 20, 23, 25, [1818].

[For subsequent proceedings, see S. C. (1820), 1 Jac. & W. 583.]

A deed executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor, not enforced, it appearing on the face of the deed that the parties did not understand their rights, or the nature of the transaction, and that the heir surrendered an unimpeachable title without consideration, and evidence being given of his gross ignorance, habitual intoxication, liability to imposition, and want of professional advice; in the absence of direct proof of fraud or undue influence, and after an acquiescence of five years.

By his will, dated the 8th of March 1802, *David Lewis*, after giving to his nephew, *William Lewis*, in fee, a freehold estate at *Bourne End*, devised to the Defendants, *White* and *Letts*, and their heirs, a freehold estate in *Bearbinder Lane*, upon trust, to receive the rents and pay them to *Jane Hill* during her life; and, after her decease, to sell the estate and divide the purchase-money in manner following; three sixths parts to be paid to his nephews, *William Lewis*, *John Lewis*, and *William Perks*, and one sixth part [138] to his niece, *Mary Nell*; the other two sixth parts to be invested in the public funds, for the benefit of his nieces, the Plaintiff *Elizabeth Dunnage* the elder, and the defendant, *Margaret Atwell*,—the interest or dividends to be paid to them equally, during their lives, for their separate use; and after the decease of either of them who should leave any child or children, to be applied towards the maintenance of such child or children during their minorities; and upon all and every of them attaining the age of 21 years, the said stock to be transferred to them, or the survivors or survivor of them, in equal

proportions. The testator then, after giving some legacies, devised and bequeathed the residue of his estate and effects to the trustees and executors thereafter named, upon trust, to sell and dispose of his household goods and stock in trade, and collect all debts due to him, and all monies belonging to him upon mortgage, &c., and to divide the same into six equal parts, and pay them in manner following; four equal sixth parts to his said nephews, *William Lewis*, *John Lewis*, and the Defendant *Perks*, and his niece *Mary Nell*. The remaining two sixth parts to be invested in the public funds upon the same trusts, in favor of the Plaintiff *Elizabeth Dunnage* the elder, and the Defendant *Margaret Atwell*, during their lives, and, after their decease, of their children, as were before declared concerning two sixth parts of the money to arise from the sale of the freehold estate in *Bearbinder Lane*. The testator appointed *White* and *Letts* his executors.

In addition to the freehold estates mentioned in the will, the testator at the time of its execution, was in possession of some freehold and copyhold lands at *Munden Dane End*, of which he had paid the purchase money, but no conveyance had been made; and between the date of his will and his death, he purchased other freehold lands at *Munden Dane End*, and obtained a decree of foreclosure of some messuages in *Spital Fields*, which had been mortgaged to him in fee.

[139] The testator died 2d February 1809, unmarried, and without issue. His next of kin were his nephews and nieces, *James Edward Lewis*, *William Lewis*, if living, the Plaintiff *Elizabeth Dunnage*, *Mary Nell*, and the Defendants *William Perks*, and *Margaret Atwell*. He had only one brother, *John Lewis*, who died in his lifetime leaving two sons, *William Lewis* the eldest, and *James Edward Lewis*. In May 1796, *William Lewis*, then unmarried, entered as a seaman into the navy, and in August following deserted from his ship on the *Jamaica* station, and had not since been heard of. (Note: The bill alleged that he was supposed to have perished on board a vessel lost at sea.) If he died without issue before the testator, his brother *James Edward Lewis* was the heir at law of the testator at the time of his death; and if, having survived the testator, he afterwards died without issue, *James Edward Lewis* thereupon became, as his heir at law, the heir at law of the testator. *James Edward Lewis*, and his mother *Ann Lewis*, were the only next of kin of *William Lewis*, in the event of his death unmarried and without issue.

At the time of making his will the testator had not any nephew named *John Lewis* (his only nephew of that name having died an infant upwards of 20 years ago), and it was alleged by the bill, and admitted by the answers of all the Defendants, that the name *John Lewis* was inserted in his will by mistake for the name *James Edward Lewis*.

*White* and *Letts* proved the will, and entered into the receipt of the rents of the testator's real estate, except the estate at *Bourne End*, of which possession was taken by *James Edward Lewis*.

By indenture dated 26th February 1810, made between the Plaintiffs *Daniel Dunnage* and *Elizabeth* his wife, of [140] the first part; the Defendants *John Atwell* and *Margaret* his wife, of the second part; *Mary Nell*, of the third part; the Defendant *William Perks*, of the fourth part; and *James Edward Lewis* (described as the brother and heir at law, and also one of the next of kin of *William Lewis*, then supposed to be dead), of the fifth part; reciting the will of *David Lewis*, and his subsequent purchase of the estate at *Munden Dane End*, and in consequence of his not afterwards republishing his will, the descent of those lands to his heir; and farther reciting that *John Lewis* died in the life of the testator, and that *William Lewis*, upwards of fifteen years ago, departed the kingdom, and was supposed to have been lost on board a vessel which foundered at sea, and that *James Edward Lewis* was his heir at law, and *James Edward Lewis*, *Elizabeth Dunnage*, *Margaret Atwell*, *Mary Nell*, and *William Perks*, were his only next of kin, and that in order to prevent disputes and litigations between the several parties thereto, respecting their shares and interests in the said testator's real and personal estates so by him given and devised, and also in the said testator's real estates so descended to his heir at law, it had been agreed that the whole of the testator's property should thenceforth, or when the same or any part thereof should become payable or distributable, be taken and held by the parties thereto, and by every person interested therein; in trust for them, or any of them, in such shares, and upon the trusts, &c., after mentioned concerning the same, and that the parties had accordingly agreed

to enter into the covenants thereafter mentioned ; it was witnessed, that in pursuance of the recited agreement, *Daniel Dunnage* for himself and his wife, *John Atwell* for himself and his wife, *Mary Nell*, *William Perks*, and *James Edward Lewis*, severally covenanted with the others, their heirs, executors, &c., that each of them respectively, their respective heirs, &c., and all persons interested in the premises as trustees or otherwise for the parties thereto, or any of them, should thenceforth and so soon as the same or any part thereof should become vested in, [141] or payable or distributable to or among, the parties thereto or any of them, or any or either of their heirs, &c., stand seised or possessed of all and singular the real and personal estate and property, by the said testator in his said will so given, devised, and bequeathed, and also of the pieces or parcels of land and hereditaments, which had so descended to the testator's heir at law, and the monies, rents, issues, dividends, and profits, arising and to arise therefrom (subject to the interest of *Jane Hill* and her assigns, in the premises in *Bearbinder Lane*, for her life, under the will), for the uses, &c., after mentioned (that is to say), as to the premises at *Bourne End*, to the use of *James Edward Lewis* in fee ; and as to one undivided fifth part of all other the testator's real and personal estates, thereinbefore respectively mentioned, as well those which passed by his will, as those which descended to his heir at law, to the use of, or in trust for, *James Edward Lewis*, his heirs, executors, administrators, and assigns, according to the respective natures and kinds thereof ; and as to one other undivided fifth part, to the use of, and in trust for, *Daniel Dunnage* and *Elizabeth* his wife, their heirs, executors, &c. (*ut supra*). and as to one other undivided fifth part, to the use of, and in trust for, *John Atwell* and *Margaret* his wife, their heirs, executors, &c., and as to one other undivided fifth part, to the use of, or in trust for, *Mary Nell*, her heirs, executors, &c., and as to the remaining undivided fifth part, to the use of, and in trust for, *William Perks*, his heirs, executors, &c.

*James Edward Lewis* died in *July 1815*, having by his will, dated *29th March 1815*, given all his estate and effects to his wife, the Defendant, *Abigail Lewis*, her heirs and assigns for ever, and appointed her sole executrix.

The bill prayed, that the will of *David Lewis* might be established and the trusts performed, that an account might be taken of his personal estate, and of the rents and profits of his real estate devised or descended ; that the trusts of [142] the indenture of *26th February 1810* might be carried into effect, and the rights of the Plaintiffs and Defendants in his real and personal estates ascertained and declared ; that such parts of his personal estate as remained unsold might be sold, and that the monies to arise by such sale, together with such parts of his personal estate as remained in the hands of the executors undisposed of, might be divided among the Plaintiffs and the other persons parties to the indenture of *26th February 1810*, or their representatives, in the manner and proportions therein mentioned. and that his real estates might be conveyed to the Plaintiffs and the other persons parties to the said indenture, or to the heirs of such of them as were since deceased, in such manner and proportions as therein mentioned, or otherwise that the testator's real and personal estates might be conveyed and paid to, or secured for the benefit of, the Plaintiffs and such other persons as should appear to be entitled thereto, in such shares, and in such manner, as the Court should direct.

*Abigail Lewis* by her answer stated, that *James Edward Lewis* was a very ignorant man, and very much addicted to liquor, and that he was prevailed upon to execute the indenture of *26th February 1810* by fraud and imposition, and was not when he executed the same, acquainted with his rights as a devisee and legatee under the will, and as the heir at law, of the testator, and of *William Lewis*, but was induced to believe that *Dunnage* and his wife, and *Atwell* and his wife, had absolute interests in the shares of the testator's residuary personal estate, and of the money to arise by the sale of the estate in *Bearbinder Lane*, and could dispose thereof, and that he executed the indenture under such belief ; that he did not receive any consideration whatever for executing the indenture, and that he was not at any time during his life called upon by the Plaintiffs to carry it into effect ; and she submitted that the indenture [143] ought not to be carried into execution, and that *James Edward Lewis* was not bound thereby.

\* Several witnesses deposed that *James Edward Lewis* was in a low station of life, having been employed by different victuallers to carry out beer for their customers,

and continuing in that employment to the year 1810; that he was very ignorant and illiterate, addicted to drinking to excess, and in the habit of almost daily intoxication; that he did not understand the nature of deeds and legal instruments, and was incompetent to judge of his legal rights without professional assistance; and that he might be easily imposed on and influenced in matters of business.

The Solicitor who attested the indenture of 26th February 1810, deposed that the Plaintiff *Dunnage* had been his client on various occasions, during six years previous to that date, but that *James Edward Lewis* became known to him about the end of the year 1809, and had never been his client; that *James Edward Lewis* and *Dunnage* gave verbal instructions for preparing the deed; that previous to the execution, the draft, and afterwards the deed ingrossed, were read to *James Edward Lewis*, and the contents fully and truly explained to him; that he was fully acquainted with, and comprehended, the true extent and nature of his rights and interests as a devisee and legatee, under the will of *David Lewis*, and as the heir at law of *David Lewis* and of *William Lewis*, and the contents and operation of the deed; that he executed it of his own free will, and without any undue or other influence; that he was perfectly sober at the time, and afterwards expressed himself satisfied with it; but that it was not perused by him, or by any professional person, other than the deponent, on his behalf.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Girdlestone*, for the Plaintiffs, Mr. *G. Wilson* and Mr. *Shadwell* for Defendants in the same interest.

[144] The object of the suit is to establish the will of *David Lewis*, and the execution of the trusts of the deed of February 1810, is prayed as the prescribed mode of executing the trusts of the will. The validity of that deed is the real subject in dispute.

The deed proceeds on the basis of a compromise of doubtful rights. On the face of the will *James Edward Lewis* takes nothing; the fact that the testator intended to describe him by the name *John Lewis* was uncertain; the death of *William Lewis* (the heir at law of the testator), much more his death without issue and without a will (in which events only *James Edward Lewis* would succeed to his rights as the heir at law of the testator), was uncertain; the rights of *James Edward Lewis*, therefore, whether as devisee and legatee, as or heir at law, were uncertain. The deed removes this uncertainty, and recognizes and establishes rights previously doubtful. That recognition is a valuable consideration, *Stapilton v. Stapilton* (1 Atk. 2), *Cann v. Cann* (1 P. W. 723. *Roe v. Mitton* was also referred to, 2 Wils. 356, and see *Taylor v. Rochford*, 2 Ves. Sen. 284).

The second foundation on which this deed rests, is family arrangement. A compromise by which the peace of families is secured, the court will anxiously support, abstaining from a rigorous scrutiny into the terms of the bargain, and sanctioning its stipulations, though proceeding on suppositions of right not conformable to the fact. In a state of common ignorance and uncertainty, the interests of the parties are promoted by any arrangement which terminates doubt and dispute. *Stapilton v. Stapilton*. *Cann v. Cann*.

[145] The deed therefore is not in the view of a court of equity merely voluntary; but if it were, it would not be less valid. The distinction is between an agreement, and a declaration of trust. It is now conclusively established that this Court, though it will not compel the performance of voluntary agreements, *Colman v. Sarrel* (3 Bro. C. C. 12; 1 Ves. Jun. 50), executes voluntary declarations of trust, *Ellison v. Ellison* (6 Ves. 656). It will not interfere to give perfection to the instrument; but the trust being created, and the relation of trustee and *cestui que trust* constituted, the parties are bound, *Sloane v. Cadogan* (Sugd. Law of Vendors, App. p. 49, and see *Pulvertoft v. Pulvertoft*, 18 Ves. 99. *Ex parte Pye*, 18 Ves. 149). This indenture is an equitable division of trust property. If an estate is vested in trustees, a deed executed by the *cestuis que trust*, covenanting that a certain number of acres shall be the property of each, is in equity as effectual a partition as a conveyance.

A farther peculiarity of this case is, that the Court must act; the parties cannot be left to law; the property must be distributed; and the only question is, what rule of distribution the Court will adopt. In these circumstances the deed must prevail, unless the representative of *James Edward Lewis* succeeds in impeaching it on the ground of incompetence and fraud. The suggestion of fraud is totally destitute of evidence, and is disproved by the acquiescence of *James Edward Lewis*,

without complaint, during the five years which he lived after the execution of the deed. The evidence of incompetence is merely general. A person in a low station in life, illiterate, addicted to intoxication, is not under an absolute incapacity of executing a legal instrument. In order to impeach the deed, the Defendant must at least connect these general incapacitating habits with the execution; not to insist on the decisions that even intoxication at the time is not a sufficient objection unless caused by the practice of the other party. (*Johnson v. Medlicott*, 3 P. W. 131, n. A, and see *Cooke v. Clayworth*, 18 Ves. 12.) [146] She must prove actual influence: the proof extends only to liability to influence; and on the other side is the satisfactory deposition of the person who attests the deed. The Defendant proves that imposition might have succeeded: her case requires evidence that it was practised.

Mr. Hart, and Mr. Parker, for the Defendant *Abigail Lewis*. The deed cannot be supported in a court of equity. In order to demonstrate that *James Edward Lewis* executed it in ignorance, or under influence, no more will be required than to confront its provisions with an accurate statement of his interest in the property of the testator. The estate at *Bourne End* devised to *William Lewis*, and the estates purchased after the date of the will, devolved to him in all events, as the heir of the testator, if *William Lewis* died in the testator's life, or as the heir of *William Lewis* if he survived the testator. His interest in the money to arise from the sale of the estate in *Bearbinder lane*, and in the residuary estate, stood thus: As a legatee described by the name of *John Lewis*, he took one-sixth of each of those funds. If *William Lewis* died in the life of the testator, he took, as one of the testator's next of kin, one fifth of so much of the sixth bequeathed to *William Lewis* as was personal estate, and as heir of the testator, the whole of what was real estate; and if *William Lewis* survived the testator, he took, as one of his next of kin, a moiety of so much of that sixth as was personal estate, and as his heir, the whole of what was real estate. If the legacy to *John Lewis*, instead of taking effect in favor of *James Edward Lewis*, was void or lapsed, *James Edward Lewis* was entitled, if *William Lewis* survived the testator, as one of the testator's next of kin, to one-sixth of so much of that sixth as was personal estate, and as one of the next of kin of *William Lewis*, to a moiety of another sixth of such portion of that sixth; and if *William Lewis* died in the testator's life, *James Ed-[147]-ward Lewis* was entitled, as one of the next of kin of the testator, to a fifth of so much of that sixth as was personalty; and in either event, as heir of the testator or of *William Lewis*, to the whole of so much of that sixth as was realty.

It is clear therefore that by this deed *James Edward Lewis* could acquire nothing. As to the real estate, against the claim of a nearer heir or devisee of *William Lewis* (if he left children or a will), it afforded no protection; and against all other persons the right of *James Edward Lewis* was unimpeachable. Every court would, under the circumstances, presume the death of *William Lewis*; and *James Edward Lewis*, having the legal estate as heir of him or of the testator, must have recovered in an ejectment. In the most unfavorable event (the death of *William Lewis* in the life of the testator), he was entitled to the whole of the *Bourne End* estate and the descended estates, and to one-fifth of the residuary personal estate; and yet it is argued that he is benefited by a deed which giving to him the *Bourne End* estate, then consolidates the personal and the real estates, and restricts his right to one-fifth of the whole. He surrendered valuable interests in property, to which the other parties to the deed had no claim, and received in exchange a share of that property which alone could become the subject of litigation, precisely the least that could by possibility be due to him. It is incredible that he could execute such an instrument with a knowledge of his rights, and of its operation; and the solicitor whose testimony is so positive, if he was not equally ignorant, betrayed his client.

The whole deed is founded in error and misrepresentation. (See *Broderick v. Broderick*, 1 P. W. 239.) *Dunnage* and *Atwell* assume an absolute interest in right of their wives, in property limited to their children; [148] and the recital represents *James Edward Lewis* as one of five, instead of one of two, next of kin of *William Lewis*.

An instrument so framed contains intrinsic evidence of mistake or fraud; and it becomes needless to insist on the proofs of general incapacity, or on the preliminary

objection, that the deed containing nothing executory, is such as, admitting its validity, this Court cannot enforce.

Mr. *Phillimore* for the executors.

*Feb. 25.* The *Master of the Rolls* [Sir Thomas Plumer]. In this case the first question is, whether the Plaintiffs are entitled to have the deed of 26th *February* 1810 carried into execution. The objections are, first, that the deed was voluntary containing no consideration in favor of the principal party ; next that it was obtained by fraud, from a person in a state of imbecility.

When the testator died in *February* 1809, his nephew *William Lewis*, the eldest son of his brother *John Lewis*, had been long unheard of. In 1796 he left *England* as a sailor, and no intelligence having been since received of him, except two letters written recently after his departure, the family considered him dead. On the supposition of his death, whether he died before or after the testator, the real estate given to him descended to *James Edward Lewis*. But the distribution of the share bequeathed to *William Lewis* of the produce of the estate in *Bearbinder lane*, and of the residuary estate, supposing him dead, varied with the time of his death. If he died in the testator's life, the next of kin of the testator would be entitled, and his own next of kin if he died after the testator's decease. It seems agreed on all sides that the name *John Lewis* was inserted in the will by mistake, and that the testator meant to denote *James Edward Lewis*, the son of one *John Lewis*, [149] and the brother of another, both deceased. Supposing that fact ascertained, the only doubt was at what period *William Lewis*, died. Recollecting that the testator lived till 1809, and that *William Lewis* had not been heard of since 1796, having left the country under circumstances which gave an early date to his probable death, there seems little doubt that he died before the testator. At the testator's death *Jane Hill*, the devisee for life, was living, and she enjoyed during her life, the rents of the estate in *Bearbinder lane*. Beside the estates devised, the testator had subsequently acquired real property, which could not pass by the will. On those estates the devisees in trust entered. *James Edward Lewis*, the undoubted heir at law of the testator, and of *William Lewis*, took possession of the *Bourne End* estate.

Such were the circumstances of the family at the time of the execution of the deed : some doubt existed on one point, namely, the precise period of *William Lewis's* death. The fact of his death could scarcely be considered doubtful : and the strong probability was, that he died in the life of the testator. On that supposition the real estates descended to *James Edward Lewis* the heir of the testator ; if *William Lewis* died after the testator (unless he left children, or a will, of which there is no evidence), they descended to *James Edward Lewis* as his heir ; but to no other person except *James Edward Lewis*, did any benefit pass in either event. With respect to the personal estate, the time of the death was certainly material ; whether the next of kin of the testator, or of *William Lewis* were entitled, depends on the fact of survivorship. It is a strange mistake in the deed to represent the parties to it as the next of kin of *William Lewis*, when it is clear that his sole next of kin were his mother and *James Edward Lewis* ; and it must not be forgotten that that error is one of the data on which the transaction is founded. Under these circumstances the deed is executed. Of the incompetence of *James Edward* [150] *Lewis* there is no satisfactory evidence : the Solicitor who attests the deed, proves that he was sober, and under no mental disability ; and with regard to undue influence, the evidence is certainly not sufficient to impeach the deed : but as to his general description there is strong testimony, and all on one side ; that he was dissolute, illiterate, addicted to intoxication ; that he had recently passed from a low station into the possession of property to which he was not apparently destined ; and that his course of life rendered him extremely subject to imposition. Such habits, though not constituting absolute incapacity, lay a ground for a strict examination, whether the instrument contains in itself evidence that advantage was taken of them.

The Solicitor who drew the deed, says that he received the instructions from *Dunnage* and *James Edward Lewis*, but he has not said what those instructions were : he admits that he had been for six years the solicitor of *Dunnage*, that he had scarcely any previous knowledge of *James Edward Lewis* ; and that no other professional person was employed on his behalf. In these circumstances *James Edward Lewis* executes this instrument. Is its nature such as to import that



all the parties, and he among the rest, were cognizant of what they did, and understood their rights? There seems strong ground to believe that the Solicitor who says he fully explained the deed, did not understand the rights of the parties. I will not suppose that he intentionally misrepresented them, but they are grossly mis-stated in the deed. First, as I have remarked, it mis-states the persons next of kin to *William Lewis*; next after a recital, in general faithful, of the will, and in particular a recital that the shares of *Eizabeth Dunnage* and *Margaret Atwell* were, after their deaths, to be held in trust for their children, it proceeds to make an absolute disposition of those shares, depriving the children of every right under the will; and then, having limited to *James Edward Lewis* the *Bourne End* estate specifically devised, it directs the [151] division of the remainder of the real estate into five parts, of which one only is to be his. Four-fifths of the real estates descended on him are thus surrendered to parties who never had a pretence of title to any portion of them. No doubt was suggested of the legitimacy of *James Edward Lewis*, or of his being heir of the testator, and *William Lewis*; yet this large proportion of the property is thus relinquished without an equivalent. The deed ought to have contained a description of the whole real estate of the testator. How does it appear that *James Edward Lewis* knew to what estates he was entitled? The deed specifies only a part. It is too plain that those by whom he was surrounded kept him in ignorance of the extent of the property which had devolved on him.

As to the personal estate, if the deed was designed to solve doubts and terminate disputes, it should have been executed by persons competent to protect *James Edward Lewis*: the covenant of these parties affords no protection against the claims of children or devisees of *William Lewis*. *James Edward Lewis* taking one-sixth under the description of *John Lewis*, and in the event of the death of *William Lewis* in the testator's life, taking, as one of the next of kin, one-fifth of his one-sixth, would in this least favorable event be entitled to precisely that share of the personalty which was limited to him by the deed, namely, one-fifth of the whole. His interest in the personalty, and the realty to be converted into personalty, could not be less than one-fifth. From the deed, therefore, he could gain nothing in any possible event; but by a sweeping clause he abandons, without equivalent, a probable share of the personalty, and an undisputed real estate.

It is then insisted that the deed may be supported as a family-arrangement, according to the doctrine of *Stapilton v. Stapilton* and *Cann v. Cann*. Undoubtedly parties entitled in different events may, while the uncertainty exists, each [152] taking his chance, effect a valid compromise. In *Stapilton v. Stapilton* the legitimacy of the eldest son was doubtful; that was a question proper to be so settled; and the settlement was a consideration which gave effect to the deed; but without inquiring whether this transaction was voluntary (for it is beyond doubt that *James Edward Lewis* received no consideration), is this a deed which the Court ought to execute? I am satisfied that *James Edward Lewis* never understood it. By this instrument he covenants that two-sixths of the personalty shall belong to *Dunnage* and *Atwell* and their wives; but under the will, their children had fixed interests in the event of survivorship. What power had the parents to dispose of the property in their own favor? It is true they are now willing to correct this error, but the instrument must be considered as it stood at the date; and the question is, was it then a right disposition of the property? Instead of ending litigation, this deed creates it: as soon as the children became of age they must be advised to assert the rights of which it sought to deprive them. It is clear that the parties knew not what they were doing.

Considering, therefore, the state of mind of this person, his circumstances, and the nature of the transaction, I am of opinion that this is not such a deed the Court ought to execute.

Upon the remaining question, whether the suit can be sustained for other purposes, I think that there is sufficient to entitle the parties to an account of the real and personal estate of the testator, to be administered on the trusts of his will, as if the deed of 1810 had never been executed. Were I now absolutely to dismiss this bill, it would be necessary to file another, with the omission of the deed, in every respect similar.

[153] The bill, so far as it prays an execution of the deed of *February* 1810, must be dismissed with costs.(1)

The decree ordered that so much of the bill as sought that the trusts of the indenture of the 26th of February 1810 might be carried into effect should be dismissed, and as against *Abigail Lewis* with costs; and declaring that *William Lewis*, the eldest son of *John Lewis*, the brother of the testator, died in the life-time of the testator, established the will, and directed the usual accounts. Reg. Lib. A. 1817, fol. 906.

(1) The validity of deeds of compromise between members of the same family, has been the subject of dispute in many cases. In *Frank v. Frank*, 1 Ch. Ca. 84. *Cann v. Cann*, 1 P. W. 723. *Stapilton v. Stapilton*, 1 Atk. 2. *Pullen v. Ready*, 2 Atk. 587. *Cory v. Cory*, 1 Ves. Sen. 19. *Stephens v. Bateman*, 1 Bro. C. C. 22. *Kinchant v. Kinchant*, 1 Bro. C. C. 369. *Stockley v. Stockley*, 1 Ves. & Beam. 23, the agreement was enforced; and see *Wycherley v. Wycherley*, 2 Eden, 175. *Gibbons v. Caunt*, 4 Ves. 849. In *Turner v. Turner*, 2 Ch. Rep. 81. *Cocking v. Pratt*, 1 Ves. Sen. 400. *Lansdown v. Lansdown*, Mos. 364. *Leonard v. Leonard*, 2 Ball & Beat. 171, the agreement was rescinded; and see *Gee v. Spencer*, 1 Vern. 32. *Pusey v. Desbouverie*, 3 P. W. 315. *Evans v. Llewellyn*, 2 Bro. C. C. 150. *Bowles v. Stewart*, 1 Schoal. & Lefr. 209.

[154] TURNER v. TURNER. TURNER v. METCALF. Jan. 16, July 8, 1818.

[S. C. 1 Wils. Ch. 471. See *Briant v. Tebbut*, 1869, 20 L. T. 63.]

It is not competent to the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, while that decree stands.

The bill in the original cause having been filed in Trinity term 1799, by persons interested under the will of *Joshua Turner* deceased, praying an account of his personal, and if necessary a sale of his real, estates, on the 12th of November 1801 a decree for an account was pronounced. On the 20th of December 1815 the master made his report, and on the 15th of May 1816, the order of the 23d of March preceding for confirming the report nisi was made absolute. On the 27th of November following the cause was heard for farther directions by the Master of the Rolls.

The Plaintiffs now moved that the Master might be directed to review his report, and the Plaintiffs be at liberty to take objections thereto, and that the proceedings under the decree made upon the hearing for farther directions, and all other proceedings, be in the mean time stayed.

The affidavits in support of the motion stated, that the solicitor originally employed by the Plaintiffs having been guilty of great neglect, was in April 1813 removed; that the succeeding solicitor during the preparation of the report made various objections to it in the Master's office, the result of which he never communicated to the Plaintiffs, and in September 1816 went to America, leaving the papers in these causes in the possession of a person, who by an order of the 3d of May 1817 was directed to deliver them to the present solicitor of the Plaintiffs on taxation and payment of the costs due; that though they had proceeded under that order with all possible diligence, the Plaintiffs had not yet obtained possession of the papers, from the [155] want of which their solicitor was unable to take the proper measures for their protection; that the Plaintiffs residing upwards of 200 miles from London had entrusted the management of the cause to their solicitors; and that there were many important exceptions (four of which were specified), to be taken to the Master's report, by which, if it remained confirmed, the interests of the Plaintiffs would be totally lost.

Sir Samuel Romilly, Mr. Wetherell, and Mr. Harrison, for the motion. The injury in this case has arisen not from the neglect of the solicitor, but from his absence. Can the Plaintiffs be bound by a decree in a suit in which they were not represented by a solicitor?

Mr. Hart and Mr. Shadwell against the motion. The question is, whether the Defendants, who have proceeded regularly, are to suffer for the misconduct of two successive solicitors of the Plaintiffs, by the farther delay of a suit which has already depended 16 years? The remedy of the Plaintiffs is against their

solicitor. It is not suggested that the exceptions proposed are different from those which were overruled by the Master.

The *Lord Chancellor* desired to be informed of the proceedings in the Master's office, and the nature of the exceptions.

July 8. The *Lord Chancellor* [Eldon]. There is a difficulty in this case which I cannot overcome. The Master having made a report on the original decree, stating debts, &c., the whole of which the Plaintiffs say is wrong, especially in respect of certain allowances, the late *Master of the Rolls* pronounced a decree directing all things to be done conformably to that report previously [156] confirmed; how can I displace the decree on a motion for reviewing the report? In this case there certainly has been gross and shameful negligence; but after the past delay, I cannot detain suitors here because a Plaintiff chuses to employ solicitors who will not perform their duty; nor do I conceive that it is in the power of the *Lord Chancellor* to order a report to be reviewed, after having been confirmed and followed by a decree of the *Master of the Rolls*, while that decree stands.(1)

Motion refused.

(1) The general competence of the Court to direct the review of a report after confirmation seems necessarily implied in this proposition. Few reported decisions however, occur in which that course has been pursued. The *Practical Register* states the doctrine thus: "After a report is confirmed, the Court will not easily (if at all) stir it upon pretence of an omission or mistake; for the parties had sufficient time to except to it; and if they will not mind their business it is their own fault." (Ed. Wyatt, p. 380.) In *Turner v. Turner* (1 Dick. 313), "The cause came on to be heard for farther directions on the report, which was confirmed. Sir Thomas Clarke, M. R., not being satisfied, referred it back to the Master, to review his report, and to be more particular." On reference to the Registrar's book, it appears that in this cause (which was between *Robert Turner*, plaintiff, and *John Turner, James Clare*, and Others, defendants), the report had been confirmed absolutely (*Reg. Lib. B. 1757, fol. 138*) in the usual course, after the order *nisi*. (*Reg. Lib. B. 1757, fol. 42*.) The following entry appears of the hearing for farther directions: "20 April 1758. This cause having received a hearing on the 26th day of February 1754, before the Right Honourable the *Master of the Rolls*, &c., it was among other things ordered, that it should be referred to Mr. Edwards, one of the Masters of this Court, to inquire what incumbrances there were on the estate of the testators *Thomas* and *Henry Turner*, the grandfather and father in the pleadings mentioned, or any part thereof, and by whom and when they were made; and state the same to the Court: that the said Master, on the 19th of December last, made his report, [157] and thereby certified that he had proceeded to enquire what incumbrances there were on the estate of the said testators, *Thomas* and *Henry Turner*, the grandfather and father, or any part thereof, and by whom and when they were made, and found that the several incumbrances following, made by the several persons at the respective times, and in the respective manners particularly mentioned in his report, were incumbrances on the estate of the said testators, *Thomas* and *Henry Turner*, the grandfather and father of the said plaintiffs; that is to say, by indentures of lease and release, bearing date the 26th and 27th May 1730; also, by indenture bearing date the 11th November 1730; also, by indenture dated the 17th day of February 1740; also, by indenture dated the 1st day of July 1741; and also by indenture quadripartite, dated the 26th day of May 1742: and this cause coming this present day to be heard before His Honor for farther directions, on the said Master's report, and as to the matter of costs reserved by the said decree, in the presence, &c., His Honor doth order that it be referred back to the said Master to review his report, and that he do distinguish the particular interest of the several parties in the estates in question, and the respective values of those estates in which they are so interested." *Reg. Lib. B. 1757, fol. 289*. A subsequent case before the same judge, is thus stated by the same reporter. "*Allen v. Allen*. Report pursuant to a decree. No objection was taken to the draught, and the report was confirmed. The cause came on this day to be heard for farther directions on the report. After hearing the decree and report read, Sir Thomas Clarke, M. R., ordered the cause to stand over, with liberty for the plaintiff to take exceptions to the report, as if he had taken exceptions to the draught." (1 Dick. 362.) From the Registrar's book it

appears, that in this cause (which was between *William Allen*, plaintiff, and *Jane Allen* and *Roderick Mackenzie*, and others, defendants), the report was confirmed with the consent of some of the defendants : and, after the usual order nisi (*Reg. Lib. A. 1762*, fol. 119), against others. (*Id.* fol. 138.) The entry of the hearing for farther directions is as follows :—" 14th June 1763. This cause coming this present day to be heard by the Right Honourable the *Master of the Rolls*, for farther directions on the report made in this cause by Mr. *Graves*, one of the Masters of this Court, dated the 17th day of *January* last ; and also as to the matter of costs reserved by the decree made on the hearing [158] of this cause the 1st day of *July* 1761, in the presence, &c., upon opening and debate of the matter, and hearing the will of *Bennet Allen*, dated the 8th day of *May* 1750, the will of *Robert Allen*, the said decree, and the said Master's said report read, and what was alleged, &c., His Honor doth order, that this cause do stand over, and that the plaintiff be at liberty to take exceptions to the said Master's said report, in the same manner as if he had taken objections thereto before the said Master."—*Reg. Lib. A. 1762*, fol. 366. The exceptions were argued and overruled. *Reg. Lib. A. 1763*, fol. 184.

In *Hawkins v. Day*, " on petition that the Master should review his report, after exceptions thereto taken, argued, and the report confirmed by judgment of the Court, *Lord Chancellor* said he never knew an order to that purpose, and it would be of mischievous consequence ; but errors in computation merely, might be set right at any time." (1 *Ves.* 189.) The decree, in that case, directed two accounts : one, of the transactions of a certain partnership ; the other, of the assets of *W. French*, deceased, whose representatives were *James Day*, and *Mary* his wife. The Master, having made his report, exceptions were taken by the plaintiffs, and by two of the defendants, *James* and *Mary Day* : some of which were waved, one allowed, and the rest on argument overruled. *Lib. Reg. A. 1747*, fol. 452. On the 8th *November* 1748, *James* and *Mary Day* presented a petition, stating that all the exceptions to the report " on both sides related to the account of the said partnership estate, and no one of them to the account of the assets of the said *W. French* " : that the exceptions having been argued, [and one relating to a sum of £4, 13s. 2d. allowed, the report " was not in any express terms confirmed ; nor was the said report directed to be sent back to the said Master to be rectified, according to the variation which that allowed exception occasioned ; nor had any farther proceedings been had thereon : that the petitioners resided at *Bristol* ; and the petitioner *James Day* was about seventy years of age, and had employed a solicitor at *Bristol* to defend this cause for them, who again employed his agent in *London* for that purpose ; and the petitioners were advised by their said solicitor, that after the said Master's report should be made, in case the said *Benjamin Lane* " (clerk of the partnership, who had become bankrupt and absconded, as was alleged by the bill, largely indebted to the partnership) " should thereby be found to be really indebted to the said co-[159]-partnership, then the cause would be considered as to the petitioner's case ; but no directions having been given at the time when the said exceptions came on to be argued, and the petitioners, since the time the same were so argued, having been acquainted that a great sum was reported to be in their hands of the said *W. French's* assets (which the petitioners well knew could not be right), the petitioners thereupon, for the first time, upon the 11th day of *August* last, got a sight of the said report, and of such of the schedules thereto as related to the said *W. French's* assets, and thereupon did then find, to their very great surprise, many plain mistakes therein to the prejudice of the petitioners which were not discovered or excepted to ; and in particular, there were two gross and palpable mistakes therein, never discovered by the petitioner's said solicitor, to the petitioners most apparent wrong, in overcharging them in the said *W. French's* assets by at least the sum of £1129, 12s. 11d., and £1511, 10s. 6½d. in those instances alone, as follows," &c. The petition, after farther stating particulars of overcharge, prayed that the petitioners might have leave to take exceptions to the report in the particulars before mentioned. The *Lord Chancellor* was of opinion that it was reasonable under the circumstances of the case, that upon the terms therein after mentioned, the petitioners should have liberty to re-argue the exceptions formerly taken to the said Master's Report mentioned in the petition, and to take new exceptions to the said report, relating to the matters complained of in the petition, to come on to be argued at the same time ; but the Counsel for the Plaintiff desiring, for the sake of despatch, to avoid such circuitry,

and the delay and expense which would be occasioned thereby. His Lordship ordered that, upon the said Defendant *James Day* giving his own recognizance within a fortnight from that time, in the penalty of £2000, with condition to pay such sum of money, if any, as should be found due from him upon the balance of the account directed by the decree, to such of the parties to whom the same should be found due, together with interest for the same to that day, at the rate of 4 *per cent. per annum*, in such manner as the Court should direct, and paying to the Plaintiffs such costs as they had been put to by taking out the said Master's last report, so far as the same related to the account of the personal estate and the administration thereof, and the costs subsequent thereto, so far as the same related, &c., and the costs of that application [160] to the Court, &c., within a week after the taxation or settling thereof, the confirmation (*Note*: It seems that the report was never in express terms confirmed) of the said report should be so far opened as related to the said account of such personal estate, and the administration thereof, and that it should be referred back to the Master to review that part of the said report; and it was farther ordered, that the Master should speed his subsequent report, and that the parties should attend *de die in diem* for that purpose. 21st December 1748, *Reg. Lib. A.* 1748, fol. 115-118. See *Bell's Supplement*, p. 106.

In *Vallence v. Weldon*, 1 *Dick.* 290, stated from the Registrar's book, 1 *Madd.* 340, and *Pennington v. Lord Muncaster*, 1 *Madd.* 555, the Court permitted exceptions to be filed by a party who had not taken objections; and exceptions to a report of the insufficiency of an answer have been permitted after a plea and farther answer. *Noel v. Ward*, 1 *Madd.* 339. For the cases on the question of opening biddings after confirmation of the report, see 2 *Madd. Cha.* 383 et seq.

Where the whole matter appears on the report, a question decided by the Master is open at the hearing for farther directions, without exception, *Adams v. Clazton*, 6 *Ves.* 226; and errors apparent in the schedules have been corrected after enrolment on a summary application. *Weston v. Haggerston, Coop.* 134.

On bills of review for correcting error, or supplying deficiency, in a report confirmed, see *Gould v. Tancred*, 2 *Atk.* 533. *Worge v. Bradley*, 2 *Dick.* 570. *Perry v. Phelps*, 17 *Ves.* 183, and *Manaton v. Molesworth*, 1 *Eden*, 18.

[161] GALLAND v. LEONARD. *Rolls. Feb.* 14, 18, [1818].

[See *Home v. Pillans*, 1833, 2 *My. & K.* 22. Discussed and explained, *O'Mahoney v. Burdett*, 1874, *L. R.* 7 *H. L.* 388.]

The words "in case of the death," construed to refer to death in the life of the tenant for life. Bequest of personal estate being in trust, to pay the interest to *M.* the testator's widow, during her life, and on her death "to pay and divide the trust-moneys unto and equally between his daughters *H.* and *A.*, for their own use and benefit absolutely, and in case of the death of them *H.* and *A.*, or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till 21, then to divide the trust-money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of *H.* and *A.*, without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life, *H.* and *A.* become entitled to the absolute interest.

*Francis Mell*, by his will dated the 14th March 1810, gave to his wife, *Ann Mell*, the whole or such part of his household furniture, plate, linen, and china, as she chose, for her own use and benefit absolutely, an annuity of £60 for her life, and a legacy of the like amount, and after giving to his daughter *Ann* the sum of £1050, to be paid on her attaining the age of 21 years, with interest, he gave to *Robert Galland*, *John Leonard*, and *John Spicer*, all his personal estate, not before disposed of, upon trust, to convert it into money, and after payment thereof of all his debts, legacies, and testamentary expenses, "upon trust to place out the residue thereof, at interest upon real or government securities, and continue the same out at interest during the term of the natural life of my said wife *Ann Mell*, except only the said sum of £1050 above given to my said daughter *Ann* on her attaining the age of 21 years, and the interest thereof to be paid to her half-

yearly, and upon trust to pay to her my said wife the said annuity of £60 a year for her life in manner aforesaid ; and upon her death, then upon farther trust to pay and divide the said trust-monies unto and equally between my said two daughters *Hannah* and *Ann* for their own use and benefit absolutely ; and in case of the death of them my said daughters, or of either of them, leaving a child or children living, then upon further trust to continue the same trust-monies out at interest during the minority of such child or children, and in the mean time to apply a competent part of the interest [162] thereof towards their maintenance and education, and upon their severally attaining their respective ages of 21 years, then upon farther trust to pay and divide the same unto and equally among them if more than one, and if only one child then the whole to such only child, my will and mind being that the child or children of each of my said daughters shall be respectively entitled to the same share his, her, or their mother would be entitled to if then living ; and upon this ultimate trust, that in case of the death of my said two daughters without leaving issue living at their respective death, in the event also happening of all their children dying minors, then my mind and will is, and I hereby direct my said trustees to pay and divide the said trust-monies unto and equally among all and every my nephews and nieces then living, share and share alike, for their own use and benefit absolutely."

The testator died in *May* 1810, leaving his widow and two daughters (the elder married, and of age ; the younger a minor, and unmarried), and several nephews and nieces. After the death of the widow, in *November* 1810, the suit was instituted by two of the trustees, against their co-trustee, the daughters of the testator, the two children of his married daughter, and his nephews and nieces, for ascertaining the rights of the parties ; and the usual accounts having been directed at the hearing, the cause now came on for further directions.

Mr. *Horne* for the Plaintiffs.

Mr. *Parker* for the daughters of the testator.

Mr. *Duckworth* for the children of the married daughter, and the nephews and nieces of the testator.

*Feb.* 18. The *Master of the Rolls* [Sir Thomas Plumer]. Under this will three distinct claims are made ; first, the two daughters of the testator, on the death of the [163] widow, claim the residue absolutely ; next, the children of *Hannah* the married daughter (here represented by the two now in existence) contend that the daughters take only a life-interest, and that the residue devolves to them, after their mother's death, on attaining 21 ; thirdly, the nephews and nieces of the testator insist on an ultimate title, in the event of the two daughters dying without leaving children who shall attain majority. The difficulty consists in reconciling the terms of different parts of the will, or deciding which part is to prevail. In one passage, the estate is given to the daughters absolutely : then follows a limitation to their children in the event of their attaining 21 : the concluding words, it is insisted by the nephews and nieces, confer on them an ultimate interest. Undoubtedly, if the successive clauses of a will are irreconcilable, the rule is to give effect to the last clause, on an idea that the testator may have altered his intent ; but a difficulty occurs in applying that rule to this case, because the question here arises on one clause, applicable all to one fund, and scarcely admitting, therefore, the hypothesis of a variation of intent. Being unable, then, literally to comply with every word in the will, the Court must endeavour, offering as little violence as possible to individual parts, to give effect to the whole ; and I am satisfied that the true construction is, to declare that, in the actual event, the two daughters are entitled to the absolute property.

The intention of the testator is expressed in the first part by terms too clear to admit of doubt. Having first ordered payment of interest to his wife during her life, he directs his trustees, on her death, to pay and divide the trust-monies equally between his two daughters,—an unequivocal declaration that, on the death of the tenant for life, the fund was to be divided between the daughters ; the fund, and not the interest. The construction that the interest only was given to the daughters, departs from the express terms of the bequest. The gift is of the trust-monies for their own use and benefit absolutely ; and the testator's [164] meaning in these words is ascertained by other parts of the will. No doubt can be entertained that the household furniture, when chosen by the wife, was her's without qualification ;

but it is given by the same expressions which are applied to this fund. So, in the latter clause, the gift to the nephews and nieces is to their own use and benefit absolutely. In these passages the testator meant to dispose of the entire interest. I cannot but impute to the same words, in the third instance, that meaning which in the other two is clear and undisputed.

He intended, therefore, to give the fund absolutely to his daughters; but then the difficulty arises to reconcile this gift with the subsequent disposition in favor of their children, and of his nephews and nieces. It must be supposed that the testator contemplated two events. He meant that if his daughters survived his widow, they should take the absolute interest; but that if they were not then living to enjoy his property, it should pass to their children, if they left any; or, if they died without children, to his nephews and nieces. That construction reconciles every part of the will, and makes it one continued disposition of the whole fund. The words evidently import contingency; for, varying the phraseology used in the bequest to his wife, he employs the terms "and in case of the death"; and it has been properly observed, that in other instances, when words importing contingency were applied to an inevitable event, as death, they have been understood to denote the occurrence of the event under particular circumstances, as death at a given period, in the life of the testator, or of the tenant for life. The introduction of that qualification required by the expression, reconciles and renders sensible the whole of this disposition; and, in adopting that construction, the Court is warranted by many authorities. By *Lowfield v. Stoneham* (2 Str. 1261), by *Hinckley v. Simmons* (4 Ves. 160), by *Turner v. Moore* (6 Ves. 567), and by *Cambridge v. Rous* (8 Ves. 12. See *Lord Douglas v. Chalmer*, 2 Ves. Jun. 501. *King v. Taylor*, 5 Ves. 806).

[165] In the disposition on the event of the death of the daughters, leaving a child or children, the testator changes the expression; and, in appropriate terms, first gives interest, the subject of gift to the daughters being capital only. The declaration of his intention that the children should take the same share to which their mother would have been entitled, "if then living," establishes the title of the daughters. It is clear, that at twenty-one the children are to take an absolute interest; it is equally clear, from this clause, that they are to take the same interest to which their mother would have been entitled if living; the mother, therefore, would have taken an absolute interest; and the construction under which the mother takes a life-interest only, and the children absolute interests, is inconsistent with this explicit declaration. The clause expressing the "ultimate trust," merely takes up the other branch of the contingency; and provision being already made for the death of the daughters leaving children, provides for their death without children.

On the general construction of the will, therefore, the whole fund is to be divided between the daughters, if living at the death of the tenant for life: and, in the actual event, the whole passing under the first clause, the subsequent clauses are inoperative.

The decree declared, that according to the true construction of the testator's will, the Defendants, *Hannah*, the wife of *Francis Rhodes*, and *Ann Mell*, are absolutely entitled to the clear residue of the testator's personal estate equally between them.—*Reg. Lib. A.* 1817, fol. 510.

[166] GORDON v. GORDON. Feb. 19, 21, 23, 1818.

[S. C. 1 Wils. Ch. 155.]

The bill prayed that certain articles of agreement, executed by the Plaintiff in favor of his younger brother the Defendant, Mr. *James Gordon*, who disputed the Plaintiff's legitimacy, might be cancelled. On the 4th of August 1809, an order was made for taking the examination *de bene esse* of Mrs. *Hannah Gordon*, relative to an alleged private marriage between her and Colonel *Gordon* deceased, before the birth of the Plaintiff. She was accordingly examined on the 24th of October following, but on the hearing of the cause at the Rolls in December 1816, after her decease, her deposition had not been published, and was not read. The Plaintiff having presented a petition of re-hearing, on the 6th of August 1817, it was ordered

by the *Master of the Rolls* that her deposition should be published and read on the rehearing, and on the 27th of *November* the *Lord Chancellor* confirmed that order. At the rehearing before the *Master of the Rolls*, on the 9th of *December* last, an issue was directed, and on the 12th of *February* 1818, the Plaintiff obtained an order for liberty to read Mrs. Gordon's deposition at the trial. The Defendant Mr. James Gordon, having previously given notice of a motion to suppress her deposition, now moved that the order of the 12th of *February*, so far as relates to her deposition, might be discharged, and that the deposition might not be read at the trial.

The affidavits in support of the motion stated, that in 1808 an action in the Court of Session in *Scotland*, still pending, was brought by the Defendant Mr. James Gordon against the Plaintiff, founded on the articles of agreement for cancelling which the bill was filed; that one Thomas Gordon had acted since the commencement of the action, and still continued to act therein, as the law-agent, attorney, [167] or solicitor of the Plaintiff, particularly on an application for taking the examination of Mrs. Gordon relative to the alleged private marriage between her and Colonel Gordon; that the commission for the examination of Mrs. Gordon (in which none of the Defendants in this cause joined) was directed to five persons, of whom the said Thomas Gordon was one, who, as appears by the return, acted in the execution thereof, the examination taking place at the house of the Plaintiff; that the *Master of the Rolls* having on the 6th of *August* last ordered that Mrs. Gordon's deposition should be published and read at the rehearing, the Defendant Mr. James Gordon, on the 8th of *August*, gave notice, for the first seal before *Michaelmas* term, of a motion to rescind that order (the last seal after *Trinity* term being held on the 5th of *August*); and the motion being heard on the 21st and 22d of *November*, the *Lord Chancellor*, on the 27th of *November*, affirmed the order of the *Master of the Rolls*; that on the 28th of *November*, the solicitor of the Defendant Mr. James Gordon received notice from the solicitor of the Plaintiff, that the *Master of the Rolls* had ordered the cause to be advanced to the head of the paper for the 4th of *December*; that the Defendant Mr. James Gordon never saw Mrs. Gordon's deposition, although it was published soon after the order of the 6th of *August*, till the 4th or 5th of *December*, nor ever knew previously thereto who were the commissioners named in the commission, or any of them; nor did he know until the middle of *December*, that Thomas Gordon, named in the commission, was the agent of the Plaintiff in the *Scottish* cause.

Mr. Agar and Mr. Roupell, in support of the motion. The application is in effect, though not in form, to suppress the deposition of Mrs. Gordon; and the irregularity on which it proceeds is, that one of the persons to whom the commission was directed, and who acted in the execution of it, was the attorney of the Plaintiff in an action carried on against him in the Court of Session, by the [168] Defendant Mr. James Gordon, for enforcing the articles of agreement, to cancel which is the object of the present suit. This Court suppresses depositions taken before commissioners, of whom one is the solicitor (*Fricker v. Moore*, *Bunb.* 289. *G. M. Selwyn*, 2 *Dick.* 563. And see *Sir Francis Fortescue and Coake's case*, *Godb.* 193), or whose clerk is a clerk of the solicitor (*Newte v. Foot*, 2 *Rep. in Ch.* 178. *S. C.* under the name of *Newton v. Foot*, 2 *Dick.* 793), of the Plaintiff or Defendant; nor will courts of law grant an attachment on affidavits sworn before an agent of either party. (*Rex v. Wallace*, 3 *Term Rep.* 403.) Commissioners are the ministers, or rather a part of the Court (6 *Ves.* 30); their duties of impartiality and secrecy are incompatible with the character of agent to the suitors. From the earliest times it has been the policy of the Court to prevent the disclosure of the evidence till publication has passed. For that purpose, Chief Baron Gilbert advised that the commissioners should be sworn not to divulge the depositions (*For. Rom.* 142); and in conformity to that suggestion, an order of the 9th *February* 1721, directs the commissioners and their clerks to take an oath of secrecy. (Orders in Chancery. *Ed. Beames*, p. 327 – 330.) In *Cooth v. Jackson* (6 *Ves.* 12) your Lordship strongly animadverted on the misconduct of commissioners disclosing to either party, even the general effect of the evidence. (See p. 30 – 32, 41.) What can be more inconsistent with the spirit of these regulations, than to permit the agent of the party to officiate as commissioner? The Defendants having refused to join in the commission, the Plaintiff himself nominated his solicitor: his solicitor, not in this cause indeed,



but in a cause in *Scotland* between the same parties, on precisely the same question, and where the same witness was to be examined to the same point. The Court has suppressed depositions, because reduced into writing by the agent of the Plaintiff (*Anon. Ambl.* 252); that was the office to which this Plaintiff appointed his agent.

[169] No delay is imputable to the Defendant; he gave immediate notice of his intention to appeal against the order of the *Master of the Rolls* for the publication of this deposition; and the present application is made as soon as he was apprized of the objection.

Sir *Samuel Romilly*, Mr. *Heald*, and Mr. *Wingfield*, against the motion. The application is altogether irregular; if the Plaintiff's argument is correct, the deposition ought to be suppressed, as unfit to be received, not only on the trial, but for any purpose. But the objection is frivolous; admitting that the questions in the *Scottish* cause and the present are substantially the same, it is clear that this deposition cannot be read there; and it has never been decided that a solicitor in another cause in which the depositions cannot be used, is disqualified to act as a commissioner.

Whatever may be the force of the objection, the Defendant is not competent to insist on it; he has given notice of a motion to read the deposition of a witness, examined before commissioners, of whom one was his own agent in the *Scottish* cause. Can he, at the end of eight or nine years from the examination, after having taken the chance of the deposition, and suffered it to be used, now finding the Court of opinion that it is conclusive against him, upon the allegation of a recent discovery that it was taken before an agent of the Plaintiff, insist that it shall not be read at the trial, himself authorizing the like conduct in his own agent?

Mr. *Agar* in reply. If any difficulty arises from the form of the notice of motion, the Court will direct the deposition to be suppressed.

The *Lord Chancellor* [Eldon]. How can depositions which have been read, at the rehearing be suppressed?

[170] Where the solicitor in the cause has acted as commissioner, the Court suppresses the depositions; but can you argue thence that the same course shall be pursued, if a commissioner is solicitor to one of the parties in another cause? It must be recollected, however, that in this case the struggle is, whether this lady, the mother of the Plaintiff and Mr. *James Gordon*, shall be examined; and it is necessary to ascertain how far the cause, in which the commissioner acted as solicitor to the Plaintiff, was between the same parties and on the same subject. Mr. *James Gordon's* affidavit denies knowledge of the objection until *December*; but, for any thing that appears, his agents may have possessed earlier information, and their knowledge would conclude him.

The order that depositions shall be read at the trial of an issue is necessary, not to render the depositions evidence, but only to save the expence of proving the bill, answer, and other proceedings. The deposition of a deceased witness, in a suit in chancery, is evidence at law (1) after preliminary-[171]-nary proof of the bill, answer, and issue joined; (2) the order is an authority to the judge to receive the evidence without that introductory matter. (*Palmer v. Lord Aylesbury*, 15 *Ves.* 176. *Corbett v. Corbett*, 1 *Ves. & Beam.* 395, see p. 396.)

*Feb.* 23. The *Lord Chancellor* [Eldon]. As far as I have been able to obtain information respecting the practice of the Court, in a case of this sort, I think, that where a deposition *de bene esse* (to the taking of which an irregularity of any kind might have been effectually objected before the hearing of the cause) has been read at the hearing of the cause, it is of course, if any issue is directed, to order it to be read upon the trial; upon which it should seem, it would not be evidence, being a deposition before issue joined, without such an order. (3) It is not necessary, if this be so, to determine what is the effect of a person's being a commissioner employed in the *Scotch* cause, as Mr. *Gordon* was.

The time was certainly very short between the publishing the deposition and the rehearing of the cause; but on the [172] other hand, the party should have applied for time to examine whether the depositions published had been regularly taken (which I think ought, upon a motion, to have been granted, as it seems to be considered in practice, as too late to object when the cause is actually rehearing), even if it had not been known that a person of the name of *Gordon* had acted as a commissioner, and that fact was known, or might have been known by all concerned, some days before the rehearing, and would have been a sufficient ground for such a motion;

and I think therefore, according to practice, the order to read the deposition on the trial cannot now be discharged.

Motion refused. (See *Whitelock v. Baker*, 13 Ves. 511.)

(1) Sir *Francis Fortescue* and *Coake's case*, *Godb.* 193. *Anon. Godb.* 326, pl. 418. *Benson v. Olive*, 2 *Str.* 920. *Tilley's case*, 1 *Salk.* 286; *Gilb. on Evidence*, 61. *Fry v. Wood*, 1 *Alk.* 445; *Bull. N. P.* 239.

In an early collection of Reports in Chancery, the following case occurs:—“Master *Vernon* moved for the Plaintiff that some records and depositions in the Star-Chamber and the city of *London*, where the matter hath been examined, may serve here for proofs of the Plaintiff's surmise: and the rather, because some of the witnesses there examined are dead, and some others are beyond the seas; therefore it is ordered, that it shall be so as is desired. *Puckly* and Others Plaintiffs; *Bridges* and Others, Defendants. *Anon. 25 Eliz.*” *Choice Cases in Chancery*, p. 163. The following entry appears in the *Registrar's Book*:—“*Robert Puckle, Richard Huson, and Edmund Warner*, Plaintiffs; *Robert Bridges*, Defendant. Whereas the said Plaintiffs have brought the matter in variance between them and the Defendant into this court by special *certiorari*, and now are to make proof of the surmises of their bill exhibited into this court in that behalf; forasmuch as it is informed by Mr. *Vernon*, being of the Plaintiffs' counsel, that there are records and depositions, both in the Star-chamber and in the city of *London*, where the matter hath been examined, which will serve for proof of the most of the Plaintiffs' surmises, and that also some of the witnesses then examined are dead, and some others are in parts beyond the seas, it is ordered, that the said Plaintiffs may use all the said records and proofs remaining in the aforesaid two places, or either of them, for proof of the said surmises, or any of them, as well as if the same had been extant or made in this court; and that the said Plaintiffs may also make such further proof thereof as they can in this court.” *Pasch. 17 April 1583. Reg. Lib. B. 24 & 25 Eliz.* fol. 333.

(2) In order to show a cause depending, and the parties and questions at issue between them, *Baker v. Sweet, Bunb.* 91. *Nightingale v. Devisme*, 5 *Burr.* 2594. And see *Illingworth v. Leigh*, 4 *Gwill.* 1619.

(3) For the rule on this point, and the exceptions, see ——— *v. Browne, Hardr.* 315. *Howard v. Tremaine*, 1 *Show.* 363; 1 *Mod.* 146; *Carth.* 265; 1 *Salk.* 278. *Piercy v. ———, T. Jones*, 164. *Bray v. Whitelake*, *Sir T. Raym.* 335, n. *Marsden v. Bound*, 1 *Vern.* 331; *Gilb. on Evidence*, 63; *Bull. N. P.* 240, and *Cazenove v. Vaughan*, 1 *Maule & Selw.* 4.

MORPHETT v. JONES. *Rolls. Feb. 25, 26, [1818].*

[S. C. 1 Wils. Ch. 100. See *Shepherd v. Walker*, 1875, L. R. 20 Eq. 664; *Maddison v. Alderson*, 1883, 8 App. Cas. 479; *M'Manus v. Cooke*, 1887, 35 Ch. D. 691.]

Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness confirmed by circumstances, against the denial in the answer, after part-performance by delivery of possession.

The bill, filed the 10th of April 1815, stated, that in October 1809, a treaty having been entered into between the Defendant *Jones*, and *Robert Morphett*, the elder, the father of the Plaintiff, in his behalf, *Jones* agreed to grant to the Plaintiff, and *Robert Morphett*, the elder, in behalf of the Plaintiff, agreed to accept, a lease of certain lands, afterwards described, for a term of twenty-one years, to commence from Old Michaelmas-day 1809, at a rent of £400. *Jones*, in part performance of the agreement, wrote and signed an authority in writing, to the effect following. “*London, 7th October 1809. To Robert Morphett, Esq. I hereby authorise you to enter the under-mentioned lands as tenant, on Wednesday the 11th instant, being Old Michaelmas-day.*”

<i>Scotney near Lydd</i>	<i>Brackenbury</i>	<i>Looker.</i>
<i>Goose New Romney</i>	<i>James Chittenden</i>	<i>Ditto</i>
[173] <i>Crooked Elms, Newchurch</i>	<i>John Chittenden</i>	<i>Ditto</i>
<i>Pilraggs Ditto</i>	<i>Hoy.</i>	<i>Ditto</i>
<i>Crumph Field, St. Mary's</i>	<i>Jacob Wrattton</i>	<i>Ditto.</i>
<i>Corner Field, New-bridge</i>		

The bill farther stated, that the Plaintiff, in pursuance of the agreement and the written authority given in part-performance thereof, entered into possession of the premises, as tenant to Jones, in October 1809, and continued in possession of the whole until *Old Michaelmas* 1810, paying the rent of £400, allowance being made thereout of such sums as the Plaintiff was entitled to have allowed; that in *March* 1810, Jones being desirous to sell those parts of the lands which were situated in or near *Newchurch, St. Mary's, and East Bridge*, communicated his desire to the Plaintiff, or his father, in his behalf, by a letter, a part of which, after referring to a pressing demand for money, was in the following words:—"The only way I have of meeting it is by selling part of the land. I know of several persons who would become purchasers, but I wish to give you the first offer of the whole or any part you may choose. I shall be inclined to take of you a fair price, inclining to your advantage. The pieces are, the

	ACRES.	
<i>Pilraggs</i>	36	} 70 acres.
<i>Crooked Elms</i>	16	
<i>Crumpp Field</i>	8	
<i>Corner Field</i>	10	

"You have certainly my promise of a lease, from which I should be ashamed to swerve; but should you not purchase any part of the land, you see to what disadvantage I must sell it. I shall be happy to give you the accommodation in the *Goose and Lydd* land, so as to make up the term that was to be granted on the whole, or to make a deduction that may appear fair between us; or, if it is more to your interest, I will execute the plan first intended, that of a lease on the whole."

[174] The bill also stated, that in consequence of that letter, several meetings took place between Jones and Robert Morphett, the elder, on the subject of the intended sale; and it was at length finally agreed, that the Plaintiff should give up the land in and near *Newchurch, St. Mary's, and East Bridge*, being the land specified in the letter; and should continue tenant of the residue of the premises, being the land in and near *New Romney and Lydd* (and in the letter called the *Goose and Lydd* land), for the residue of the term of twenty-one years, to be granted by lease, at the reduced yearly rent of £150, to commence from *Old Michaelmas-day* 1810; that after Jones had contracted for the sale of the land specified in the letter, he requested the Plaintiff to give up eleven acres of the *Goose* land, retaining in lieu the *Corner Field* (part of the land previously agreed to be given up for the purpose of sale), and the Plaintiff having complied with his request, surrendered all the land which he had agreed to surrender (namely the *Pilraggs, Crooked Elms, Crumpp Field*, and eleven acres of the *Goose* land), and continued in possession as tenant, at the reduced rent of £150, of the residue, consisting of the *Corner Field*, and the *Goose and Lydd* land (except eleven acres of the *Goose* land given up).

The bill then stated, that in November 1810, Jones, being desirous of purchasing the Plaintiff's interest in the last-mentioned lands, communicated his desire to the Plaintiff's father, by a letter, dated 2d November 1810, in which, after referring to his having occasion for money to complete the purchase of some estates, he proceeded thus:—"The only resource then left to me, is to dispose of such part of my property as I may deem less likely to increase in value, and surely the marsh land is considered in this state. It therefore remains for me to offer you a consideration for the term you have in it, and I trust such a one as you will think liberal; for I wish to make no other than a handsome compensation, which I feel I am bound [175] to do, as well for the inconvenience of your son's leaving the land, as for the numerous obligations I lie under to you. I am willing to allow you the rent of the present year, and up to *Michaelmas* 1811, on condition of your giving me at that time possession of the land; and I also engage to continue it to you after that period, in case I do not sell it, or that Fenner does not join in the recovery, in which case I cannot make a title. I have suspended for the present the draft of the lease, until your decision is known. If it should not meet your approbation, you will find me not swerve from what I have ever appeared true to, my word. I must then sell under the greatest disadvantage, which you are well aware of. I am so well convinced of your liberality, and of your wish to serve me, that I think you will allow the compensation equal to the sacrifice."

The bill farther stating that the Plaintiff did not accede to this proposal, but continued in possession of the premises, and paid the rent to *Michaelmas* 1814, on the faith of having a lease, expending large sums in repairs and improvements; and that on the 23d of *March* 1815 he received from *Jones* (who had contracted to sell the premises to the other Defendant, *John Pepper*) a notice to quit at *Michaelmas* next; prayed that the agreements, so far as the former was not altered by the latter, might be performed, and that *Jones* might be decreed to execute to the Plaintiff a lease, pursuant to the terms of the agreement; and that the Defendants might be restrained from proceeding at law for the recovery of the premises, or conveying or contracting to convey them.

By his answer the Defendant *Jones* admitted, that in or about *September* or *October* 1809, he entered into a treaty with *Robert Morphett*, the elder, in behalf of the Plaintiff, touching the granting a lease of the lands in the bill described as after mentioned, but not otherwise (that is to [176] say), that the Plaintiff wishing to become the tenant of the premises, it was proposed and agreed generally between the Defendant and *Robert Morphett*, the elder, on the part of the Plaintiff, that the Plaintiff should become such tenant, but nothing was said as to any lease or term of years for which he was to hold the same, except that in the course of the treaty, the Defendant promised generally to grant to him a lease, but he denied that any duration, or the commencement, or termination, or the rent, of any lease, was ever settled and agreed upon, or even mentioned in any way between him and the Plaintiff; and he denied that he ever agreed or promised to grant to the Plaintiff a lease of the premises for a term of twenty-one years, or for any other period, or that the rent to be paid should be £400 a-year, but he said that it was originally agreed, that the Plaintiff should become tenant, at a rent to be settled by a mutual friend, who having accordingly valued the land at £3 per acre, thereby ascertained the rent to be £450. Admitting the written authority to take possession dated 7th *October* 1809, he said that it was for the purpose of putting the Plaintiff in possession as tenant from year to year, without reference to any lease, or agreement for a lease. He also admitted the letter of *April* 1810, possession taken by the Plaintiff, the transaction for surrendering part of the lands, and remaining tenant (from year to year as he insisted) of the rest, at a rent of £150, the subsequent exchange of part of the *Goose* land for the *Corner Field*, and payment of rent as alleged in the bill. He denied expenditure by the Plaintiff on the premises, except in cleansing ditches, to which he was bound as tenant from year to year, and claimed the benefit of the statute of frauds (29 *Car.* 2, c. 3).

*Robert Morphett*, the elder, deposed, that some time previous to *Michaelmas* (old style), 1809, he entered into a [177] treaty with the Defendant *Jones*, for a lease to be granted by *Jones* to the Plaintiff, of all the lands mentioned in the bill for the term of twenty-one years, at a rent to be fixed by one *Martin*; and that about *Michaelmas* 1809, it was finally settled between *Jones* and the witness, that *Jones* should grant a lease to the Plaintiff for the term of twenty-one years, to commence on the 10th of *October* 1809, at the rent of £400, *Jones* having agreed to abate £57 from the rent of £457, previously fixed by *Martin*, which *Jones* as well as the witness thought too high; that the Plaintiff took possession, and paid the rent of £400 to the 10th of *October* 1810; that about *Michaelmas* 1810, the Plaintiff, at the request of *Jones*, gave up the possession of the *Crooked Elms*, *Pilraggs*, and *Crump-field*, and eleven acres of the *Goose* land; and it was agreed between *Jones* and the witness, that the Plaintiff should pay a rent of £150 for the remainder of the lands, during the remainder of the term of twenty-one years; that the Plaintiff paid that rent to *October* 1815, and that such payment was made under the contracts between *Jones* and the witness on the part of the Plaintiff; that the Plaintiff had expended about £100 upon the lands now in his possession, with a view to their improvement, and in expectation that *Jones* would grant a lease for twenty-one years, and that the improvements (which he specified) were not such as are usually made at the expense of a tenant from year to year, or as would be made by any tenant who did not expect to have a lease for twenty-one years at least.

*John Morris* deposed, that on the 2d of *November* 1810, at the request of *Robert Morphett* the elder, he informed *Jones* that the Plaintiff could not comply with the request contained in his letter of that date, for the delivery of the lands; to which *Jones* replied, that the Plaintiff should have the lease; it would be better for the

Plaintiff, but worse for *Jones* ; for that he must sell the land, and that he had told Mr. *Morphett* so in the letter.

[178] The Plaintiff gave in evidence the Defendant's receipt for £400 for a year's rent to *Michaelmas* 1810, and subsequent receipts for the reduced rent of £150.

Mr. *Bell*, Mr. *Roupel*, and Mr. *Sugden*, for the Plaintiff. The Plaintiff rests his claim on a parol agreement with part performance by delivery of possession.

The agreement is proved by *Morphett* the elder, and it is now settled that the evidence of one witness, corroborated by circumstances, will prevail against a positive denial in the answer. *The East India Company v. Donald* (9 *Ves.* 275 ; and see *Pilling v. Armitage*, 12 *Ves.* 78). Here the denial, applying rather to the terms, than the existence, of the agreement, is not positive, and the circumstances confirming the testimony are irresistible. First, the letters of *Jones* himself : his declarations that the Plaintiff had his promise of a lease from which he would be ashamed to swerve, " and that if required he would execute the plan first intended, that of a lease of the whole " ; and his offer of " a consideration for the term which the Plaintiff had in the land " : unequivocal acknowledgments of an agreement to grant a lease. To the same effect is the conversation proved by *Morris* ; and in addition we have possession taken of the whole lands, and payment of rent, conformably to the agreement ; a subsequent surrender of part of the lands, continued occupation of the rest, and payment of the reduced rent. *Jones's* proposal in the letter of *November* 1810, to relinquish a year's rent on condition of obtaining possession at *Michaelmas* 1811, is inconsistent with the suggestion of a tenancy from year to year, under which he might have compelled the Plaintiff to quit at that time. His expression " draft " of a lease is equally inconsistent. The existence of an agreement for a lease therefore appears from the declarations of *Jones* ; the terms are ascertained by parol evidence ; and an act of part-performance is proved in the delivery of possession under a written autho-[179]-rity from *Jones*. From the date of Lord *Aylesbury's* (2 *Str.* 783. The cases are collected by Mr. *Sugden*, *Law of Vendors*, p. 99) case, it has been established that delivery of possession, as an act of part-performance, excludes the application of the statute of frauds (29 *Car.* 2, c. 3) ; upon the principle that without referring the possession to the agreement, the party admitted into possession would be a trespasser (*Clinan v. Cooke*, 1 *Schoales & Lefr.* 41) ; having no other title, his possession is *prima facie* to be referred to the agreement, and it is not competent to the person by whom he was admitted to take and to retain possession, to represent that possession as a trespass. (*Gregory v. Mighell*, 18 *Ves.* 333.) Possession taken of a farm is a strong act of part-performance, the beneficial occupation of such property requiring considerable expenditure. Another act of part-performance was the relinquishment of a part of the lands, and the continued occupation of the remainder at a reduced rent.

The terms of the agreement are clearly ascertained, but after acts of part-performance, according to the doctrine of more than one case, the Court will not be prevented from executing an agreement, by a difficulty in ascertaining the terms. (5 *Vin. Abr.* p. 522 ; pl. 38, p. 523, pl. 40.) Admitting that all the terms of this agreement are not ascertained in writing, the parol evidence supplies that defect ; and it is settled that the terms of an agreement which has been in part performed may be proved partly in writing, and partly by parol. (*Allan v. Bower*, 3 *Bro. C. C.* 148. See the cases collected by Mr. *Sugden*, *Law of Vendors*, p. 110, et seq.) It would indeed be most inconsistent were the Court, which admits parol evidence of the whole agreement, to reject it of a part, because the rest had been reduced into writing.

[180] Mr. *Hart*, and Mr. *Joseph Martin*, for the Defendant. The Plaintiff alleges an agreement for a lease of certain lands during twenty-one years at a rent of £150 ; but the proof by which he endeavours to substantiate that allegation is defective. The written evidence is only of a tenancy, or a promise of a lease, without specification of terms ; and he cannot, in violation of established principles, be permitted to introduce supplemental parol testimony. Whatever form the Plaintiff's case assumes, whether that of a written agreement, to be aided by parol proof, or a parol agreement to be aided by written proof, it proceeds on a confusion of the rules of evidence.

Possession was taken under the written authority, and it is too clear for argument, that parol evidence cannot be received to add terms not contained in the

writing. The letters afford evidence not of an agreement but of a promise: the proposal to abandon a part of the land, and the subsequent abandonment by the Plaintiff, are inconsistent with the existence of a valid agreement. No circumstance confirming the statement of the witness, the positive denial in the answer must prevail.

Assuming the existence of a parol agreement, the Plaintiff next contends that the possession taken by him was an act of part-performance. The Court will not accede to a doctrine so unauthorized and so perilous; which would enable every tenant from year to year to give parol evidence of agreements, comprehending even the fee-simple of the lands. The principles on which that doctrine is said to rest have no application to the present case. Possession here incurs no expense; and being justified by the written authority, in the character of tenant from year to year, it could not be treated as a trespass. The *dictum* of Lord Redesdale, in *Clinan v. Cooke* (1 Schoales & Lefr. 41), [181] is adverse to the Plaintiff's argument, since it, implicitly at least, limits the effect of possession, as an act of part-performance, to cases in which the person taking possession might, upon any other construction, be treated as a trespasser. In strictness, the act insisted on by the Plaintiff is not the taking, but the continuance of possession.

The surrender of one portion of lands held under a prior agreement, is not an act of part-performance of a new agreement for holding the rest. It would be most dangerous to establish that such partial relinquishment of possession, a transaction common between landlord and tenant, enables the tenant to give parol evidence of any alleged agreement relative to the lands. The Court will not extend those doctrines of very doubtful policy, by which the statute of frauds is to a great extent repealed.

The *Master of the Rolls* [Sir Thomas Plumer]. The first question is, whether, by any act of part-performance, this case is exempted from the operation of the statute of frauds (29 Car. 2, c. 3). In order to amount to part-performance, an act must be unequivocally referrible to the agreement; and the ground on which courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referrible to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to contract, has always been considered an act of part-performance. The acknowledged possession of a stranger in the land of another is [182] not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms; the Court regarding what has been done as a consequence of contract or tenure. The fact of possession here is proved, and proved in writing, by the regular authority transmitted to *Morphett* the elder, to deliver possession to the Plaintiff, and it is beyond doubt, that possession was taken under some agreement. The existence of a contract is indeed admitted by the Defendant; and the single question is, what are its terms?

To a certain extent both parties are agreed; as to the fact of a contract, the quantity of land, the agency of *Morphett* the elder, repeated meetings relative to a treaty, and possession taken under some contract, either for a tenancy from year to year, or a future lease. The Defendant alleges that the contract was not obligatory, the period for which the lease was to be granted not being specified; and that possession was taken on the understanding that the terms would be ascertained when the parties met. On the other hand it is said, and proved by *Morphett* the elder, who made the agreement, that it was not a mere promise of a lease, but included a specification what that lease was to be; to commence from *Michaelmas-day* 1809, at a rent to be fixed by *Martin*, afterwards reduced by the parties to £400, and for a period of twenty-one years. Supposing this representation correct, here are all the parts of a complete contract: the quantity of land, the parties, landlord and tenant, the rent, and the term; but it is said that this statement is denied by the Defendant, and he certainly swears positively, that the term was never fixed. The question is, whether the testimony of *Morphett* the elder is sufficiently corroborated; it being clear that the testimony of one witness, sup-

ported by collateral circumstances, may prevail against the positive oath of a De-[183]-fendant. I think that all that passed strongly confirms his statement of the case. The fact that the parties ascertained the quantum of rent is cogent presumptive evidence that they had ascertained the duration of the lease. In fixing a rent, the first question is, for what term is it payable, for one year or for many years? Under a promise of a lease it would be premature to fix the rent before the parties were agreed on the term. From the time when the rent was fixed to the year 1815, when notice to quit was given, nothing passed farther to ascertain the terms of the agreement; and the continual payment of rent during that interval is a circumstance most improbable, on the supposition that those terms were still unascertained.

It is said, that the written authority to take possession is an agreement in writing, and that the Court is not at liberty to resort to parol evidence of the terms. I cannot so consider that document. It is the consequence of an antecedent agreement, not the agreement itself; and it must not escape attention, that it coincides in time with the parol agreement proved. The next act is the letter of *March* 1810, written five months after the contract, nothing having intervened to render the situation of the tenant more permanent. I cannot interpret that letter, as referring to a mere vague promise. Written in a style the reverse of imperative, expressly mentioning a lease, and evidently supposing in the tenant a title to a term; to me it seems the letter of a landlord, bound by an equitable contract. It is then argued, that the relinquishment by the plaintiff of a large portion of the land repels the supposition of a right; but the transaction consisted not only in the surrender of seventy acres, out of 150, but in the reduction of rent from £400 to £150. Is that no advantage to the tenant? Of 150 acres, which he held at a rent of £400, he retains eighty at a rent of £150. That might be a fair inducement to relinquish his right to the rest. With re-[184]-spect to the quantum of rent, the receipt is strong evidence that it was £400, not £450; no reason can be assigned for giving a receipt for a total of £400 unless that sum was the rent. The letter of *November* 1810 is evidence still stronger. After the lapse of near a twelvemonth, nothing having passed to render the tenancy more fixed, the Defendant not only addresses to the Plaintiff a request to relinquish possession of the land, but offers a considerable sum, two years' rent, as a satisfaction of some supposed right. It is said, that the Defendant, being a man of strict honor, might desire to purchase a release from his promise; he might so: but in *March* 1815, when the Plaintiff had the same claim on his honor, he sold the estate, and gave him notice to quit. Had this obligation of honor, still remaining unsatisfied, lost in 1815 the authority which it possessed in 1810? At that time his urgent application had received a refusal well calculated to provoke the assertion of whatever right he possessed. The acquiescence of a disappointed man affords strong evidence of a contract. The testimony of *Morphett* is corroborated by the transaction which *Morris* proves; and on the whole, I think the circumstances abundantly sufficient to confirm the statement of the witness; and that the Plaintiff has established a parol agreement in part performed. The first agreement being once fixed, such as equity will enforce, the second only reduces the quantity of land, and of rent, leaving the original good as to the residue.

Specific performance decreed with costs.

"His Honor doth order and decree, that the agreements, so far as the former is not altered by the latter, be specifically performed and carried into execution; and it is ordered, that the Defendants do execute to the Plaintiff a proper lease accordingly; and it is ordered, that the Defendant, *J. G. Jones*, do pay to the Plaintiff the costs of this suit to the present time, including the costs of this decree," &c. Reg. Lib. B. 1817, fol. 857.

[185] The Honorable ROBERT CURZON and HARRIET ANNE his Wife, *Plaintiffs*, and The Right Honourable CECIL BARON DE LA ZOUCH and Dame HARRIET ANNE his Wife, THOMAS RHOADES and JOS. ROSE, *Defendants*. Feb. 5, July 29, 1818.

[S. C. 1 Wils. Ch. 468. See 3 Swans. 683 (app.).]

A demurrer and answer filed by a Defendant attached for want of an answer, after orders for time to plead, answer, or demur, not demurring alone, ordered to be taken off the file.

The Defendant *Thomas Rhoades* having obtained two orders for time to plead, answer, or demur, not demurring alone, which had expired, was taken under an attachment issued against him for not answering on the 13th of *November* 1817, and on the 27th of that month filed a demurrer and answer. On the 5th of *December* the *Vice Chancellor* ordered the demurrer and answer to be taken off the file. On the 24th of *December* the *Lord Chancellor* ordered the Six-clerk to restore the demurrer and answer to the file, with liberty to the Plaintiffs to make such application as they should be advised concerning the same. (1) The Plaintiffs now moved that the demurrer and answer might be taken off the file.

[186] Mr. *Bell*, and Mr. *Pepys*, for the motion. It has been repeatedly decided that a Defendant who has obtained an order for time to answer only, cannot file [187] an answer and demurrer, *Kenrick v. Clayton* (2 Bro. C. C. 214; 2 Dick. 685), *Taylor v. Milner* (10 Ves. 444), *Mann v. King* (18 Ves. 297; and see *Dyson v. Benson*, *Coop.* 110; *Bruce v. Allen*, 1 Madd. 556), nor even obtain an order for [188] time to plead, answer, or demur, not demurring (*Penn v. Lord Baltimore*, 1 Dick. 273) alone. Can a Defendant against whom process of contempt for [189] not answering has issued, be in a better situation? The general rule is, that a party in contempt cannot demur; the Defendant must prove that that rule applies only to a demurrer to the whole bill. In *Newton v. Dent* (1 Dick. 234), Lord *Hardwicke* discharged a plea filed by a Defendant attached for not answering: a *fortiori* his demurrer, which in contradistinction to a plea or answer is always considered as [190] dilatory is irregular (*East India Company v. Campbell*, 1 Ves. Sen. 246). A Defendant under an attachment cannot, without answering, satisfy the words of the writ, the endorsement is "by the Court for not answering"; and Chief Baron *Gilbert* says, "the form of the attachment being *ad respondendum de contemptu per ipsum nobis illatum, et ad faciendum ulterius et recipiendum quod dicta curia consideraverit*, he must answer as well as clear his contempts at the same time (*For. Rom.* 72). The expressions of Lord *Hardwicke* in *Dupond v. Ward* (1 Dick. 133) imply that the Defendant, who had been attached for not answering, would not have been discharged without an answer. In a very recent case (*Broughton v. Jones*, 3 Madd. 42), the present *Vice Chancellor* has decided that after an attachment for want of answer, the Defendant cannot have a special commission to take his plea, answer, or demurrer.

The irregularity being clear, the only question is whether the demurrer should be expunged, or the whole writing taken off the file? The latter is the correct course, because the writing being contrary to the rule of practice is a nullity, and because by the expunction of the demurrer, an answer would remain purporting to be an answer to part of the bill.

The act of the Plaintiff in taking an office-copy is not a waiver of the objection, but the only mode by which the Court can be informed whether the writing is an answer or a demurrer.

Sir *Samuel Romilly* and Mr. *Wilbraham* against the motion. No decision has been cited that a Defendant attached for not answering after having obtained orders for time to plead, answer, or demur, not demurring only, is not entitled to file an answer and demurrer. Cases in which orders [191] for time to answer only have been obtained are not analogous to the present; by that proceeding the Defendant submits to answer, and precludes himself from the privilege of demurring. It is not competent to him afterwards to enlarge the terms of the indulgence which he has sought; the subsequent orders must be conformable to the preceding. (*Mann v. King*, 18 Ves. 297.) *Newton v. Dent*, the only case similar to



this, proves too much ; for it will not now be disputed that the Defendant might have filed a plea to the whole bill. (*Anon.* 2 P. Wms. 464. *Roberts v. Hartley*, 1 Bro. C. C. 56 ; 2 Dick. 554, and see 3 P. Wms. 81. In *Lloyd v. Gunter*, 1 Vern. 275 ; the plea was filed after attachment with proclamation, and under a commission to take the answer only.) The meaning of the rule that a Defendant attached for not answering must answer, is that he must not evade answering by a demurrer merely for delay ; and that rule is not infringed by a Defendant who having answered every part of the bill which he is bound to answer, demurs to the rest. An answer and demurrer form a substantial defence, as distinguished from a demurrer alone ; a distinction recognized by the Court in the form of orders for time. It is not disputed that by his answer the Defendant might in effect have demurred submitting that he was not bound to answer those parts to which he now demurs. To that answer exceptions might have been taken ; and the Court would then have determined on exceptions the points which it is now solicited to determine on demurrer. Such is the importance of the question which the Plaintiffs agitate : whether the Defendant must use the form of answer or demurrer, to protect himself from giving an answer to interrogatories which require none ; for it cannot be pretended that a Defendant, by the circumstance of being in contempt, is bound to answer interrogatories impertinent, or tending to subject him to a penalty. I defy the Plaintiffs to state a distinction in principle between the situation of two Defendants not having answered, of whom [192] one obtains an order for time to plead, answer, or demur, not demurring alone, and the other becomes the object of an attachment. The Court allows time to answer and demur, and the party clearing his contempt may use the same defence as if he had obtained an order for time.

*Mr. Bell* in reply. The question of practice is highly important. If a demurrer to part of a bill may be filed after an attachment, additional means of delay will be afforded to litigious Defendants. Dishonest executors, seeking to retain money in their hands, in addition to the established course of an attachment for not answering, followed by an insufficient answer, will be entitled to interpose a demurrer ; and a new dilatory will be added to the records of the Court. If the Defendant may file a demurrer and answer after an attachment for not answering, why not in the last stage of the process of contempt ?

*The Lord Chancellor* [Eldon]. In many cases practice gives a construction to the term answer. If of the interrogatories in the bill, some require an answer, while others tend to criminate the Defendant, is it not clear that he might by answer insist on not answering the latter interrogatories ? Suppose the case of a bill in which there was not one question that the Defendant could answer without subjecting himself to a penalty.

*Mr. Bell*. The Defendant must protect himself by answer, submitting that he is not bound to answer farther. If this demurrer is overruled, can we resume the process where we left it, as in the instance of an insufficient answer ? That uncertainty shows the novelty of the attempt.

*The Lord Chancellor*. The regular course, no person in Court knowing the practice, would be to direct the Master to certify what it [193] is ; but thinking that that step would not advance us nearer to the end, I will take time for consideration in order to settle this question, and those which have been raised in the course of the argument.

*July 29.* *The Lord Chancellor* [Eldon]. The application in this case was to take the answer and demurrer off the file ; and I have given a great deal of consideration to the question. An answer and demurrer having been filed, there is an answer ; and it has been the opinion of some of my predecessors that the proper course is to overrule the demurrer and let the answer stand ; on consideration I think otherwise, because by overruling the demurrer you admit that it was regularly filed. I am of opinion, therefore, that the order of the *Vcie Chancellor* was right, and that both the demurrer and answer must be taken off the file.(2)

[194] On the motion of Sir *Samuel Romilly*, a month's time to answer was given to the Defendant *Rhoades*.(3)

*July 30.* " His Lordship [Lord Chancellor Eldon] doth order that the said demurrer and answer be taken off the file, and it is ordered that the Defendant *T. Rhoades* do have a month's time to answer the Plaintiffs' bill, and it is ordered

that the said Defendant do pay unto the Plaintiffs the costs of this application to be taxed, &c." Reg. Lib. A. 1817, fol. 1689.

(1) In explanation of the proceedings in this cause which, on the first view, seem scarcely consistent, the following account of them is subjoined from the Registrar's book.

*Vice Chancellor* [Sir John Leach], *Friday, 5th December 1817*. Upon motion, &c., by Mr. *Pepys*, of counsel for the Plaintiffs, it was alleged that the Defendant *Thomas Rhoades*, on the 10th day of *June* last, obtained an order for six weeks time to plead, answer, or demur (not demurring only), to the Plaintiffs' bill, and a commission to take the same, with the usual directions, and that the said Defendant, on the 28th day of *July*, obtained another order for a month's further time to plead, answer, or demur (not demurring only), but that order was to be peremptory; that the said Defendant not answering within the time thereby limited, the Plaintiffs, on the 13th day of *November* last, caused an attachment to be issued out of this Court against the said Defendant for want of his answer, returnable, &c., and a *cepi corpus* has been returned thereon; but on the 27th day of the same month of *November*, the said Defendant filed a demurrer and answer, which the Plaintiffs are advised is irregular; it was therefore prayed that the said demurrer and answer may be taken off the file for irregularity, with costs to be taxed, &c.

Whereupon, and upon hearing Mr. *Wilbraham*, of counsel for the said Defendant *T. Rhoades*, this Court doth order, that the said demurrer and answer be taken off the file of this Court for irregularity, and that the Defendant *T. Rhoades* do pay to the Plaintiffs their costs occasioned by filing the said demurrer and answer, and of this application, to be taxed, &c. Reg. Lib. A. 1817, fol. 81.

24th Dec. 1817. Upon opening of the matter, &c., to the *Lord High Chancellor*, &c., by Sir *Samuel Romilly* and Mr. *Wilbraham*, of counsel for the Defendant *Thomas Rhoades*, it was alleged that by an order made in this cause, bearing date the 5th day of *December 1817*, it was ordered that the demurrer and answer filed in this cause by the Defendant *T. Rhoades* to the Plaintiffs' bill should be taken off the file, and by another order made in this cause bearing date the said 5th day of *December 1817*, stating that an attachment having been issued against the Defendant *T. Rhoades* for not answering the Plaintiffs' bill directed to the sheriff of *Sussex*, he had returned a *cepi corpus* thereon, it was thereupon ordered that the messenger attending this Court should apprehend the said Defendant, and bring him to the bar of this Court to answer his contempt, whereupon such further order should be made as should be just; that it appearing by the affidavit of *L. H.* agent in this cause to the Defendant *T. Rhoades*, that the demurrer and answer of the said Defendant *T. Rhoades* was sworn and filed on the 27th day of *November* last, and that so soon as the same had been sworn the said *L. H.* went to the office of Messrs. *L. and B.*, the Plaintiffs' solicitors, and saw and informed the said Mr. *L.* thereof, and very soon afterward, on the same day, happening to be in the Six-clerks' office at the seat of Mr. *J.*, the said Mr. *L.* came there, and in the hearing of the said *L. H.* bespoke an office-copy of the said demurrer and answer of the said Mr. *J.*, and believes that such office-copy was accordingly made for, and delivered to, the said Messrs. *L. and B.*; that in the bill of costs of the said Messrs. *L. and B.*, carried into Master *Thompson's* office, pursuant to the order made in this cause for taking the said demurrer and answer off the file, the first charge in the said bill is a sum of £2, 7s. 10d. as paid for office-copy of the said demurrer and answer, which charge was, on the taxation of the said costs, claimed by, and allowed to, the said Messrs. *L. and B.* accordingly; that although the Plaintiffs' notice of motion for the taking the said demurrer and answer off the file was given for the 5th day of *December* instant, yet his Honor the *Vice Chancellor* did not decide thereon for several days afterwards, nor did the said *L. H.* hear of his Honor's decision on the said motion until the 11th day of the said month of *December*; and upon hearing thereof the said *L. H.* called the same day at the office of the said Messrs. *L. and B.*, to have seen the said Mr. *L.* who attends to this cause on the part of the Plaintiffs, to have requested him not to make any adverse motion or take any hostile proceedings against the said Defendant *T. Rhoades*, as the same were quite unnecessary, he the said *L. H.* being about to write to him to come to *London* forthwith to put in his answer in lieu of the said demurrer and answer; but the said *L. H.* was informed

at the said office of the said Messrs. *L.* and *B.*, that the said Mr. *L.* was not within, nor did the said *L. H.* see him on the said 11th day of *December* as he wished to have done, and therefore he the said *L. H.* called upon him again on the following day, but he was not then within; however the said *L. H.* in his search met with the said Mr. *L.* in *Lincoln's Inn Hall*, when the said *L. H.* made to him the request which he intended to have made on the preceding day as above mentioned, and the said Mr. *L.* in answer stated to the said *L. H.*, that an order of this Court had already been put into the hands of Mr. *P.* the messenger for the apprehension of the said Defendant *T. Rhoades*, which information the said *L. H.* for some time hesitated to credit, imagining that the said Mr. *L.* was only in jest, and conceiving it hardly possible for the motion to have been made, and the order drawn up subsequently to the said decision of his Honor the *Vice Chancellor*; however the said Mr. *L.* gave the said *L. H.* to understand that such was the case, and the said *L. H.* then remonstrated with Mr. *L.* on so harsh and unnecessary a proceeding, and entreated him to stop the execution of the order, and to give the said *L. H.* a note to the messenger to that effect, which the said Mr. *L.* declined doing, but he subsequently consented to accompany the said *L. H.* to the said messenger, and having afterwards met with Mr. *P.* the messenger in the street, he informed the said Mr. *L.* and the said *L. H.* that his deputy had gone to *Chichester* on the evening of the 11th by the mail to bring up the said Defendant, and the said *L. H.* then again complained of the hardship of the proceeding, and the said Mr. *P.* excused himself by pleading his duty, and having acted according to the instructions of the said Messrs. *L.* and *B.*, and he offered to write a note to his deputy to discharge the said Defendant *T. Rhoades* out of his custody, on the said *L. H.* undertaking for his appearance, and agreeing to consider the said Defendant in his the said *L. H.*'s custody, provided the said Mr. *L.* would consent to his so doing, and the said Mr. *L.* did thereupon write a note to the said Mr. *P.* signifying such consent, as the said *L. H.* understood, and the said Mr. *P.* then wrote such note as he had before offered to do, and his said deputy on the *Monday* following put the order and the warrant into the hands of the said *L. H.*, and told the said *L. H.* that he must consider the said Defendant in his custody; and that the said *L. H.* discovered that the said order for the arrest of the said Defendant was dated on the said 5th day of *December* instant, and that the said *L. H.* had never any intimation whatever of any intention to move for a messenger against the said Defendant, nor did he know of such a step having been taken until he saw the said Mr. *L.* on the said 12th day of *December*, and saith he has been informed and believes, that the said demurrer and answer were not taken off the file of this Court until the same 11th day of *December*; it was therefore prayed that the order made in this cause dated the 5th day of *December* instant, authorising the demurrer and answer filed in this cause by the Defendant *T. Rhoades* to be taken off the file, and also the order made in this cause also dated the 5th day of *December* instant, whereby it was ordered that the messenger attending this Court should apprehend the said Defendant *T. Rhoades*, and bring him to the bar of this Court to answer an alleged contempt for not answering the said Plaintiffs' bill, may be respectively discharged, and that the said demurrer and answer, if taken off the file, pursuant to the said first-mentioned order, may be restored, or that the said Defendant may have a further reasonable time to plead, answer, or demur, to the said Plaintiffs' bill, not demurring alone, and may be discharged out of the custody of the messenger of this Court: Whereupon, and upon hearing Mr. *Pepys*, of counsel for the Plaintiffs, and the said orders of the 5th day of *December* instant, the said affidavit of *L. H.*, an affidavit of *J. L.*, and an affidavit of *J. H.*, his Lordship doth order, that the order for a messenger of the 5th day of *December* be discharged, and that the said Defendant *T. Rhoades* be discharged out of custody; and it is ordered that the Six-clerk do restore the said demurrer and answer to the file, and the Plaintiffs are to be at liberty to make such application to this Court concerning the same as they may be advised; and it is ordered that the Plaintiffs do pay the costs of, and incidental to, the said order of the 5th day of *December* for a messenger, and of this application, to be taxed, &c., and the Defendant *T. Rhoades* is not to be subject to any costs of, or relating to, the said messenger, or of the said order for taking the said demurrer and answer off the file. Reg. Lib. A. 1817, fol. 169.

(2) In *Taylor v. Milner*, 10 Ves. 444, it seems to have been considered that the  
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demurrer being coupled with an answer, could not be taken off the file; a proceeding not permitted by the modern practice on the amendment of answers. See *Edwards v. M'Leay*, 2 Ves. & Beam. 256, and the note; to which may be added *White v. Godbold*, 1 Madd. 269. By one of Lord Clarendon's orders (copied from an article in the Orders of the Lords Commissioners, published in 1649, *Beames, Orders, App.* p. 496, 497), after a contempt duly prosecuted to an attachment with proclamation returned, no commission to answer shall be made, nor any plea or demurrer admitted, but upon motion in court, and affidavit made of the party's inability to travel, or other good matter to satisfy the Court touching that delay. (Orders in Chancery, ed. *Beames*, p. 178; and see the references in n. 51.) "The reason why upon the first contempt on the attachment, they allow a commission to issue, or a plea or demurrer to be put in, is, because it does not appear to be an affected delay, and therefore, upon tendering the costs of the attachment, the Defendant may take his commission, and, upon like tender, the plea and demurrer are to be received. But if there regularly issues an attachment with proclamation, the Defendant cannot of course purge his contempt by a mere tender, but he must apply to the Court, to show that his plea and demurrer are proper, and to exhibit a proper excuse for his delay, that the Court may see that there is no farther likelihood of delay by the plea or demurrer put in, or by the commission to answer granted." (*Gill. For. Rom.* p. 71.) In the present case, this distinction between the two species of attachment was not insisted on. It is clearly settled that a mere denial of combination by answer does not satisfy the undertaking not to demur alone. *Lansdown v. Elderton*, 8 Ves. 526. *Lee v. Pasco*, 1 Bro. C. C. 78. *Stephenson v. Gardiner*, 2 P. Wms. 286. *Attorney-General v. —*, 4 Vin. 442, Ch. W. a, Mitf. Plead. p. 171, and cases cited in note (r). A demurrer may be filed at any time before process of contempt has been issued, or an order for time obtained, though the period for answering is expired; *East India Company v. Henchman*, 3 Bro. C. C. 372. *Sowerby v. Warder*, 2 Cox, 268; but not, as it seems, after an injunction issued upon a *dedimus potestatem* to take the Defendant's answer. *Edmonds v. Savery*, 3 Mer. 304.

(3) In *Griffith v. Wood*, 1 Ves. & Beam. 541, after a demurrer over-ruled, an order for a month's time to plead or answer was made on motion of course; but in *Jones v. Saxby*, Lincoln's Inn Hall, 12th Dec. 1814, two of the Defendants, after a demurrer overruled, having obtained an order of course, by petition to the Master of the Rolls, for six weeks time to plead, answer, or demur, not demurring alone, the Lord Chancellor, on the motion of Mr. Combe, discharged the order for irregularity, stating his clear opinion, that after a demurrer overruled time to answer can be obtained only on a special application. Reg. Lib. A. 1814, fol. 99.

[195] HILL v. SMITH. *Rolls. March 2, [1818].*

[S. C. 1 Wils. Ch. 134.]

Bequest of £3000 stock to W., the testator's son by a first marriage (his second wife and a son by her being living), the interest to be appropriated to his maintenance under the direction of trustees till he attained 24, and of the residue of the testator's personal estate (the interest being given to his wife during her widowhood, after her decease or marriage), "unto any child or children I may have by my wife, to be equally divided between them that attain the age of 21 years, the survivor of my children to possess what is here bequeathed to the other, but should not either of my children attain the age of 21 years, or live to possess what is here bequeathed to them, I then bequeath" to the children of the testator's sister the £3000 stock; the son by the second marriage dying in the life of the testator, and there being no other issue of that marriage; W. is entitled to the stock and to the residue.

The question in this case arose on the will of *William Hill*, dated the 5th of August 1811. "As for and concerning all my worldly affairs and effects, I dispose of as follows: *Item*, I give and bequeath unto my son *William Hill* £3000 stock in the 3 per cent. consols. and reduced, free from all deductions whatever, and what may be short of that amount in those funds at my decease, to be made up out of my other effects, within the space of one year after, and the interest arising therefrom

to be appropriated to his maintenance and support, under the direction of his trustees herein named." The testator then appointed two persons trustees of his son till he attained the age of twenty-four years; and after bequeathing to his son his watch and a book-case, and to his wife £300 and some furniture, and to his sister *Ann Pashley* £50, proceeded in the following words. "I further will and direct that my lease, stock, and utensils in trade, with my other property and effects not herein disposed of, shall be sold, either by public or private sale as my executors may think best, as soon as possible, but not exceeding one year after my decease; and the monies arising therefrom to be immediately vested in the funds, and the interest thereon I give and bequeath unto my wife *Betsey* for and during her natural life, provided she remains a widow; and after her decease or marrying, I give and bequeath the said stock and interest arising from the residue and remainder of my estate and effects, unto any child or children I may have by my wife *Betsey*, for to be equally divided between them that attain [196] the age of twenty-one years, the survivor of my children to possess what is here bequeathed to the other; but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I then further will and bequeath unto the children of my aforesaid sister *Ann Pashley* widow, by her late husband *Robert Pashley*, the £3000 stock in the 3 per cent. consols. and reduced, left to my son *William*, on their attaining the age of twenty-one years, equally divided between the survivors of them, share and share alike, the interest on which my said sister *Ann Pashley* may receive during the term of her natural life, if she remains a widow, and require it, without being liable to be called to account as to the disposal of the same."

The testator appointed his wife executrix and *Thomas Smith* and *James Williamson* executors.

At the date of his will the testator had two children; the Plaintiff, his only son by a former wife, and by his second wife, a son who died in infancy during the testator's life.

The testator died in the year 1813, leaving his wife surviving, and the Plaintiff his only child. On the 30th of *September* 1815 the widow died, and the Plaintiff, having in *July* 1815 attained the age of 24 years, in *November* following, filed the present bill, praying a transfer of the £3000 3 per cent. reduced annuities; a declaration that on the death of the widow, he became entitled to the residue of the testator's personal estate not specifically bequeathed, and the consequential accounts.

*Mr. Bell* and *Mr. Garratt* supported the claims of the Plaintiff for reasons fully stated in the judgment.

[197] *Mr. Cooke*, for *Mrs. Pashley* and her children. The sum of £3000 stock is expressly bequeathed to the children of *Mrs. Pashley*, on failure of issue by the second marriage attaining 21; the residuary bequest lapsing in that event, the testator considered the share of the residue to which his eldest son would become entitled, a sufficient provision. The residue is given to the children of the second marriage only, and on failure of such children devolves as undisposed of to the next of kin. The claim of the executors is excluded by the express intention of the testator to dispose of the whole of his property, *Bennet v. Batchelor* (3 Bro. C. C. 28; 1 Ves. Jun. 63), *Mence v. Mence* (18 Ves. 348).

*Mr. Hart* and *Mr. Roupel* for the executors; *Mr. Pemberton* for the representatives of the widow. The residue is not only undisposed of, but the testator has expressed no intention to dispose of it, except in an event which has not occurred. The cases cited, therefore, are inapplicable, and the legal right of the executors must prevail.

The reply was stopped by the Court.

The *Master of the Rolls* [Sir Thomas Plumer]. This will, however inaccurate, sufficiently discloses the testator's intention. Having a son by his first wife, and another living by his second, it was natural that he should provide for both branches of his own family in preference to more distant relations. The sister *Mrs. Pashley* and her children contend, that in the event of his leaving no children by his second wife who should attain twenty-one, the provision for his son by his first wife was to be devested; that is not a reasonable intention, and it is inferred upon the harsh construction, that he calculated on the portion which the son as one of the next of kin would take in the residue [198] as a compensation. It is not to be believed that he meant to leave his son to this implied provision, under a clause so ambiguous

as to raise a claim of title in the executors. The probability is that he would first make provision for his own children, and that the collateral branch was to take only in the event of their not living to enjoy it. Are not the words competent to effect that intention? They are clearly sufficient to embrace all his children. "The survivor of my children." The son of the second wife having died under twenty-one, the Plaintiff sustains the character of survivor. I think, though the intention is not accurately expressed, that the testator meant to speak of his family by his second wife as a class of claimants, by distinction from the issue of his first wife; and that the term survivor refers to a survivorship between those two classes. Contemplating the death of his eldest son on the one hand, and a failure of issue by his second wife on the other, he designed that the family which survived, should succeed to the fund originally provided for the family which failed; and a doubt might have arisen in the event of a plurality of children by the second wife, and one surviving. It is difficult to maintain that the words "my children" in the clause of survivorship, refer to objects different from those denoted by the same words in the succeeding clause; and it is impossible to doubt that in that branch of the contingency, he meant to include all his children, his eldest son as well as the offspring of his second wife. "Should not either of my children attain twenty-one or live to possess what is here bequeathed to them." It is true the former expression is not correctly applicable to the eldest son, who was not to take till he attained twenty-four; but the succeeding express bequest of the £3000 given to him proves conclusively that the testator was then disposing of funds, and referring to events, in which he was interested; and the latter alternative phrase seems intended to advert to the clause postponing payment to him till the age of twenty-four. By the words "my children," then, he must be [199] understood to include all his children, and the eldest son is therefore, within the terms of the clause, the survivor. By that construction a meaning is given to the whole will; the intention of the testator was, having bequeathed legacies to each class of his descendants, that the survivor should take the whole, in preference to collaterals. That intention is natural; the terms of the clause are sufficient to express it, and I find nothing contradictory in the context. I am of opinion, therefore, that in the actual event, the surviving son is entitled to the residue bequeathed in the first instance to the other branch, as well as to the sum expressly given to him.

"Declare that the Plaintiff is entitled to the £3000 reduced annuities standing in the name of the said testator; and the Defendants *Thomas Smith* and *James Williamson* by their answer admitting assets, his Honor doth order and decree that they do transfer the said £3000 reduced annuities to the Plaintiff, and doth declare that in the events which have happened, the Plaintiff became, on the death of *Betsey* the widow of the testator, entitled to the residue of the testator's personal estate." Reg. Lib. A. 1817, fol. 817.

GITTINS v. STEELE. *March 3, [1818].*

[See *Parker v. Morrell*, 1846-48, 17 L. J. Ch. 230.]

On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds making interest in the hands of the Court, is to be charged with interest; not a legatee who has no further concern in the estate.

In preparing the minutes of the decree on the appeal in this case (reported, 1 *Swans*. 24), a question arose whether in refunding so much of the legacy of £7000 as had been paid out of the [200] personal estate, the legatees of that sum who were also residuary legatees, should be charged with interest.

Mr. *Bell*, Mr. *Owen*, Mr. *Horne*, and Mr. *Trower*, for different parties, opposed the charge of interest. The payment was made *bona fide*. Interest is never charged except on contract or breach of trust, not for mere delay of payment, *Walker v. Bayley* (2 *Bos. & Pull*. 219. *Bell v. Free*, 1 *Swans*. 90).

Mr. *Wetherell* in support of the charge. The parties who have been prejudiced, are entitled to an indemnity from those who have profited, by the erroneous payment; and the Court is enabled to satisfy their just claims, from the residuary fund in its possession, a portion of which is the property of the overpaid legatees.

The *Lord Chancellor* [Eldon]. Where the fund out of which the legacy ought to have been paid is in the hands of the Court making interest, unquestionably interest is due. If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment I apprehend that the rule of the Court is not to charge interest ; but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share.

The order directed payment of interest at the rate of 4 *per cent.* Reg. Lib. A. 1817, fol. 1689.

[201] MOHUN v. MOHUN. *Rolls. March 6, [1818].*

[S. C. Wils. Ch. 151.]—Testamentary papers in this form :—" I leave and bequeath to all my grandchildren, and share and share alike ;" and " further, I appoint *T. H.* and *T. E.* my trustees for all my grandchildren and nieces ;" are void for uncertainty, and pass no interest in the real estate. Persons nominated trustees by an instrument which, being void, passes no trust fund, not allowed costs, as between solicitor and client.

*John Mohun* being possessed of real and personal estates, made his will, signed with his mark, and attested by three witnesses, in the following words :—" I *John Mohun* of the town of *Cornforth*, do make this my last will and testament. I leave and bequeath to all my grandchildren, and share and share alike. As witness my hand and seal this 14th day of April 1814." On the same day, the testator made the following codicil without date, but attested by three witnesses :—" And farther I appoint *Thomas Haswell* and *Thomas Eggleston* my trustees for all my grandchildren and nieces ; as witness my hand."

On the day following the date of the will, the testator died leaving nine grandchildren ; and administration of his personal estate was granted, with the will and codicil annexed.

The bill filed by some of the grandchildren, alleging that the effect of the will and codicil was to devise and bequeath all the testator's real and personal estates in trust for his grandchildren, in equal shares, charged that the testator intended to leave all his estates to his grandchildren, and that he so directed his will to be made ; but that the person who wrote the will, by mistake or accident, transposed the words " all to," and wrote " to all my grandchildren," instead of " all to my grandchildren." The bill prayed that the will and codicil might be established, and the rights of the parties ascertained ; an account of rents and profits, and a receiver.

*Thomas Eggleston*, who wrote the will, deposed that the [202] testator directed him " to make the grandchildren all alike " ; that after he had written the will, in which he had inserted the words grand-nephews and nieces, he read it to the testator, who remarked " that is wrong ; it is grandchildren " ; upon which the witness altered the words grand-nephews and nieces to grandchildren, and again read the will to the testator, who said " that will do " ; that the witness afterwards recollecting that all the grandchildren were infants, suggested the propriety of appointing trustees ; and at the testator's request drew the codicil, naming *Haswell* and himself for that purpose.

*Mr. Bell* and *Mr. Mascall* for the plaintiffs ; *Mr. Roupel* and *Mr. Harrison* for the other grandchildren ; and *Mr. Dowdeswell* for the nieces. The question is whether the testamentary intention, which indisputably existed in the testator, is sufficiently expressed by these instruments. The words " leave and bequeath " are designed as an exercise of the testator's power of devise and bequest ; and being unaccompanied by terms of restriction, they operate on all that was the subject of that power,—his whole property, real and personal. The mere appointment of executors, passes a testator's property ; and the appointment of trustees, whose duty would be analogous to the office of executors, must be equivalent. The legal estate devolves to them, the beneficial interest being, by the combined operation of the two instruments, in the grandchildren and nieces. The whole difficulty is removed by the transposition of the word " all," which, in its present situation, is without effect, the term grandchildren necessarily including all who correspond to that description. The clause " I leave and bequeath all to my grandchildren,"

becomes then an explicit declaration of the testator's intention ; and the codicil extends the bequest to the nieces.

Mr. Agar for the heir at law. The Court cannot insert or transpose words for the purpose of disinherit the heir ; and the ecclesiastical court has decided that the trustees are not executors.

The *Master of the Rolls*. This instrument presents ambiguity of every kind, uncertainty both in the subject and in the objects of the bequest ; who are to take, and what is to be taken. The Court cannot insert or transpose words for the purpose of giving a meaning to instruments which have none.—The Bill must be dismissed.<sup>(1)</sup>

It was then suggested that the trustees should receive costs as between solicitor and client.

The *Master of the Rolls* [Sir Thomas Plumer]. Where the Court finds both a will and a fund, it avails itself of the fund to relieve the difficulties created by the will ; but here is no will ; nothing that can affect the real estate. Were there a fund in the hands of the trustees they would be entitled to the costs as proposed, but they are trustees of a nullity.

Bill dismissed, with costs as against the heir at law, personal representative, and trustees.

(1) It may be doubted whether even after the transposition suggested the instruments would amount to a valid devise ; in a case where a man seised of lands which by custom were devisable by parol, made a parol will in these words, " I give all to my mother, all to my mother " : the Court held that the word " all " was uncertain, and not sufficient to disinherit an heir, and that the lands did not pass by the will. *Bowman v. Milbanks*, 1 Lev. 130 ; 1 Siderf. 191 ; 1 Keb. 719 ; 1 Eq. Ca. Ab. 207, pl. 1. Some questions remotely analogous to the present, in which the principles of the civil law admitted a different conclusion, may be found in *Dig. lib. 28, tit. 5, l. 1, 2*.

[204] FIELD v. BEAUMONT & UX. March 3, 1818.

An action having been commenced in 1816, the Plaintiff in July 1817, obtained a verdict, and a new trial having been ordered on 21st January 1818, on the 9th February, the Defendant at law filed a bill for the production of documents, which he had given notice to the Plaintiff to produce on the trial, but which were not then produced, the commission day at the assizes, being the 7th of March, a motion on the 3d March, to extend the common injunction to stay trial refused.—[See 3 Swans. 682 (App.).]

By deeds of lease and release dated the 30th of July 1790, Sir Tho. Blackett granted to John Jarratt, Richard Hird, and others in fee, all the coal mines in Cold Harbour Farm, and also " in the several lands or grounds then in the several tenures or occupations of widow Kellett and son, Abraham Walker," and other persons named, tenants of his estate at Wibsey.

At the date of the release, none of the farms were in the occupation of persons corresponding to the description of the widow Kellett and son, but one had been held by a family of the name of Kellett since 1742, and was then in the possession of Joshua Kellett, the son of a widow Kellett, who had occupied it jointly with the brother of her husband, till her death in 1788.

In 1808 the grantees caused pits to be sunk, and a steam engine to be erected on the farm so occupied, and proceeding to obtain coal, continued to work the mines without interruption till 1816, when the Defendants, devisees of Sir Thomas Blackett, commenced an action of trespass against the Plaintiff, the agent of the grantees, in respect of such mining. Previously to the trial of the action, the Plaintiff gave notice to the Defendants to produce certain documents, tending to prove that the farm in question passed by the description of lands in the occupation of the widow Kellett and son, but they were not produced, and the Defendants obtained a verdict. On the 23d of January last, the Court of King's Bench, in consequence of the rejection at the trial of evidence tendered by the Plaintiff, ordered a new trial (*Beaumont and wife v. Field*, 1 Barn. & Ald. 247), which



was expected [205] to take place at the ensuing *York assizes*, the commission-day being the 7th of *March*.

The bill filed on the 9th of *February* last, stating these facts, and that the farm in question was described, in the rent-books and other documents relating to the estate of Sir *Thomas Blackett*, as in the occupation of widow *Kellett*; and charging that the Defendants had in their custody or power, divers deeds, leases, rent-books, and other documents, by which it would appear that they ought not to maintain their action against the Plaintiff, prayed an account and production of such deeds &c., and an injunction.

The common injunction having been obtained for want of answer, the Plaintiff on the 28th of *February*, moved before the *Vice-Chancellor*, that it might be extended to stay trial, and his Honor having refused the order (*Field v. Beaumont & Uz*, 3 *Madd.* 102), the motion was now made before the *Lord Chancellor*.

Mr. *Bell*, Mr. *Heald*, and Mr. *Buck* in support of the motion. The question is, whether the Court will not, on the trial of a right, secure to parties applying in conformity to its rules, the production of evidence necessary to a just decision? The importance of these documents is obvious; to ascertain the tenants of particular lands at a given time, the proper evidence is the steward's books. Is it consistent with justice that the Defendants, profiting by their refusal to produce the documents, which cannot be withheld without a violation of the moral duty of a landlord towards his tenant, shall compel us to a trial of the question with imperfect proof?

No delay is imputable to the Plaintiff. Before the first trial, he had no reason to apprehend that the Defendants [206] would refuse to assist the justice of the case by the production of the evidence which he required. After the verdict it would have been vain to proceed in this Court for compelling the production, till the court of law had granted a new trial; *Whitmore v. Thornton* (3 *Price*, 231). "Where there is no trial to be had, there can be no discovery to be sought; and if a verdict had passed simpliciter without more, a bill then filed for a discovery might be demurred to, for there could be no discovery, any more than as to a matter not at issue." (*Per Richards, Baron*, p. 248.) The rule for a new trial was not made absolute till the 21st of *January*, and on the 9th of *February* the bill is filed. Even if delay had been practised, the Court would grant the order on terms. No evil can ensue from the postponement of the trial till the next assizes.

The application to extend the injunction to stay trial, is always successful, unless opposed by special circumstances, and the affidavit in support of the motion may be filed so late as the previous day. *Jones v. —* (8 *Ves.* 46).

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wingfield*, against the motion. After the delay practised by the Plaintiff, the Court will not afford the extraordinary aid solicited.—In *July* 1817, notice was given for the production of these documents; the Plaintiff therefore, insisting on them as material, must admit that he was at that time at least (how much earlier appears not), apprized of their materiality: but he has since taken no means to obtain them; nor is it even proved that at the trial they were called for by his counsel. Can he now on an application, within a few days of the assizes, be permitted to postpone the second trial, upon the sole ground of the want of this evidence? (See *Blacoe v. Wilkinson*, 13 *Ves.* 454.) The Court would hesitate to grant that indulgence, even had the Plaintiff [207] recently obtained a knowledge of the existence of these papers; but after a delay of nearly two years must, without hesitation, refuse it.

It is not easy to understand how these documents can be material: at least, the circumstances which they are stated to prove must, if true, be capable of other proof; and no necessity can arise for the admission of this evidence, in order to the attainment of the justice of the case.

The authority cited (*Jones v. —*, 8 *Ves.* 46), refers only to the common affidavit, that the party believes the discovery to be material, and is not applicable to affidavits of special circumstances.

The *Lord Chancellor* [*Eldon*]. As I understand this case, in the year 1790. a grant was made of coal mines under different farms described in the deed; and among the rest, of mines, under a farm described as in the occupation of the widow *Kellett* and son. The question, what are the mines under lands so occupied, is a mere question of fact, and may undoubtedly be decided by evidence *dehors* the deed. It is said, that before 1790, the widow *Kellett* and her son occupied the

lands to the minerals under which this contested claim is made, occupying them by virtue of one demise, and on payment of one entire rent ; and that fact is alleged to be material to establish the right for which the Plaintiff contends. This at least is clear, that the Grantees, whose agent the Plaintiff is, had actually worked the mines on these premises from 1808 till 1816, when the action of trespass was commenced ; and that that action, not commenced till then, was not brought to trial till 1817. On the effect of these [208] circumstances of time, it was for the Jury to decide ; but it has been very correctly stated at the Bar, that if the Defendants had filed a bill to stay the working of these mines, this Court, now in the habit of granting injunctions in cases of trespass (see 19 *Ves.* 146, 147. *Grey v. The Duke of Northumberland*, 17 *Ves.* 281, and the cases there cited) as well as of waste, must have refused an injunction to parties who had permitted these operations to proceed from 1808 till 1816 without interruption. To stop the working of a coal mine is a serious injury ; and the expenditure incurred in the course of eight years, would raise an equitable ground to prevent the hasty interference of the Court. The Defendants would have been directed first to bring an action, and to return when the result of the trial had enabled the Court better to deal with the application. In 1817, they proceed to trial ; and clear as it is that this discovery is extremely material, the Plaintiff, instead of adopting from the beginning the usual mode of compelling a discovery here, gives notice to the Plaintiffs at law to produce the rent rolls, and other documents : but the construction of the affidavits, though critically correct, is strained, by which they are understood as amounting to a statement, that the production was not required at the trial. It is true, that the fact might probably be established to a certain extent by the evidence of witnesses for many persons must be still living who knew the nature of the occupation of these premises ; and yet it may be equally true, that no other explanation or testimony would be as satisfactory as the evidence in the possession of the landlord. No bill for a discovery, however, was filed : and while it must have been known that the notice to produce the documents was nugatory, in the event of non-production at the trial, unless the Plaintiff was prepared with parol evidence of their contents, no attempt was made to give such evidence ; nor did the [209] Plaintiff obtain a *sub-pœna duces tecum*, which, according to the present determinations at law, it would not be discreet to disobey ; for though the party may in Court object to produce the documents, yet, if the objection is over-ruled, the Court will compel the production. (*Amey v. Long*, 9 *East*, 473.)

If the Defendants had come to this Court immediately after the trial, stating that the impediment which previously existed was removed, by the verdict they had obtained, and praying an injunction against repeated trespass, it may be worth their consideration, whether, if it had been satisfactorily established that they would not at the trial make a production necessary to the fairness of the decision, this Court would have granted an injunction. It is another question what I am to do with the present bill. On the motion for a new trial, I cannot think that the Court of King's Bench would be influenced by the production or non-production of the documents ; they would have said only that other measures should have been adopted to enforce production ; but on the ground that the Judge rejected evidence which he ought to have received and laid before the jury, that Court granted a new trial. Now without referring to the case in the Exchequer (*Whitmore v. Thornton*, 3 *Price*, 231), I entertain no doubt that after the trial, with proper and apt charges, a bill might have been filed in this Court to compel the production of these documents, to which a demurrer would not have been allowed. That proposition in no degree impeaches the judgment of the Court of Exchequer, that a bill stating only that a verdict has passed against the Plaintiff, and praying a discovery, without imputing a violation of the duties arising from the relation between the parties, could not be sustained. I do not mean to dispute that doctrine ; but considering the mutual obligations of landlord and tenant, this is a different case, [210] and a bill might have been sustained in this Court for relief and for discovery. Then it is said, that pending the application for a new trial no one could have advised the Defendant at law to file a bill. Now, in my opinion, the attempt to obtain a new trial, after being foiled in compelling the production of these documents which he believed to be necessary evidence, was a reason for filing a bill ; and I think there was negligence in this respect, though I am far from imputing blame to any one. The Court of King's

Bench, from the state of their business, did not give judgment on the motion for a new trial till the 21st of *January*, and during all that time no bill for a discovery was filed. Having obtained the judgment of that Court, the Defendant at law then files the bill, and within a few days of the trial makes this application. My opinion is that the *Vice Chancellor* was right. In strictness, I cannot stay the trial because the Defendants withhold this evidence; but it will be for them to consider, whether, should they, refusing the production, obtain another verdict, and then apply here for an injunction against future trespasses, it may not be a subject of discussion in this Court, what is to be the effect of a verdict in a mere action of trespass, on an equitable right, after such length of possession.

Motion refused with costs, the Defendants undertaking to produce the documents on oath at the trial.—Reg. Lib. A. 1817, fol. 593.

[211] GOLDSMID v. GOLDSMID. *Rolls. March 4, 9, [1818].*

[See 3 Swans. 681 (App).]

G. having by marriage articles covenanted that if he died in the life of his wife, his executors should within three months after his decease pay to her £3000, and having by his will given all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them shall appear right," on his death during the life of his wife, the executors having died or renounced, his property is divisible according to the statute of distribution, and the widow's distributive share exceeding £3000 is a performance of the covenant in the marriage articles.

By articles of agreement dated the 28th of *March 1791*, executed in contemplation of marriage with the Defendant *Martha Goldsmid* (which was afterwards solemnized), *Abraham Goldsmid* the younger covenanted, that in case he should die in her life, his executors or administrators should, within three calendar months next after his decease, pay to *Martha Goldsmid*, her executors, &c., the sum of £3000.

On the 9th of *July 1812*, *Abraham Goldsmid* died, leaving his wife surviving. His will, dated the 23d of *July 1800*, was in the following words:—"I desire all my debts to be paid, and as to my worldly estate of all kinds, I dispose thereof as follows: Having the highest opinion of the honor and discretion of my executors hereinafter named, and satisfied that they will to the utmost exert themselves for the benefit of my family, I nominate and appoint my good relations and friends, that is to say, my father *George Goldsmid*, *Daniel Eliason*, *Benjamin Goldsmid*, and *Abraham Goldsmid*, joint executors of this my will, and guardians of my minor children; and I give to my said executors all my estate and effects, of what nature, kind, or quality soever, to hold to them and the survivors of them, in trust, and to and for the several ends, intents, and purposes following; that is to say, as it is my wish not to withdraw my capital for three years after my decease, I desire my executors will not do so, but during that space, take out and apply only so much as they shall deem necessary to defray the expenses of my funeral, pay my debts, and give to charities, which I hereby authorize them to do to any extent they may [212] think right, and also what may be deemed by them necessary for the support of my wife and family; and from and immediately after the expiration of three years, upon trust to divide my property of all kinds, in such ways, shares, and proportions as to them shall appear right; and I declare my mind and will to be, that if any of my family shall dispute such division, and bring any action or suit against my executors and trustees, or any of them, then and in such case my mind and will is, that such parties shall forfeit and lose all right and title to any part of my estate and effects, and shall be for ever excluded therefrom; and I declare my mind to be, that my executors and trustees may leave any matter in dispute concerning my estate and effects, if any shall be, to arbitration in the common and usual way."

*Benjamin* and *Abraham Goldsmid* having died in the life of the testator, and *Eliason* declining to act, *George Goldsmid* alone proved the will, but never undertook the discretionary trusts; on his death in *December 1812*, *Eliason* renouncing probate, administration with the will annexed was granted to *Martha Goldsmid* the widow of the testator, and the Plaintiff *John Goldsmid* his eldest son.

The bill filed by the children of the testator against his widow, prayed a declaration. *Q. XVI.—12\**

tion, that under the circumstances his personal estate ought to be distributed in a course of administration, as if he had died intestate, and that the Defendant was not entitled to the sum of £3000 by virtue of the marriage articles, as a debt out of the testator's personal estate, and also to a distributive share of his personal estate, in case it should amount to more than £3000.

Mr. *Bell* and Mr. *Perkins* for the Plaintiffs. In consequence of the death of three of the executors, and the renunciation of the fourth, no persons remaining to whom the testator had confided the discretionary distribution of his property, that trust cannot be executed. [213] The distribution of his estate, therefore, having become impracticable in the manner prescribed, must be made under the statute (22 & 23 *Car.* 2, c. 10).

Assuming the fact of an intestacy, the question is, whether the Defendant is entitled to the sum of £3000 secured by the marriage articles, in addition to her distributive share? Upon the principle of decided cases, that share is a satisfaction of the covenant. *Blandy v. Widmore* (1 *P. Wms.* 324; 2 *Vern.* 709), *Lee v. D'Aranda* (1 *Ves. Sen.* 1. S. C. under the name of *Lee v. Cox*, 3 *Atk.* 419), *Garthshore v. Chalie* (10 *Ves.* 1). In the latter case, after a review of all the authorities, the two former decisions are declared to be unshaken (p. 14). The rule is, that if, on a division of the covenantor's property at his decease under the statute of distribution, a portion equal in amount to the stipulated sum devolves to the party claiming by the covenant, that is a satisfaction, or more properly a performance, of the covenant. (For the distinction between performance and satisfaction, and its consequences, see Mr. *Cox's* note to *Blandy v. Widmore*.) The substance of the agreement is, that a given sum shall be paid to his wife after his death; if she receives that sum, the covenant is performed. Nor is it material whether the benefit accrues by the want of a will, or by the failure of a bequest, as on the death of a legatee in the life of the testator.

The conclusion, which is clear, therefore, considering this as a case of virtual intestacy, follows equally from the manifest design of the will, that whatever benefit might accrue to the wife under the discretionary authority confided to the executors, should be a satisfaction of the covenant. The express direction is, that any of his family who shall dispute the division made by the executors, shall forfeit all right to any part of his estate. If then the executors had given to the Defendant £5000, without declaring [214] it to be in satisfaction of the covenant, she could not have claimed the £3000. That claim disturbing the arrangement of the executors, would have subjected her to the forfeiture denounced by the testator. Under the will, therefore, she could not take both sums; and no argument can be thence deduced to exclude, in this instance, the application of the rule which prevails in all cases of intestacy.

Mr. *Hart* and Mr. *Parker* for the Defendant. The cases cited are not analogous to the present. In them the question arose on an intestacy, here it arises on a will. The distinction is recognized in *Haynes v. Mico* (1 *Bro. C. C.* 129); and the principle of that decision must prevail in this instance. There a husband who, before his marriage, had executed a bond for securing to his wife, in the event of her surviving him, £300 payable in a month after his decease, having bequeathed to her £500 payable in six months after his decease, Lord *Thurlow* held the widow entitled to both sums. Had the husband died intestate, the widow's distributive share, exceeding £300, would, on the authority of the cases cited, have been a satisfaction of the sum secured by the bond; but the Lord *Chancellor* proceeded on the distinction between an intestacy and a will.

The Court cannot overlook the will and consider the testator as having died intestate; but must execute the discretionary trusts confided by him to his executors, which, by unforeseen events, can no longer be performed by them. Upon that instrument the intention is clear. The will authorizes the trustees to withdraw from his trade so much of the testator's capital as was necessary for the payment of his debts; and the discretionary distribution of the residue is not to be effected till the expiration of three years. At the death of the testator, the sum of £3000 was a debt [215] due to the Defendant; the Court cannot suppose the testator ignorant that it was a debt: by the express provisions of the will, therefore, it must be defrayed before the discretionary distribution commences. The testator could not intend that precarious unknown share, which in their discretion the trustees

might, at the end of three years, apportion to the widow, as a satisfaction for a present debt. The Plaintiff's case is grounded entirely on the assumption of an intestacy. Here is neither intestacy nor *quasi* intestacy. The will vests the property in the executors, but the trust being joint, and therefore incapable of execution by the survivors, now devolves upon the Court, which in such cases always removes the uncertainty by resorting to the statute as the rule of distribution. *Green v. Howard* (1 Bro. C. C. 31). The direction that the capital shall remain in the trade during three years, is imperative on the Court as well as the executors; distribution cannot be made till the expiration of that period; in the mean time the Defendant is entitled to payment of the £3000 as a debt. When the period of distribution arrives, the Court will not impute the payment of that debt as the receipt of a portion of the residue.

Mr. Bell in reply. The existence of a will which events have rendered inoperative cannot prevent intestacy.

Even conceding that the sum of £3000 is a debt, and that the widow claims under the will, what prevents the application of the rule, that a debt is satisfied by a legacy of an equal or greater amount? A direction for the payment of debts is clearly not sufficient. The instances in which the Court has established an exception to that doctrine proceed on the peculiar nature of the debt; as in [216] *Chancey's* case (1 P. Wms. 408), and *Richardson v. Greese* (3 Atk. 65; and see *Wallace v. Pomfret*, 11 Ves. 542), where the debt consisted of wages, a growing and in part future claim.

But the true view of this case is as a case of intestacy; and then the authorities cited are conclusive.

March 9. The Master of the Rolls [Sir Thomas Plumer]. The bill is filed by the six children of Abraham Goldsmid the younger, against his widow Martha Goldsmid, co-administratrix of his effects with his eldest son; and the object of the suit is to obtain a decree, first, that the personal estate of Abraham Goldsmid shall be administered as in case of intestacy; secondly, that Martha Goldsmid, taking her distributive share under the statute, is excluded from all right to the £3000 secured to her by the marriage articles. The single question is, Whether, on the comparison of the marriage articles and the will, the widow is entitled to both the provision which, by the former, the husband covenanted to make in her favor, and her distributive share of the personal estate? or whether the latter is to be considered either performance or satisfaction of the covenant? It is not disputed, but distinctly admitted by the Defendant, that in the actual event, the statute of distribution is the rule and guide for dividing the personal estate, the discretionary distribution intended by the testator having, under the circumstances, become impracticable, and no trusts existing which can be sustained or carried into execution. The first object of the bill therefore is matter of course; distribution by the executors not having taken place, and being now impossible, the personal property, though given to the executors, must be distributed by the only rule that can be resorted to for that purpose, the statute of distribution. The question, therefore, is, assuming the fact that the amount of the widow's distributive share [217] exceeds £3000, whether she is entitled first to that sum as a debt under the articles, and then to her proportion of the remaining assets; or whether her distributive share of the whole personal estate is either a performance or satisfaction of the covenant contained in the articles?

In the examination of this question, the Court is not at liberty to proceed as if it were entirely open. Considering the nature of the claim to the provision under the articles on the one hand, and the distributive share under the statute on the other; the first derived under a contract, a specialty debt, payable in preference to all legacies, and even simple contract debts; the latter, a right to receive the residue after payment of debts, derived, not from the husband, but from the law distributing the estate, and, as Lord Hardwicke observes, making a will for him who has made none for himself: Considerable doubt might have been entertained whether, of two claims in their nature so distinct, the satisfaction of one could be considered a satisfaction of the other. But the Court cannot now so discuss a question which for more than a century has been at rest. The rule is clearly this: that the distributive share of the widow, in the case of absolute intestacy, is con-

sidered as performance of a covenant by which the husband had undertaken that she should receive a fixed sum at his death, provided that her share is equal to that sum. I state that the question is at rest; because I consider that rule conclusively established by the case of *Blandy v. Widmore* (1 P. Wms. 324; 2 Vern. 709), in which the judgment of Sir John Trevor was affirmed, and on a rehearing, re-affirmed, by Lord Cowper. More than a century has since elapsed, and the subject has been frequently under the review of the most distinguished judges, of Lord Hardwicke, Lord Thurlow, Lord Alvanley, and the present Lord Chancellor; and I am warranted by the expressions of his Lordship in *Garthshore v. Charlie* (10 Ves. 1), [218] when I say that that case is unshaken. The rule was recognized by Lord Hardwicke in *Lee v. D'Aranda* (1 Ves. Sen. 1; 3 Atk. 419), and again in *Barrett v. Beckford* (1 Ves. Sen. 519); and though the subsequent authorities of *Haynes v. Mico* (1 Bro. C. C. 129), and *Devese v. Pontet* (*Pre. in Cha.* ed. Finch, p. 240, n.; 1 Cox, 188), have decided that, in the case of testacy, what was given should not operate as performance or satisfaction of what was due, those decisions, grounded on particular circumstances, are so far from impeaching the rule, that they expressly recognise it. The only question now is, Whether a distinction can be made in the present case, the widow taking her distributive share under not an absolute, but a *quasi*, intestacy; where the purpose of the testator being disappointed, a virtual intestacy ensues, and the statute is the guide of distribution.

The principle of the decisions is most clearly explained in the able review of them by the Lord Chancellor in the last case on the subject. Admitting that it would originally have been extremely difficult to answer the argument of Serjeant Hooper, in *Blandy v. Widmore*, Lord Eldon says,—“Those cases are distinct ‘authorities, that where a husband covenants to leave, or to pay at his death, a sum of money to a person who, independent of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that.’” (10 Ves. 13.) Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive; and, consequently, when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is, that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage contract, she in fact obtains [219] from the executor or administrator that sum, the Court is bound to consider that as a payment under the covenant. These are not cases of an ordinary debt: during the life of the husband, there is no breach of the covenant, no debt: the covenant is to pay after his death; and the inquiry is, not whether the payment of the distributive share is satisfaction, but, a question perfectly distinct, whether it is performance. An important distinction exists between satisfaction and performance. Satisfaction supposes intention; it is something different from the subject of the contract, and substituted for it; and the question always arises, Was the thing done intended as a substitute for the thing covenanted? a question entirely of intent: but with reference to performance, the question is, Has that identical act which the party contracted to do been done? What sum was the widow to receive; and when? If she has received the sum stipulated, and at the time stipulated, namely, on the death of her husband, from his assets, the contract is performed. That is the principle of the cases of *Blandy v. Widmore*, and the rest of that class.

The cases of *Haynes v. Mico*, and *Devese v. Pontet*, it is not necessary to examine critically: they range under a different principle. The question there was, What was to be the effect, not of intestacy, but of testacy. The proceeding in the former seems somewhat extraordinary.—Lord Thurlow first delivered an opinion strongly recognizing the whole doctrine established in the case of intestacy, and applying it to the case of testacy; distinguishing between a covenant and a debt, and stating the question to be of performance, not of satisfaction. We have certainly not a very correct account of what passed on a future day; for without answering his own reasons, he is represented as placing the case on a different ground, assimilating the claim to an ordinary debt, and considering it as a question of satisfaction. That was not the view which the former authorities required. The question was.

Whether [220] the testator had performed his contract that the widow should receive at his death £3000. In *Devese v. Pontet*, Lord *Kenyon* proceeds on the ground of satisfaction, not of performance. On that case, it is sufficient to observe, with Lord *Eldon*, that the covenant was entire, and could not be satisfied by the provision in the will; because, under the covenant, the birth of issue would reduce the wife's interest to a life estate. In *Garthshore v. Chalie*, the whole doctrine was investigated to its origin, and the principles on which it rests ascertained—principles such as I have stated. In cases of this description, construing the covenant with reference to the nature of it, and to that which alone gives to the widow any title, the contract of marriage, the question must always be, Is the covenant performed?

Assuming this to be the clear doctrine of the Court, does any distinction exist between the present case and those by which that doctrine is established? Does not the widow take the same interest, from the same source?—her interest under the statute, as in those cases, precisely the same share, and in her character of widow, arising from the marriage contract? So far the cases are identical: she takes, not through the testator's intent, but through the operation of law; for though the testator has not died intestate, but intended distribution by the discretion of his executors, yet that course being now impracticable, the rule of distribution is the same as in case of intestacy. She takes, therefore, not by virtue of the testator's intention: he designed and contemplated a very different division of his property. It is quite unnecessary to consider whether the executors could have bargained with the widow for the relinquishment of her claim under the marriage articles, before they assigned to her any share, or could have taken into their consideration the amount. The question now has no reference to intention. The widow takes through the medium, not of the will alone, but principally of the [221] statute—that is the source and measure of her right, regulating the interest of herself and her children.

Considering, therefore, the question of performance of the contract, on what principle can it be contended that the share taken under a *quasi* intestacy is not a performance, which the same share taken under absolute intestacy indisputably is? In this case, as well as in the other, the widow takes *pleno jure*, herself being administratrix, and precisely the same sum. Every rule and principle established in the former cases applies equally when the widow, in that character, receives a proportion of the assets, by operation of law, exceeding the amount which she was entitled to receive under her marriage contract. To determine that this is not a performance of the contract, when in the case of absolute intestacy I should be bound to determine it to be performance, would be to proceed on those nice distinctions so strongly reprobated by Lord *Eldon* (10 *Ves.* 12–15) and Lord *Hardwicke* (3 *Atk.* 422); and which, to adopt the expression of the latter, “would never stand with the reason of mankind.”—In substance, the widow obtains all for which she contracted; and I am therefore bound to say that she is entitled to her distributive share, but not in addition to her provision under the marriage contract.

I desire to be understood as not intending to impeach the authority of *Haynes v. Mico*, and *Devese v. Pontet*—I say only, that those cases are not applicable to the present. They were cases of testacy, and the question arose on the effect of legacies given by the will to the widow, which *prima facie* importing bounty, admitted a presumption of an intention in the testator to augment the provision in the settlement, and not to satisfy or perform it. No such considerations apply to intestacy.(1)

[222] “His Honor doth declare, That the personal property of *Abraham Goldsmid* in question in this cause ought to be distributed as if he had died intestate; and the Defendant, *Martha Goldsmid*, by her answer admitting that her distributive share of the said testator's personal estate and affects is larger than the sum of £3000, by her said marriage articles covenanted to be paid to her by her said late husband in the event of her surviving him, His Honor doth order and decree, That the said Defendant do take her distributive share of the personal estate of the said late *Abraham Goldsmid*; but the same is to be in satisfaction of the said covenant contained in the said articles made on the marriage of the said Defendant with the said late *Abraham Goldsmid*, deceased.”—Reg. Lib. A. 1817, fol. 807.

The following are some of the principal cases on the question. Whether a benefit accruing under the testacy or will of the covenantor is a performance or satisfaction of a covenant for securing a sum of money at his death?—In *Corus v. Farmer*, 3 Eq. Ca. Abr. 34. *Edwly v. Wigmore*, 1 P. Wms. 324; 1 Vern. 709. *Lee v. D'Armon*, 3 Atk. 412; 1 Ves. Sen. 1. *Wilcocks v. Wilcocks*, 2 Vern. 558. *Herve v. Herve*, 2 Vern. 555. *Edwards v. Morgan*, 1 Bro. C. C. 63; 2 Bro. C. C. 394. *Gardshore v. Chasie*, 15 Ves. 1. *Bengough v. Walker*, 15 Ves. 507:—such a benefit was held to be a performance or satisfaction of the covenant; and see *Lechmere v. Earl of Carlisle*, 3 P. Wms. 411; *Ca. Temp. Inst.* 80. *Souden v. Souden*, 1 Bro. C. C. 582; 1 Cox. 155. *Bellasis v. Uthman*, 1 Atk. 425. ed. Saund. *Weyland v. Weyland*, 2 Atk. 662. *Wilson v. Pigott*, 2 Ves. Jun. 556. *Sparkes v. Cator*, 3 Ves. 551. In *Haynes v. Mico*, 1 Bro. C. C. 122. *Kirkman v. Kirkman*, 2 Bro. C. C. 95. *Jeacock v. Falcener*, 1 Bro. C. C. 225; *Devese v. Pontet*, 1 Cox, 188; *Pre. in Cha.* ed. Finch, 249, n. *Broughton v. Errington*, 7 Bro. P. C. 12. *Eastwood v. Vinke*, 2 P. Wms. 613. *Couch v. Straton*, 4 Ves. 521: such a benefit was held to be neither performance nor satisfaction of the covenant. And see *Barrett v. Beckford*, 1 Ves. Sen. 520. *Prime v. Stebbing*, 2 Ves. Sen. 499. *Richardson v. Elphinstone*, 2 Ves. Jun. 463. *Twisden v. Twisden*, 2 Ves. 413.

[223] NESBITT v. MEYER. *Rolls.* Feb. 24, 25. April 13, 14, [1818.]

[S. C. 1 Wils. Ch. 97.]

Specific performance refused of an agreement to grant a lease for a term expired before the hearing of the cause, the acts of waste committed during the possession of the premises not entitling the Plaintiff, in an action on the covenants to be inserted in the lease, to more than nominal damages.

The bill filed on the 30th of July 1814, stated an agreement of February preceding, for granting a lease by the Plaintiff to the Defendant, of a house and land at Norwood, for a term of three years from the 1st of May in that year, with an option to the Defendant to hold the premises two years longer. The Defendant took possession under the agreement, but refused to accept a lease or execute a counter-part. The bill alleging that the Defendant had cut down ornamental timber on the premises, prayed a specific performance of the agreement, an account of the timber cut, and an injunction.

The Defendant by his answer, admitting that he objected to some clauses contained in the draft sent to his agent, offered to accept a lease, and denied cutting down timber, except about 80 poles, which were used in the repair of the fences.

The value of the poles cut was estimated by the witnesses at about £3.

Mr. Bell and Mr. Shadwell for the Plaintiff. Although the term is expired before the hearing of the cause, we are entitled to a specific performance of the agreement, in order that upon a lease executed with proper covenants to be settled by the Master, we may at law recover damages for waste committed in breach of them. It is clear that the Defendant was bound to execute a lease with proper covenants: it is equally clear that those covenants have been violated; and the question is, Whether, because the cause could not, in the regular course of proceeding, [224] be brought to a hearing before the expiration of the term, the Court will deny to the Plaintiff a relief, without which he can have no opportunity of obtaining justice. It is an established practice to direct the Master to settle leases, for the sole purpose of enabling the parties to recover damages at law. The doctrine, that a person taking possession of an estate under an agreement for a lease, and committing acts of waste, cannot be made the object of a decree, provided that he sufficiently protracts the proceedings, and postpones the hearing till the term is expired, would, by a singular exception to the equitable principle, that time is not of the essence of a contract, authorize the perpetration of enormous mischief with impunity.

Sir Samuel Romilly, and Mr. Heald, for the Defendant. The relief prayed is without precedent. How can the Court direct the execution of a lease for a term already expired—a lease which must on the face of it appear to be dated after the expiration of the term? But the question is no longer open to argument. In a



recent case, the late *Master of the Rolls* advanced a cause instituted for the specific performance of an agreement to accept a lease, in order that the hearing might take place before the expiration of the term (*Hoyle v. Livesey*, 1 Mer. 381); and in the case of *Weston v. Pimm*, precisely similar to the present, His Honor dismissed the bill. The relief if obtained would be nugatory. The Plaintiff has not shown that she is entitled to a covenant on which she could recover at law. The charge in the bill of felling ornamental timber is not substantiated by the answer or evidence.

The *Master of the Rolls* [Sir Thomas Plumer]. This seems not a case for the interference of a court of equity; but before I give judgment I will look into the evidence.

[225] Feb. 25. The *Master of the Rolls*. The bill was filed, before the term expired, for a specific performance of the agreement to accept a lease, and if the case rested there, the Plaintiff would be entitled to a reference to the Master; but, without fault on either side, before the hearing, the term is expired, and the question arises, what course is to be pursued when the hearing has been thus postponed till after the expiration of the term, in a case in which specific performance would otherwise have been decreed? This question is said to have come before the late *Master of the Rolls* in *Weston v. Pimm*.<sup>(1)</sup> I have seen the pleadings in that case, and the circumstances are so exactly similar to the present [226] that I cannot distinguish them. It seems to have been there suggested that the lease ought to be antedated; the terms of the dismissal are not stated, but in fact the *Master of the Rolls* dismissed the bill. It is not necessary, however, now to determine the general question, and I wish to be understood as not holding, that there cannot be a case in which it may be fitting for a court of equity to decree the execution of a lease, after the expiration of the term; a case of important rights and losses arising in the interval, and where a strong necessity is presented to the Court.

Without deciding that question, I think that this is not a case of that description. On examining the facts, it seems that the only effect of a decree for specific performance, would be to encourage litigation. A decree is asked in order that an action may be brought for acts committed by the lessee while in possession; but if in any case a court of equity refuses its interference, on the principle of protecting a party from his own imprudence, and the ill-advised prosecution of his claims, this is that case. By the evidence of the person who cut down the 70 or 80 poles in question, it appears that he had been previously employed by the Plaintiff to repair the premises; they were represented in the treaty for the lease to be in complete repair, and this witness proves that, with the exception of a fence, that statement was correct: the fence wanted repair, but instead of consulting the Plaintiff on the subject, the Defendant engaged this workman to cut down poles, amounting in value to about £3, which were employed in the repair; an act certainly incautious and incorrect. As a tenant, the Defendant was wrong in felling growing trees, and undoubtedly a verdict would be obtained by the Plaintiff, but what damages would a jury give? None certainly sufficient to compensate the expenses of litigation.—Such being the only injury alleged, and such the sole object for which the Court is to direct [227] the execution of the lease, in mercy to the Plaintiff, whatever might be done in a case of another description, I will not enable her to bring an action. The bill must be dismissed, but without costs; in strictness the rights of the Plaintiff were infringed.

The case was mentioned again on the subject of costs.

April 13, 14. The *Master of the Rolls* [Sir Thomas Plumer]. After reading all the pleadings and evidence, I have not discovered any reason to change my former opinion. The pressure of business in Court having delayed the hearing till the lease was expired, the Plaintiff, without any default on her part, is prevented from obtaining a decision on the merits. Without determining whether a case might arise in which the Court, for the purpose of investing the party with a legal right to satisfaction for the breach of covenants which the lease was to contain, would not decree a specific performance after the expiration of the term, I was of opinion that this case did not contain sufficient for that purpose; but the principal subject on which expense has been incurred by the examination of witnesses, is the act of the Defendant in cutting down trees to repair fences, without a lease, or permission from his landlord. It is evident that the lease would have contained no clause to authorise that act; even if the landlord were bound to supply timber for repairs, still

it is his right to point out what shall be taken for that purpose. The Defendant is clearly not entitled to costs.

(1) In that case the bill stated a memorandum of agreement dated 10th *October* 1809, by which the Plaintiff agreed to let, and the Defendant to take, certain farms for the term of 5, 7, or 9 years from *Michaelmas* preceding, determinable at the end of the first or second term, on 12 months' previous notice by either party, the tenant to keep and leave the premises and buildings of every description in good repair, "they being first put into that state"; and prayed a specific performance. The answer admitted the agreement, possession taken under it, and tender and refusal of a lease; but stated that at the date of the agreement, the buildings and fences were very much out of repair, that the Plaintiff had since repaired only one farmhouse, that repeated applications had been made to him by the Defendant or his agents (particularly one by letter of 16th *January* 1812), apprizing him of the state of the premises, and requiring him to put them into good repair, which he had not done; and submitted that "the Plaintiff, by having so long refused or neglected to perform his part of the said agreement, by not first putting the said farms and premises into good and sufficient repair, was not entitled to a specific performance of the said agreement." It was admitted, that on the 17th *September* 1813, the Plaintiff gave to the Defendant a written notice to quit on 29th *September* 1814, being the end of the term of five years. On the question of repair the Defendant adduced evidence. The cause was argued at the Rolls on the 24th of *November* 1815, by Sir *Samuel Romilly* and Mr. *Horne* for the Plaintiff, and Mr. *Hart* and Mr. *Newland* for the Defendant, when His Honor dismissed the bill without costs. *Reg. Lib. Min.* 24th *November* 1814. The case is briefly reported under the name of *Western v. Perrin*, 3 *Ves. & Beam.* 197; where it is stated that the Master of the Rolls dismissed the bill, "on the ground that the term to be granted by the lease was determined by the notice."

[228] RAPHAEL v. BIRDWOOD. Feb. 27, March 5, 10, 14, [1818].

On a motion to dissolve a special injunction staying the trial of an action till further order, the Master, on a reference for impertinence, having reported the answer impertinent in a small part only, and the Plaintiffs having excepted to the report, and insisting on their right, after the question of impertinence was decided, to except to the answer for insufficiency, the Lord Chancellor examined the bill and answer, and dissolved the injunction, so far as it extended to stay trial.

A special injunction having been obtained by the Plaintiffs, after the answer had been filed, restraining the Defendants from proceeding to trial in certain actions commenced by them "till the further order of the Court" (reported 3 *Mer.* 229) against the Defendants' motion to dissolve the injunction, the Plaintiffs showed a reference for impertinence.—The Master having reported a small part of the answer impertinent, the Plaintiffs excepted to the report. In this state of the cause the Defendants moved to dissolve the injunction, so far at least as it restrained the trial at the ensuing assizes.

The Solicitor-General [Gifford], Mr. *Wetherel*, and Mr. *Rose*, in support of the motion. This injunction, granted after answer, restrains the proceedings, not in the common form "till answer or farther order," but "till farther order" only, and is therefore not continued of course till the answer has been proved perfect. To such an injunction the ordinary rules of practice are inapplicable. The Court, in the exercise of that discretion which by the terms of the order it in effect reserved, will now remove the obstacle to our proceeding at law, and permit the trial at the ensuing assizes.

The Plaintiffs, treating this as a common injunction, insist on the exception to the Master's report as an insuperable objection to the motion.—The rule for which they contend is unreasonable. On the reference of the answer for impertinence, the Master reports it impertinent, not in the greater part, as the Plaintiffs contend, but to the extent [229] of some few folios only; they except to his report; if dissatisfied with Your Lordship's decision, what is to prevent their resort to the ultimate court of appeal? A final judgment being at length pronounced, they claim

to be entitled to except to the answer for insufficiency, and to pursue the same ruinous course of successive appeals upon interlocutory proceedings; and during this whole period the injunction, as they contend, remains indissoluble. By this suspension of the progress of the suit till the collateral issues, first of impertinence, and then of insufficiency, have been decided, an injunction becomes a most destructive instrument of delay.—The Court can never, abandoning all control over its practice, permit abuses so destructive. According to decided cases, a reference for impertinence is no objection to a motion for dissolving an injunction (*Milner v. Golding*, 2 Dick. 672); and that doctrine is highly reasonable. The Plaintiffs complain that we have answered too much.—*Nimium non nocet*.

We have offered to expunge the impertinent matter, and tendered costs. In the discussion before the Master, the Plaintiffs have admitted that their proposed exceptions for insufficiency apply to the schedule only: the body of the answer they acknowledge to be unexceptionable.

It is not competent to them to insist on the strict practice in support of an order obtained by the indulgence of the Court. To their motion for an injunction, the fact that the answer was filed afforded an objection as strong, as the exceptions to the report afford to the present.

The *Lord Chancellor* [Eldon]. Against the motion for dissolving the injunction on filing the answer, the Plaintiff may object, either a reference for impertinence, or exceptions for insufficiency, but he cannot object both at the same time. A reference for impertinence can never be contemporaneous with exceptions for insufficiency; for before the Court can examine the sufficiency of the answer, it must decide the question of impertinence.(1) On exceptions for insufficiency, the Master's report that the answer is sufficient, terminates the injunction, although the Court should afterwards be of opinion that the answer is insufficient. Is there any case in which it has been determined that on a reference for impertinence, the report is, or is not, decisive? I recollect no determination, and in the absence of authority, I should think that the Master's judgment, that the answer is not impertinent, must be conclusive with respect to the injunction, unless the Plaintiff, content with that judgment on the question of impertinence, insists that he is entitled to take exceptions for insufficiency.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Pepys*, against the motion. It might be sufficient for us to rely on the established practice. But in no case was there less pretence for the charge of studied delay on the part of the Plaintiffs. On the 7th of May the Defendants filed a demurrer, which, we are entitled to say, was frivolous—for it was overruled. That event was not unexpected to the Defendants, and on the same day their answer was filed. The Master reported the answer impertinent in certain particulars; we think it impertinent in others, and claim the judgment of the Court on that point. We think it also insufficient. But the Defendants assume a merit for the impertinence of the answer; they say that they have given more than we required. We ask the necessities of life, and they give us the superfluities.

[231] In order to exclude the suggestion of delay, we are willing to file exceptions for insufficiency immediately.

The *Lord Chancellor* [Eldon]. On both sides it seems to be taken for granted, that a Plaintiff who has obtained an injunction, may, on the filing of the answer, first have a reference for impertinence; and if the Master reports the answer impertinent, though in six lines, may then, having the report in his favor, refuse to expunge those six lines, may except to the report for not stating that much more is impertinent, may next except to the answer for insufficiency; and may, during all these proceedings, delay the trial of the action at law. On what authority is that stated? Certainly the practice that a reference for impertinence stays the motion to dissolve the injunction is modern. (See *Milner v. Golding*, 2 Dick. 672. *Goodinge v. Woodhams*, 14 Ves. 534.) I think it right; (2) but the difficulty has always been, a difficulty on which I know no decision, what is to be done in such a case as the present? The Plaintiff is required to procure the Master's report in four days; but a report that the answer is sufficient destroys the injunction.(3) Is that the effect here? The Plaintiff can expunge the impertinence; the De-

feudant cannot. I recollect not a single determination on a case circumstanced like this.

[232] If the Master's opinion that the answer is sufficient is a competent document for the Court to act on at all hazards, should not the report as to impertinence be effectual at least to compel the Plaintiff to take his exceptions for insufficiency immediately? The question is, Whether the Master's report of insufficiency is every thing, and of impertinence nothing? Doubts have existed, therefore, whether the Plaintiff should not, on the one hand, have an opportunity to except for insufficiency, and, on the other if the Master reports the answer not impertinent, be required to take his exceptions immediately. My present opinion is, that the Master's judgment on the question of impertinence must, at least without reference to the inquiry whether there is farther impertinence, be taken, in injunction cases, to have the same weight as his judgment with regard to sufficiency or insufficiency; and as with regard to sufficiency his report terminates the injunction, although the Court afterwards differs from him, (4) his report on impertinence, without reference to the question whether there is farther impertinence, must impose on the Plaintiff an obligation to except for insufficiency immediately. I have a recollection that on consideration of the question, whether the party can refer for impertinence and insufficiency at the same time, a difficulty of this sort arose, but I recollect not in what way the Court disposed of it.—Certainly Lord *Kenyon's* opi-[233]-nion was, that a Plaintiff is not entitled to complain of having too much; but it is obvious that an answer may be impertinent in nine-tenths, and insufficient in the remaining tenth. Another difficulty occurs from the course of the Court in directing the references to different Masters, of whom one may report impertinent the very passage, from the want of which another reports the answer insufficient. That must be remedied.

The Plaintiffs having specified the points to which they intend to except for insufficiency, perhaps the best course will be for you to submit by consent to the opinion of the Court, whether the answer is sufficient in those points.

March 10. The Lord Chancellor [Eldon]. References of answers for impertinence, more numerous within the last two years than in all my former experience, have become a subject of complaint in the Master's office, and a scandalous abuse of the rules of practice. On the filing of the answer, the Plaintiff refers it for impertinence; in regular course the report must be obtained within a certain number of days, but practisers are so absurd as not to insist on that rule; if the Master reports the answer not impertinent, the Plaintiff excepts to the report, and the Court having disposed of that question, there follows a reference for insufficiency; the party taking care not to obtain a reference to the same Master who reported on the impertinence, and who would at once understand the matter, but industriously selecting for the motion a day when the reference will be made to another Master. The Bar will learn with satisfaction that I have this morning made an order of Court for the correction of that abuse. It is at present impossible for me to say, whether this case affords [234] an instance of the sort of practice to which I allude. Without at all prejudging that question, I wish it to be understood, that it is a practice which I am determined to suppress. I shall follow the example of Lord *Hardwicke*, and myself examine the bill and answer.

March 14. On this day the Lord Chancellor [Eldon] dissolved the injunction so far as it restrained trial.

(1) "There must be a judgment on the reference for impertinence, before there can be a judgment upon the reference for insufficiency: the Court not knowing what the answer is, until the question of impertinence has been disposed of." *Gooding v. Woodhams*, 14 *Ves.* 536. *Lacy v. Hornby*, 2 *Ves. & Beam.* 293. The reference for impertinence is waived by a subsequent reference for insufficiency. *Pell v.* — 6 *Ves.* 456.

(2) *Hurst v. Thomas*, 2 *Anstr.* 591. *Fisher v. Bailey*, 12 *Ves.* 18. *Lacy v. Hornby*, 2 *Ves. & Beam.* 291; and a motion to refer the answer for impertinence has been allowed as cause against dissolving an injunction, upon the terms of procuring the report in a week, *Gooding v. Woodhams*, 14 *Ves.* 534.

(3) The meaning of the Plaintiff's "undertaking to procure the Master's report in four days, must be considered to be that he will procure the Master's report of the *insufficiency of the Defendant's answer* within that time, otherwise it would merely furnish the Plaintiff with farther means of delay, and there would be exceptions to the Master's report, upon every reference of an answer to an injunction bill." (*Botham v. Clark*, 2 Cox, 429.)

(4) *Botham v. Clark*, 2 Cox, 429. *Vipan v. Mortlock*, 2 Mer. 479. *Scott v. Mackintosh*, 1 Ves. & Beam. 503. The dissolution of the injunction being the consequence of the Master's report, without motion, *Hutchinson v. Markham*, 2 Madd. 355. But where the answer has been referred for impertinence on the day for showing cause against dissolving the injunction, and the impertinence has been expunged, and exceptions to the Master's report disallowing exceptions to the answer over-ruled, the injunction may be dissolved on motion, in the first instance, without an order nisi (*Lacy v. Hornby*, 2 Ves. & Beam. 291), but is not, as it seems, dissolved *ipso facto* by the Master's report of the sufficiency of the answer; the reference for impertinence "putting an end to all application to dissolve the injunction." (2 Ves. & Beam. 293.)

GREENE v. WIGLESWORTH. *Rolls. March 6, [1818].*

[S. C. 1 Wils. Ch. 313.]

A testator having, by his will, devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given, by his first codicil, a special power of sale over a part of his estates, to be exercised at the request of his son, in favor of his nephew; and, by his second codicil, a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees; the conveyance by the trustees must contain both the particular and the general power of sale.

*Thomas Greene*, by his will, dated the 3d of September 1796, devised his freehold estates within *Cockerham* and *Skerton*, in the county of *Lancaster*, and his copyhold estates within the manor of *Slyne* with *Hest* (subject to a term of 60 years, for securing an annuity of £1000 to his widow during her life), to *Henry Wiglesworth*, *Robert Bradley*, and *George Tennant*, and their heirs, upon trust, to convey to the use of his son *Thomas* for life, on attaining 21, without impeachment of waste; remainder to the same trustees to preserve contingent remainders; remainder to the issue of *Thomas* in strict settlement; remainder to the testator's second and other sons successively, and the heirs male of their bodies; remainder to the [235] daughters of the testator, as tenants in common in tail; remainder to his sister *Margaret Bradley* for life, without impeachment of waste; remainder to his nephew *Robert Greene Bradley* for life, without impeachment of waste; with like remainders to trustees, and to his issue, as in the previous limitation to the testator's son, with remainders over.

By a codicil dated the 23d of August 1799, the testator, after reciting the devise in his will for the term of 60 years, and that the lands at *Cockerham* and *Skerton* were an ample security for the annuity to his wife, revoked the devise as to the copyhold estates within *Slyne* and *Hest*, and substituted some estates purchased since the date of the will; and, after devising all his freehold estates at *Cockerham*, and all his copyhold estates within the manor of *Slyne* with *Hest*, to *H. Wiglesworth*, *R. Bradley*, and *G. Tennant*, and their heirs, upon the trusts in the will mentioned, proceeded as follows:—"Whereas my son *Thomas*, having had the misfortune to be born in *London*, may perhaps prefer some other part of the kingdom to *Lancashire*, which I do not wish; and it may so happen that it may be convenient to my nephew *Robert Greene Bradley* to purchase my estate at *Slyne*, and being desirous that the same may be held and enjoyed by one of my worthy father's descendants, I therefore order and direct that a proper clause should be inserted in the conveyance in tail directed by my will, to enable the trustees therein to be named, and for a valuable consideration, at the request of my said son, to grant, surrender, or convey, all or any part of my estate at *Slyne*, unto the said *R. G. Bradley* and his heirs, freed and discharged from the said entails, on his the said

"*R. G. Bradley's* agreeing to assume the name of *Greene* instead of *Bradley*;" and the testator directed the money arising from such sale to be laid out in the purchase of other estates.

[236] On the 22d of *April* 1809, the testator published a second codicil, which, after some alterations in his will and codicil, and a confirmation and republication of them so altered, contained these words:—"I do hereby further declare and direct, that the settlement by my said will, directed to be made as therein mentioned, shall contain the usual and common powers to the trustees, with the consent of the tenants for life in possession, and of the guardians of tenants in tail in possession, during the minority of such tenants in tail, to sell and exchange all or any part of the lands and hereditaments devised by my said will, and directed to be purchased and settled as therein mentioned, and for laying out the money arising by such sales, or for equality of exchange, in the purchase of freehold, copyhold, or customary lands or hereditaments, to be settled to, upon, and under, the subsisting uses, trusts, and powers of my said will; and also clauses for giving receipts, and for appointing new trustees, and clauses of indemnity, and all such other usual and reasonable clauses and provisions, as by counsel in the law shall be advised and approved; and I hereby ratify and confirm my said will and codicil so altered as aforesaid."

The testator died on the 6th of *December* 1810, leaving *Thomas Greene* his only child and heir at law, his sister *Margaret Bradley*, and her son *Robert Greene Bradley*. The bill filed on the 29th of *April* 1815, by *Thomas Greene* the testator's son, against the trustees, *Martha Greene* the widow of the testator, and his sister, and her son, stating the will and codicils, and that the Plaintiff attained the age of 21 years on the 19th of *January* 1815; and alleging that the trustees refused to make a proper settlement and conveyance of the devised premises, by reason of doubts which had arisen on the construction of the will and codicils, and on the extent of the power of sale or exchange relative to the copyhold estate at *Slyne* to be inserted therein; [237] prayed a declaration that there should be inserted in the settlement a power of selling and exchanging all the estates devised, and all others since purchased upon the same trust, including the estate at *Slyne*: that the trustees might make such settlement accordingly; and that the Plaintiff might be let into possession of the estates as the first tenant for life.

On the hearing, the Court directed a reference to the Master to approve a settlement.

The Master reported that it was the intention of the testator, that there should be inserted in the settlement the usual powers to the trustees, with the consent of the tenants for life in possession, and of the guardians of tenants in tail in possession (during the minority of such tenants in tail), to sell and exchange all or any part of the lands and hereditaments devised by the will and the first codicil, to the Defendants the trustees, and the lands and hereditaments directed to be purchased and settled therewith, with the exception of the testator's estate at *Slyne*, to which the Master was of opinion that the general powers of sale and exchange should not extend; but that a special power ought to be inserted in the settlement enabling the trustees, at the request of the Plaintiff, and for a valuable consideration, to sell and convey the estate at *Slyne* to the Defendant, *R. G. Bradley* and his heirs, on the condition in the first codicil mentioned.

To this report the Plaintiff excepted, insisting that the Master ought to have reported that the estate at *Slyne* was subject to the general power of sale.

Sir *Arthur Pigott* and Mr. *Pepys* for the exception. The limited power of sale in the first codicil, seems an extraordinary arrangement for accomplishing the wish which the testator avows, that the property at *Slyne* should [238] be enjoyed by one of his father's descendants; a purpose better secured by the strict limitations of the will, than by a clause enabling the nephew to acquire an absolute estate. If understood to confer on the nephew a right of pre-emption, that provision probably presents the first instance of such a right, without an ascertained price. But whatever might be its design or effect, it is abrogated by the second codicil. The renewed confirmation of the will and first codicil with which that instrument concludes, can refer only to the power of sale introduced since the first confirmation. The power of sale given by the second codicil must indisputably be either a revocation of the former limited power, or supplemental to it. The opinion of the Master is

consistent with neither supposition. He considers the estate at *Slyne* withdrawn by the first power from the operation of the second. What authority has the Court to restrain the meaning of the terms, "all or any part?" To construe them as excluding some part? The attempt to qualify an unambiguous clause by reference to a codicil ten years earlier, is preposterous. Supposing them inconsistent, the last must prevail.

The true construction is, that the general power supersedes the limited. Considerable difficulties may occur if both powers are inserted in the settlement. Must the estate at *Slyne* be offered to *Bradley* before it can be sold to others? By what means is the price to be ascertained? If *Bradley* refuses to purchase at the price proposed, may it afterwards be sold for less? His rights under the particular, will render nugatory the general, power. No man will purchase subject to be embarrassed by his claims.

Mr. *Bell* and Mr. *Roupell* for *R. G. Bradley*. The testator intended that both powers of sale should subsist; the first to give to *Bradley* a right of pre-emption, the last to enable the trustees to sell, in the event of his refusal to become the purchaser. On this construction [239] these clauses are evidently consistent, and wherever the different parts of a will can be reconciled, effect must be given to the whole. The difficulties suggested are imaginary. A valuation of the estate may be made, and a price fixed, at which if *Bradley* refuses to purchase, it may be sold to others.

Mr. *Romilly* for the trustees. It was the wish of the testator that some of the descendants of his father should reside on the estate at *Slyne*, his patrimonial estate, which had continued in the family upwards of two centuries; confiding in the local attachment of his nephew, he authorises the trustees (with the consent of his son) to convey the estate to him; but as a pledge of the existence of that local attachment, he requires payment of a valuable consideration, and the assumption of the family name. The peculiar form of the special power is calculated to execute this peculiar intention; a direction for inserting usual and common powers of sale, is not a sufficient evidence of an intention to revoke so special a provision.—A mere right of pre-emption, which would cease with the life of *Bradley*, is not an adequate security; on his death the estate would, on that construction, become subject to the general power of sale.

The principle is, that a clause declaratory of a particular intent, with reference to a particular subject, shall not be controlled by subsequent general words which, if applied to that particular subject, are inconsistent with the declared intent. *Adams v. Clarke* (9 *Mod.* 154; 2 *Eq. Ca. Ab.* 557, 561). *Nevil v. Broughton* (1 *Rep. in Ch.* 77). *Popham v. Bamfield* (1 *P. Wms.* 54; *Salk.* 236), and other cases of that class.

The insertion of the word freehold in the second codicil (all or any part of the freehold lands, &c.), would remove the whole difficulty, the first power applying only to copyhold.

[240] The *Master of the Rolls* [Sir Thomas Plumer]. Whatever difficulties may attend the sale of the estate, the only question for the consideration of the Court is, what directions the testator has left? If the will and the two codicils can be reconciled, effect must be given to them. The fair inference from these instruments seems to be, that at one period, the testator intended to prescribe a special power of sale respecting the estate at *Slyne*, and that at a period ten years subsequent, his intention was to confer a general power of sale over all his estates, without exception. The question is, whether the last is to be the sole direction on the subject, or whether the two powers are so consistent that both may be inserted in the settlement? In a case so singular, I am not surprised by the difficulties which have occurred.

The testator has pursued a peculiar object, in a way that seems not well calculated for the attainment of it. Having a predilection for the copyhold estate, by his will he settled it, in common with freehold estates, in the strictest manner on his son, and his son's children, with remainder to his nephew; effectually securing the transmission of the estate through the line of posterity to whom he thought it desirable that it should descend. Under the will the son possessed no power to alien the estate, unless with the concurrence of a son who attained 21 in his life: it was natural to suppose, therefore, that if the testator wished to preserve this property in the family, he would leave the will untouched; far from this, however, by his

first codicil he gives a power of sale, at the instance of that very son whom he supposes to want, in favor of the nephew whom he supposes to possess, the sentiment of regard for the property that existed in himself, under which the nephew might instantly acquire an absolute estate in fee; an arrangement exposing the estate to a hazard of passing into another family, and relying wholly on the local attachment of the nephew. Instead, however, of indulging in specu-[241]-lation and criticism on the intention of the testator, the Court must observe his expressions. By the first codicil he had separated the copyhold estate, declaring that it should not be included in the term for securing the annuity, but that his nephew should have a right to purchase it. Whatever difficulties might arise in executing such a power of sale, it is enough to say that the testator has given it; and had he made no other codicil, no obstacle of that sort would have prevented the Court from inserting in the settlement a power so qualified. The omission to name a price, and regulate the right of pre-emption, may create embarrassment, but that must be encountered; a sale effected under the power can be effected only in conformity to its provisions. Upon a reasonable construction this special power, whatever it is, must, supposing the first codicil unrevoked, be inserted in the settlement.

In the second codicil it appears that the testator had not forgotten the first; it must have lain before him, for he erases the names of two persons whom he appointed trustees, and expressly ratifies and confirms it. If he no longer intended a limited power over the *Slyne* estate, why did he not then annul that clause? The confirmation of the codicil unaltered in that respect raises a strong inference that he designed not to abrogate the limited power of sale. He then adds a general power, extending over the whole property. I feel it exceedingly difficult to insert the term freehold, or exclude one part when the testator uses the words "all or any part." The will clearly embraced freehold and copyhold. How can I suppose, in the absence of any such expression, that he meant this clause to be confined to freehold only? We cannot conjecture when the words contain no ambiguity, or interpolate when there is no mistake to be corrected by insertion. Sometimes the testator speaks of freehold, sometimes of copyhold, sometimes of real estates: here he says "all my estate." Can it be maintained that that phrase extends to part only [242] of his estate? The usual power of sale, of which he directs the insertion in the settlement, comprehends the whole property, without regard to the holders of it, and is to be exercised at the discretion of the trustees. In what respect is that more extensive power inconsistent with a special power of sale over the *Slyne* estate only, to be exercised at the discretion of the son in favor of the nephew, and limited therefore to their lives; the motive for qualifying it being personal, the fear that the son had not the same local attachment as the nephew? There is not that incompatibility between the two provisions which should induce the Court to reject either. The difficulties afford no reason for rejection. If *Bradley* declines to purchase, the provision in his favor ends; he may retain a power of creating embarrassment; difficulties may arise during the lives of these two individuals, but the testator might intend these difficulties for the purpose of preventing an absolute sale, or of directing it into a particular channel.

On the construction of the three instruments, I think that the settlement should contain a general power over all the estates, and also a special power relative to the *Slyne* estate. The report must be confirmed, with a variation relative to this power of sale.

His Honor doth declare, that the provision in the first codicil to the said testator's will contained, whereby it was directed that a proper clause should be inserted in the conveyance in tail directed by the said will, to enable the trustees therein to be named for a valuable consideration, at the request of the said testator's son to grant, surrender, and convey, all or any part of his estate & t *Slyne*, unto the said *R. G. Bradley*, freed and discharged from the said entails, on his the said *R. G. Bradley* agreeing to assume the name of *Greene* instead of *Bradley*; and that the money arising from such sale should be laid out in the purchase of freehold or copyhold lands in any part of *Great Britain*, [243] according to the direction of his said son, to be settled to the same uses as were by the said will directed respecting his said estate at *Slyne*, is, upon the true construction of the said codicil, to have effect only during the joint lives of the said *R. G. Bradley*, and of the son of the said testator; and His Honor doth also declare, that the provision in the second codicil to the said testator's will, whereby it was directed that the settlement by the said will directed to be made



should contain the usual and common powers to the trustees, with the consent of the tenants for life in possession, and of the guardians of tenants in tail in possession, during the minority of such tenants in tail, to sell or exchange all or any part of the lands and hereditaments by the said will directed to be purchased and settled, as therein mentioned, and for laying out the money arising by such sale, or for equality of exchange in the purchase of freehold, copyhold, or customary lands or hereditaments, to be settled to, upon, or under the subsisting uses, trusts, and powers of the said will, is upon the true construction of the said first and second codicils thereto, to extend to, and to comprize, the said copyhold estate at *Slyne*, as well as the other estates devised by the said will, but subject, as to the said estate at *Slyne*, to the special power given with respect thereto by the said first codicil, &c.

Reg. Lib. A. 1817, fol. 1227

[244] The MAYOR and BURGESSES of KING'S LYNN v. PEMBERTON. March 17, [1818].

Persons authorised by act of Parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, not restrained from cutting through their own lands, at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to Parliament for farther powers to levy money.

The bill filed by the "Mayor and burgesses of the borough of *Lenne Regis*, commonly called *King's Lynn*, in the county of *Norfolk*, in behalf of themselves and all other the persons who are or may be interested in the security and preservation of the town and harbour of *King's Lynn*, and the navigation thence to the open sea," stated, that by act of Parliament 35 *Geo. 3*, c. 77, entitled, "An act for improving the drainage of the middle and south levels, part of the great level of the fens called *Bedford level*, and the low lands adjoining or near to the said levels, as also the lands adjoining or near to the river *Ouze*, in the county of *Norfolk*, draining through the same to the sea, by the harbour of *King's Lynn*, in the said county, and for altering and improving the navigation of the said river *Ouze*, from or near a place called *Eau Brink*, in the parish of *Wiggenhall St. Mary*, in the said county, to the said harbour of *King's Lynn*, and for improving and preserving the navigation of the several rivers communicating with the said river *Ouze*," certain persons therein described were appointed commissioners for drainage, and certain other persons commissioners for navigation; and the commissioners for drainage were authorized and required to make a new river or cut, to branch out of the river *Ouze* at or near a place called *Eau Brink*, and to rejoin the present course of that river at or near the harbour of *King's Lynn*, for the free passage of the navigation, and of the waters of the river *Ouze*; and in order that those purposes might be effectually answered, and that the harbour of *King's Lynn* might not be prejudiced or rendered unsafe in consequence of such [245] new river or cut, it was directed that the same should be made of the dimensions and on the plan therein particularly described; and the commissioners of drainage were authorized and directed to execute all such works as certain engineers named should agree upon, for the better security and more effectual preservation of the town and harbour of *King's Lynn*, and the navigation thence to the open sea, from all possible damage in consequence of the making the said intended new river; that after authorizing the sale of the bare sands and channel of the river between two dams which were to be constructed, the act directed the commissioners for drainage to retain in their hands, out of the money to arise from the sale, a fund sufficient to answer the expenses of the future maintenance and repair of the works, which was to be exclusively appropriated to defray the expense of such maintenance and repairs as might become necessary, after the works should have been finished; and that the act authorized the commissioners for drainage to levy a tax of 4*d.* an acre on all the lands described, to be applied to the purposes mentioned; and imposed certain tolls, during 10 years after the opening of the new river, on all goods passing thereon.

The bill farther stated, that by statute 36 *Geo. 3*, c. 33, the commissioners for drainage and navigation were authorised to direct the continuance of the rate of

4*d.* per acre during a farther period of five years ; that by statute 45 *Geo.* 3, c. lxxii., the lands directed by the former acts to be taxed at the rate of 4*d.* per acre, were taxed at that rate for five years from the 24th of *June* 1805 ; and that by statute 56 *Geo.* 3, c. xxxiii., it was enacted, that all occupiers of the lands taxed under the former acts should pay the sums with which they were chargeable, together with a certain penalty thereon.

The bill farther stated, that the tax of 4*d.* per acre for the term of 15 years (which expired on the 24th of *June* [246] 1810), if properly levied, would have produced the sum of £75,724 and no more ; and that the arrears of the tax yet unreceived amounted to £20,000 ; that none of the works proposed by the acts had been commenced until lately, and that the commissioners for drainage had already expended £60,000, and upwards, being considerably more than the sum actually received by them on account of the said tax, in the purchase of lands and other purposes provided by the acts preparatory to the commencement of the works ; and that they had no funds in hand for entering on and proceeding therewith ; but that on the contrary they were considerably in arrear in respect of the monies already expended by them, as appeared by a statement of their accounts from *August* 1809 to the 25th of *August* 1817, printed in behalf of the commissioners, and signed with the name of their treasurer, the Defendant, a copy of which was annexed by way of schedule to the bill.

The bill then stated, that an application had lately been made, and was then pending in Parliament, in behalf of the commissioners for drainage, for an act to enable them to levy a farther tax of one shilling per acre, for the term of five years, for the purpose of commencing and carrying on the works directed by the former acts, and that such tax would amount to the like sum of £75,724 and no more ; that by an estimate made in behalf of the commissioners for drainage, as a foundation for their application to Parliament, the expenses attending the making the said new navigable cut, and other expenses incident thereto, were stated to amount to the sum of £84,000 ; in which estimate were not included the expenses of the several works which would become necessary for the security of the town and harbour of *King's Lynn*, and the navigation thence to the open sea ; that the nature and extent of such works could not be ascertained till the navigable cut had been completed, and the effect of the tidal and other waters passing [247] through the same, and confined therein, was known ; but that, in the opinion of engineers of skill, the completion of them would require £150,000 or £200,000.

The bill farther stated, that the Mayor and burgesses of the borough of *King's Lynn* were incorporated by royal charter considerably above two centuries ago, and that they had ever since continued and still were a corporation by virtue thereof ; and by letters patent granted to the predecessors of the Plaintiffs, the then Mayor and burgesses of the borough, by *King James* the First, the said Mayor and burgesses were constituted, and had ever since been and then were, admirals within the said borough, and the port, limits, and bounds thereof ; and by virtue of such office and appointment, the Plaintiffs and their predecessors for the time being had ever since and still exercised all necessary powers and authorities for the conversation and security of the said harbour, and of the navigation thereof ; that previous to the passing of the act 35 *Geo.* 3, c. 77, certain able and experienced engineers, whom the Plaintiffs consulted on that occasion, were of opinion that the opening of the said navigable cut would be attended with imminent hazard to the town and harbour of *Lynn*, and the navigation thereof, and that the hazard would probably increase with the increased operation of the waters of the said navigable cut, and the harbour be rendered inaccessible except to vessels of light burden ; that the Plaintiffs, together with the owners of other adjacent lands, opposed the passing of the act, and obtained the introduction of the clause directing the construction of works for the more effectual preservation of the town and harbour ; that the proposed tax of one shilling an acre for five years would not provide a fund sufficient for completing the navigable cut, and the works more immediately connected therewith ; and that the proceedings in the works, so far only as the said fund would extend, would be attended with great and manifest detriment, and the most imminent danger, to the harbour [248] and the navigation thereof, as well as to the property and interests of the merchants of the town, and of a great number of the landholders of the adjoining districts ; and that it would be necessary for the commissioners of drainage to renew their application

to Parliament for an increase of the tax, or an extension of the period during which it was to be levied, as often as the funds should be exhausted, and inadequate to defray the current expenses of the works.

The bill charged, that in proceeding to obtain the intended act of parliament, the commissioners were guilty of a fraud on the public, and especially on the Plaintiffs, their application being grounded on a declaration and express understanding that the funds to be raised under the intended act would be fully sufficient to complete all the works provided for by the several acts; that since making the last-mentioned application to parliament, the commissioners had begun to dig in the ground purchased by them for the purpose of making the said navigable cut, and that several hundred workmen were then employed upon the same under their direction; that the said works, if continued under the circumstances aforesaid, would be to the great and irreparable loss and injury of the town and harbour of *Lynn*, and of the navigation thereof.

The bill, farther charging that the Defendant was many years ago duly appointed by the commissioners for drainage, and then was, the treasurer of the said commissioners; and that it was directed by the said acts, or some or one of them, that the commissioners should and might be sued by or in the name of their treasurer for the time being, or other officer, as therein mentioned, prayed a discovery, and injunction to restrain the Defendant as such treasurer, and the commissioners for drainage, their agents, &c., from making and digging, or continuing to make and dig, the said navigable cut, and from in any manner proceeding in the execution of the said several works, unless or until a [249] proper and sufficient fund should have been raised or provided, and set apart for the purpose of making and completing all such works as should be necessary for the security and preservation of the town and harbour of *King's Lynn*, and the navigation thence to the open sea, from all possible damage or injury in consequence of the making the said navigable cut.

An affidavit having been filed, verifying the allegations of the bill, and stating estimates to show the insufficiency of the funds for the completion of the works, the Plaintiffs gave notice of a motion for an injunction.

Affidavits were filed in opposition to the motion, but not read. They stated, in substance, that with the strength of labor at present employed the works could not be finished, and the water diverted from its channel, within two years; nor could an additional strength be with safety employed for finishing them in less time; that the ground through which the work was then proceeding belonged to the commissioners of drainage, having been purchased by them for the purpose of making the cut; that until the ground at the ends of the cut was taken out, and the water of the river diverted from its present channel into the new river, no possible damage or injury could in any way happen to the town and harbour of *King's Lynn*, or to the navigation thence to the open sea; that the commissioners of drainage were in possession of about £14,000 to proceed with the making of the new river; that the land and tolls which they would have as part of their fund would produce £40,000, and the tax to be levied under the intended act £75,000.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Merivale*, in support of the motion. The commissioners have obtained the powers conferred on them by the act, under a representation that the sums which they were authorized to raise would be sufficient to [250] complete the undertaking. That representation is falsified by the event. It is ascertained that their present fund is not adequate even to open the new navigable river, much less to construct the works necessary for the protection of the town and harbour of *Lynn*. Their application to Parliament proceeds on the acknowledgment of the insufficiency of their means. What may be the probable result of that application it is needless to inquire; for our purpose it is enough that they are not now in possession of competent funds. The question is, whether the Court will permit them, while they are destitute of the means of completing it, to proceed with an undertaking from the partial execution of which irreparable mischief may ensue.

The *Lord Chancellor* [Eldon]. The circumstance of their not cutting through your lands distinguishes this case most materially from every other of the kind. In the case of *Agar* and the *Regent's Canal Company*, I acted on the principle,

that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the legislature has given to the speculators a right to carry the canal, can show that the persons so authorized are unable to complete their work, and is prompt in his application for relief grounded on that fact, this Court will not permit the farther prosecution of the undertaking.<sup>(1)</sup> So in another case, a Mr. *Taylor* filed his bill, stating that at the time of subscribing, he expected that when he had paid the whole of his instalments he should find the canal complete, but that with the present fund it would not pass to the east of *Hampstead*, and the Court thought him entitled to relief.

[251] I do not say that you cannot reach this case : that is to be discussed ; but it is not the case of a proprietor through whose lands the commissioners are proceeding to conduct the canal. I must assume that Parliament will not give to them farther powers, without taking care that they have funds sufficient to complete the undertaking. The proper application seems to be to Parliament, by petition representing these circumstances.

For the motion. Our application is that, in the meantime, they may be restrained from proceeding with an undertaking which, in the eventual deficiency of the fund, may be productive of irreparable injury.

The *Lord Chancellor* [Eldon]. What irreparable injury can ensue to the town and harbour of *Lynn*, from the act of the commissioners in cutting through their own lands ? If they have not funds, and any proprietor complains that they are cutting through his lands, that is an equity which I understand ; but unless irreparable mischief can be shown to arise from the very act, what right have I to restrain them from cutting through their own lands ?

Mr. *Wetherell* and Mr. *Abercromby* against the motion. Before mischief can possibly arise to the harbour of *Lynn*, the canal must be completed. The object is to direct the river through that course, and we are still two miles from the harbour. The peculiarity of this case is that the undertaking must be completed before the alleged injury can occur.

The *Lord Chancellor* [Eldon]. This case does not appear to me to turn on the same principle with those which have been mentioned. The commissioners are not cutting through the lands of others. [252] If the Plaintiffs show injury to their property, that is another ground.

Sir *Samuel Romilly*. The ground of our application is, danger to the harbour of *Lynn*. It is true that what is now done cannot injure the harbour ; but it occurred to us, that if we delayed till the danger approached, suffering the Defendants to expend large sums, the Court would tell us that we came too late. (See *Birmingham Canal Company v. Lloyd*, 18 *Ves.* 515.)

The *Lord Chancellor* [Eldon]. You have come very properly ; but a peculiarity in this case is the pending application to Parliament ; and the acts provide that the commissioners shall take measures for the security of the harbour of *Lynn*. Any person interested may petition either House of Parliament.

Motion refused.

(1) *Agar v. The Regent's Canal Company*, 26th January 1814, Injunction granted. Reg. Lib. A. 1813, fol. 476. 5th March 1814, Injunction dissolved. Reg. Lib. A. 1813, fol. 1056. And see *Coop.* p. 77.

SMYTHE v. SMYTHE. March 31, [1818].

On a motion after the answer for an injunction to stay waste, affidavits filed subsequently to the answer cannot be read.

The bill filed on the 9th of February stated, that the Defendant was tenant for life of certain estates, subject to impeachment of waste, during a term of 30 years ; and after that period, without impeachment of waste ; that the term having expired in January last, the Defendant marked and advertised for sale all the oak.

ash, and elm trees (with few exceptions) on the estates; and charging that the trees afforded shelter and ornament, and were necessary to the pleasurable enjoyment of the estate, and were for that purpose planted and suffered to grow, prayed an injunction against felling any timber or trees, growing or planted [253] for the ornament of the mansion-house, or for ornament in the grounds and plantations, or saplings unfit to be cut.

The answer having been filed on the 26th of *February*, insisting on a right to cut timber, but denying the fact or intention of cutting ornamental trees, the Plaintiff on this day moved for an injunction to restrain the Defendant from cutting any timber or other trees unfit to be cut in a due and fair course of husbandry.

The *Solicitor General* [Gifford] and Mr. *Rose*, for the motion.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Dowdeswell* for the Defendant. The Plaintiff having in support of the motion offered affidavits subsequent to the answer, tending to prove the fact of equitable waste, the Defendant objected to their being read; insisting that although an injunction obtained on affidavits filed before the answer may be sustained on affidavits filed subsequently, an injunction cannot be originally granted on such affidavits.

The *Lord Chancellor* [Eldon]. I recollect no former case in which this question has arisen. The allegations in the bill are general: if the Plaintiff at once supports them by the statement of particular facts on affidavit, the Defendant possesses an opportunity of explaining or denying those facts in his answer; but if the Plaintiff reserves his affidavits till the answer is filed, he deals not altogether fairly with the Defendant, who is entitled before the answer to be apprized of the points on which the Plaintiff rests his case. I shall pause before I extend to cases, in which no previous injunction has been obtained, the rule of practice which authorizes the admission of affidavits for continuing an injunction to stay waste against the answer. Affidavits of acts of waste committed [254] since the filing of the bill are entitled to a distinct consideration.

*April 1.* The *Lord Chancellor* [Eldon]. On diligent inquiry I find no instance in which the Court has permitted the Plaintiff to support a motion for an injunction, by affidavits filed after the answer. *The Countess of Strathmore v. Bowes* (2 *Dick.* 673; 2 *Bro. C. C.* 88; 1 *Cox*, 263) is the most material case; but all the reasons there given for receiving the affidavits tendered are founded on the fact that the injunction had been originally granted on affidavit. The affidavits are inadmissible.(1)

Motion refused.

(1) So *Sommerville v. Buckler*, 3 *Anstr.* 658. The general rule is, that for the purpose of obtaining or continuing an injunction, affidavits cannot be read against the answer (see *Clapham v. White*, 8 *Ves.* 35); but the policy of preventing irreparable injury has introduced an exception to that rule in cases of waste (*Gibbs v. Cole*, 3 *P. Wms.* 255. *Potter v. Chapman*, *Amb.* 99. *Robinson v. Byron*, 1 *Bro. C. C.* 588. *Countess of Strathmore v. Bowes*, 2 *Dick.* 673; 2 *Bro. C. C.* 88; 1 *Cox*, 263. *Norway v. Rowe*, 19 *Ves.* 153), or of mischief analogous to waste (*Peacock v. Peacock*, 16 *Ves.* 49. *Charlton v. Poulter*, 19 *Ves.* 148, n. *Norway v. Rowe*, 19 *Ves.* 144), an exception not extending to questions of title (*Norway v. Rowe*, *ubi supra*), or to injunctions for restraining the negotiation of bills of exchange (*Berkeley v. Brymer*, 9 *Ves.* 355). From the present decision it may be collected that where no affidavits are filed prior to the answer, none filed subsequently can be read in contradiction to it; but they may be read in support of an allegation in the bill, not contradicted by the answer, *Taggart v. Hewlett*, 1 *Mer.* 499. *Morgan v. Goode*, 3 *Mer.* 10; and see *Burroughs v. Oakley*, 1 *Mer.* 52, 376, n. *Bonner v. Johnston*, 1 *Mer.* 366. *Crutchley v. Jerningham*, 2 *Mer.* 505. During the discussion, the case of *Isaac v. Humpage* (3 *Bro. C. C.* 463; 1 *Ves. Sen.* 427) was mentioned by the *Lord Chancellor* as of no authority; and see to the same effect *Hanson v. Gardiner*, 7 *Ves.* 308. *Berkeley v. Brymer*, 9 *Ves.* 356.

[255] BURTON v. TODD. TODD v. GEE. *Rolls. March 31, 1818.*

On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor who, during 15 years, had retained possession of the whole estate, and of one-third of the purchase money, was, under the circumstances, charged with interest on one-third of the rents and profits.

In August 1802, *Mary Burton*, *Richard Gee*, and *Robert Osborne*, devisees in trust to sell, under the will of *Robert Burton* deceased, put up for sale by auction two estates called *Turner Hall* and *Ganstead*, described in the printed particulars of sale as containing 412 acres, of which 227 acres were tithe-free, paying a very trifling modus. One of the conditions of sale was, that the purchaser should make a deposit of 10 *per cent.* upon the purchase money, and sign an agreement to pay one-third on the 10th of *October* then next, one-third on the 5th of *January* 1803, and the remaining third on the 5th of *April* following, a good title having been made. At the sale, the agent of *William Todd* was declared the purchaser, at the price of £16,000; and a memorandum in writing was signed by him, and by the auctioneer, in behalf of the vendors. On the 11th of *October* 1802, *William Todd* paid to *Osborne* £5333, 6s. 8d., the first instalment of the purchase money; and on the 23d of *October*, the farther sum of £430, being the whole of the purchase money for the close called *Ganstead*; but he was not admitted into possession of any part of the estates except that close. On the 17th of *March* 1803, an abstract of the vendor's title was, for the first time, delivered to the purchaser, who returned it early in *April*, with the observations of his counsel; and on the 30th of *May* a farther abstract was delivered, which still not showing a good title, after repeated applications by the purchaser's solicitor, on the 18th of *November* 1803, the solicitor of the vendors delivered a third abstract, but the title produced being unsatisfactory, objections were stated by the purchaser's [256] counsel, which were not removed, nor the information required given.

In *May* 1804, the vendors filed a bill against *Todd* for specific performance of the agreement; and under a reference on motion, the Master reported that the vendors could not make a good title, the principal objections to the title arising from the refusal of the vendors to have an account taken of the money which they had received from such part of the testator's personal estate as by his will was made subject to his debts and legacies, and to purchase the tithes of such part of the estate sold as was described to be tithe-free. To this report the vendors excepted.

On the 19th of *October* 1808, the purchaser filed a bill against the vendors and other persons interested under the will of *Robert Burton*, praying that the vendors might specifically perform the agreement, and that all necessary accounts respecting the estate of the testator might be taken in order to make a good title; and if it should appear that the vendors could not make a good title, that an account might be taken of the sums of money paid by the Plaintiff in pursuance of the contract, and of the interest thereon, and of the injury which the Plaintiff had sustained by the non-performance of the contract; and that the vendors might be decreed to pay the amount to the Plaintiff.

In addition to the facts before stated, the bill alleged the will of *Robert Burton*, devising certain estates in the county of *York* to his wife *Mary Burton*, *Richard Gee*, and *Robert Osborne*, upon trust, to sell all or such parts as they should judge necessary and proper; and to apply the money in the first place in payment of the testator's debts; and to place out the surplus at interest for his wife, for life; and after her decease to pay his legacies (not expressly made payable out of personal estate) in exoneration of his personal [257] estate; and to continue the surplus, if any, at interest, for the benefit of the person entitled to the residue of his real estate: and he devised all other his estates, and also such of his said estates as should not be disposed of by his trustees for the purpose before mentioned, to his wife for life, in satisfaction of all claims; and after her decease to *R. C. Burton* for life, and to his sons and daughters, in strict settlement; with a like remainder to *N. C. Burton*, and his issue; with remainder to the third and other sons of the mother of *R. C. Burton*, and *N. C. Burton*, with remainders over. And he declared, that in case the estates devised to his trustees should not be sufficient for payment of his debts, and such legacies as were directed to be raised by sale of such estates,

then, and in such case only, he devised such part of his other estates as should be sufficient for the payment of his debts and legacies, to *Mary Burton*, *R. Gee*, and *R. Osborne*, their heirs and successors, upon the same trusts as the estates previously devised to them in trust to be sold; and he appointed his wife sole executrix.

The bill charged, that if the accounts of the testator's real and personal estates were taken, it would appear that the estate agreed to be sold to the Plaintiff, or some part thereof, was devised to *Mary Burton*, *Gee*, and *Osborne*, to be sold to pay the debts and legacies of the testator; and that by having the accounts taken, and purchasing from *C. A. Cooper* the tithes of that part of the estate stated to be tithe-free which he was willing to sell, and by other necessary acts, the vendors might make a good title to all, or the greater part of the estate.

To this bill the Defendants, *Gee* and *Osborne*, put in a demurrer and answer, demurring to the relief for want of equity, and admitting that a bill had been filed against the [258] Plaintiff as stated; and that *Mary Burton* was dead. The demurrer was overruled. (*Todd v. Gee*, 17 Ves. 273.)

The answers of the Defendants concurred with the statement of the bill, except in assigning to the delivery of the first abstract the date of *January* instead of *March* 1803; and of the second, the 18th of *September*, instead of the 18th of *November* following.

In *May* 1809, the exception to the Master's Report in the first suit was overruled; after which, no farther proceedings were taken. On the hearing of the second suit in *December* 1813, the decree directed a reference to the Master to make inquiries relative to such of the debts and legacies of *Robert Burton* the testator, as were by his will directed to be paid or raised by sale of his real estates specified, and relative to his real estates sold; and it was declared, that in case the Defendants *Gee* and *Osborne* could make a good title, the Plaintiff was entitled to have the agreement specifically performed; and it was ordered "that it be referred to the said Master to inquire and state whether the said *R. Gee* and *R. Osborne* can make or procure to be made to the said Plaintiff a good title to the said hereditaments and premises, or to any and what part thereof, pursuant to the particulars and conditions of sale; and in case the said Master shall find that the said *R. Gee* and *R. Osborne* cannot make to the said Plaintiff a good title to any part of the estates, hereditaments, and premises, pursuant to the said particulars and conditions of sale, the said Master is to state to the Court specially in what respects, and by reason of what circumstances, the said *R. Gee* and *R. Osborne* are not able to make to the said Plaintiff a good title." &c. (Lib. Reg. B. 1813, fol. 923.)

[259] By his Report, dated the 6th of *December* 1816, the Master stated, that *Gee* and *Osborne* could make a good title to the estate sold, except that they had not shown that the 227 acres, or any other part of the estate, were tithe free, or subject only to a trifling modus.

The cause coming on for farther directions, was argued by Mr. *Agar* and Mr. *Duckworth* for the Plaintiff; and by Mr. *Hart*, Mr. *Bell*, and Mr. *Barber*, for the Defendants.

The Master of the Rolls [Sir Thomas Plumer]. The first of these suits was instituted in *May* 1804, by Messrs. *Gee* and *Osborne*, and Mrs. *Burton*, the trustees under the will of Mr. *Burton*, against Mr. *Todd*, to compel the specific performance of an agreement concluded in *August* 1802, for the purchase of an estate. In *June* 1806, the common order for a reference to the Master to inquire whether a good title could be made, was obtained by the Plaintiffs. In *December* 1807, the Master reported that a good title could not be made. To this report, the Plaintiffs took an exception, which was overruled in *May* 1809. No further proceedings have occurred in that suit.

In *October* 1808, Mr. *Todd* filed a bill against *Gee* and *Osborne*, the trustees, and against the persons interested in taking the accounts under the will of Mr. *Burton*, praying specific performance of the agreement, and that for that purpose the necessary accounts might be taken, or, in case a good title could not be made, compensation for the injury sustained by the Plaintiff from the non-performance of the contract. In *December* 1813, a decree was pronounced in this cause, directing the necessary accounts and inquiries, in order to ascertain whether a good title could be made. In *December* 1816, the Master made his report, stating that a good title could be made to the estates in question, except that the vendors had not

shown that the 227 acres in the agreement described as tithe free, or subject only to a very trifling modus, were not subject to tithe.

[260] The decree, therefore, in the second suit, is nearly of course. The Plaintiff, Mr. *Todd*, is entitled to a specific performance, and to a compensation for the tithes of the 227 acres. The only questions are, first, on what principle the accounts must be taken? and, secondly, by whom the costs must be paid?

By the agreement in *August* 1802, it was stipulated that the purchase money should be paid by instalments, one third on the 10th of *October* 1802; one third on the 5th of *January* 1803; and the remaining third on the 5th of *April* following, a good title to the estates being then made. The purchaser paid the first instalment, amounting to £5333, 6s. 8d. on the day appointed, the 10th of *October* 1802; and the vendors have ever since retained that sum; and have also received all the rents and profits of the premises, Mr. *Todd* never having been admitted into possession of any part. An abstract was delivered in *January* or *March* 1803, and was returned by Mr. *Todd* before the *May* following, with the objections of his counsel, the principal of which was, that the title could not be approved unless certain accounts were taken in a court of equity. The vendors insisted that the taking of those accounts was not necessary; and instituted a suit in *May* 1804, to compel the purchaser to accept the estate without that preliminary. Their attempt failed; and Mr. *Todd* having subsequently filed the second bill for the purpose of having the accounts taken, was resisted by the vendors, but ultimately succeeded. The vendors then having been uniformly wrong, while the purchaser was uniformly right, and having continued in possession of one-third of the purchase money, and in the receipt of all the rents and profits of the estate for upwards of 15 years, the question arises, Upon what principle the accounts are to be taken?

The usual course is, that the purchaser shall receive the rents, and pay £4 *per cent.* interest on the purchase money, [261]—a practice rather hard, where the delay is not caused by him; the rents seldom yielding £4 *per cent.*, and the purchaser, after having been deprived of the enjoyment of the estate, receiving it at last in a worse condition. In the present case, a delay of 15 years has been caused by the resistance of the vendors; and I think it is necessary to distinguish this case from those in which the Court has adopted the rule of giving to the purchaser the rents and profits of the estate, and to the vendor, interest on the purchase money. That rule was founded upon the principle recognized by Courts of Equity, that from the moment of the contract, although no purchase money is paid, the estate is to be considered as the property of the purchaser, and the purchase money the property of the vendor. But, in this case, the immediate payment of a part of the purchase money (no less a sum than £5600) requires a deviation from the usual practice. The vendors have not only continued in possession of the rents and profits for the last 15 years, but, during that long period, have also enjoyed the benefit of this large portion of the purchase money, and instead, as in the common case, of now receiving the whole amount with simple interest in a gross sum, they have had the opportunity of making compound interest on one third part, during a number of years sufficient to double the principal. If therefore, in this case, the common rule were adopted, the effect would be to give to the vendors, who from the issue of the suit stand as aggressors, a double advantage, and to subject the innocent purchaser to a double loss, namely, a loss of the benefit to be derived from an *annual* receipt of the rents, and of such profit as a continued use of his £5600 would have given to him, beyond the interest for which he would now have been accountable to the vendors. That rule would bestow on the wrong doer all the benefit of his own delay, and inflict all the evil on the rightful suitor.

Under these circumstances equity demands that some [262] mode should be adopted by which the purchaser may be placed as nearly as possible in the same situation as if no part of the purchase money had been paid. The case is novel, and I am aware of no precedent, but on principle I think, that as in strict justice and conscientious dealing, a proportionate share of the estate should have been conveyed to him, in immediate exchange for his purchase money, the most equitable course in the power of the Court appears to be, in addition to the usual directions, to allow to the purchaser interest upon the rents and profits of so much of the estate as is proportionate in value to the purchase money already paid.

It may be said that Mr. *Todd* might have applied for an order that the £5333,



6s. 8d., or the rents and profits, should be brought into Court and laid out; but he has not done so, and the vendors have enjoyed the benefit of his omission.

Under the circumstances, I am of opinion, that the vendors ought to account, not only for the rents and profits of the estate from *October* 1802, but also for interest after the rate of £4 *per cent.* upon one-third of the rents and profits.

The costs of both suits must be paid by the Defendants to the second suit. The original bill must be dismissed with costs, because the vendors, apprised of the objections, instituted a premature and improper suit, omitting to provide the only proper mode of settling the question. As to the second suit, The vendors took no steps to amend the original bill, and adapt it to the purpose of obviating the objections to the title. Mr. *Todd* had therefore no means of obtaining a specific performance of the agreement but by the institution of the second suit. The vendors opposed his claim without success, and a specific performance was decreed. There was no inconsistency on the part of Mr. *Todd*. The provisions of the will rendered it necessary [263] that the accounts should be taken; a proceeding in which all the parties to the second suit were interested. The vendors must be at the expense of clearing the title by taking the accounts, and therefore Mr. *Todd* is entitled also to the costs of the second suit.

His Honor doth order that the Plaintiff's bill in the first mentioned cause stand dismissed out of this Court, with costs to be taxed by Mr. *Courtenay, &c.*, and in the second mentioned cause, His Honor doth declare that the Plaintiff is entitled to a specific performance of the agreement, and to a compensation in respect of the 227 acres of land agreed to be sold, not being tithe free or paying only a trifling modus; and it is ordered that the said Master do settle such compensation, and take an account of what is due from the Plaintiff in the second mentioned cause, to the Defendant *Robert Osborne*, the surviving trustee, for the remainder of the purchase money for the estate and premises called *Turner Hall*, and the timber thereon, according to the particulars and conditions of sale, and the agreement dated the 7th day of *June* 1803, in the pleadings mentioned, and compute interest thereon after the rate of £4 *per cent. per annum*, as to the sum of £5637. 15s. 2d. part thereof, from the 5th day of *January* 1803, and as to the sum of £5637. 15s. 2d. the residue thereof, from the 5th day of *April* 1803, when the respective portions of the purchase money ought to have been paid, and deduct them from what the said Master shall settle for such compensation; and it is ordered that the said Master do take an account of the rents and profits of the said premises, accrued since the 10th day of *October* 1802, received by the said Defendants *Richard Gee* and *Robert Osborne*, or either of them, or any person or persons by their or either of their order, or for their or either of their use, and in order thereto the parties are to produce before the Master upon oath all books, papers, and writings in their custody or power relating thereto, and are to be examined upon inter-[264]-rogatories as the said Master shall direct; and it is ordered that the said Master do compute interest at £4 *per cent. per annum*, on one third part of the said rents and profits which have accrued and become due and been received as aforesaid, in each and every year since the said 10th day of *October* 1802, from the respective times when such rents respectively were so received; and it is ordered that the said Master do tax the costs of the Plaintiff and the Defendants *R. C. Burton, N. C. Burton, John Clitheroe*, and *Sarah* his wife, *Thomas Mauleverer* and *Mary Mauleverer*; and it is ordered that the Plaintiff do pay to the said Defendants their costs when taxed, and pay the amount of the money which shall be taxed for his own costs of both the said causes to Mr. W., his solicitor; and it is ordered that the Plaintiff deduct the same, and also the said rents and interest, out of what shall be found to remain due to the said Defendant *Robert Osborne*, the surviving trustee, for the purchase money and interest; and it is ordered that the said Plaintiff do pay the residue thereof into the bank with the privity of the Accountant-General of this Court, in trust in this cause; and His Honor doth continue the reservation of farther directions, and any of the parties are to be at liberty to apply to this Court as there shall be occasion.

Reg. Lib. B. 1817, fol. 1802.

[266] The ATTORNEY-GENERAL (at the Relation of WILLIAM IZARD), *Informant*; JAMES BROWN, JOHN HALL, and forty-six others, *Defendants*. April 10, 11, Nov. 25, 1816; April 3, 1818.

[S. C. 1 Wils. Ch. 323. See *Attorney-General v. Eastlake*, 1853, 11 Hare, 215; *Attorney-General v. Mid-Kent Railway Co.*, 1867, L. R. 3 Ch. 104; *In re St. Botolph, etc., Parish Estates*, 1887, 35 Ch. D. 150.]

Commissioners appointed by act of parliament, being authorized to levy a rate (not exceeding a certain proportion of the poor-rate) on the occupiers of all houses, &c., in *Brighton*, for paving, lighting, and watching the town, and another rate, not exceeding a fixed sum, on every chaldron of coal, landed on the beach, or otherwise brought into the town, for repairing or building works to protect the coast of *Brighton* against the encroachment of the sea (the act reciting that the inhabitants were unable to raise money sufficient for that purpose without the aid of parliament), with power of distress for non-payment, and liberty to apply any surplus of the coal-rate, after payment of the debt contracted on the security of that rate, and the expenses of repairs, &c., in aid of the rate for paving, &c.; to an information by the *Attorney-General*, at the relation of an inhabitant, filed against forty-eight commissioners (the whole number being a hundred), by the description of Acting Commissioners, stating that the commissioners had, during several years, levied the coal-duty at its maximum, and applied a large proportion of the produce in aid of the town-rate for paving, &c., instead of the construction and repair of works for the protection of the coast, and the discharge of the debt contracted on the security of the coal-duty, and had distrained the goods of the relator for non-payment of the duty, and praying an account of the money levied and expended, an injunction against an undue levy, and a direction that the commissioners should replace any sums which they had applied to purposes not warranted by the act, a general demurrer for want of equity, and a demurrer *ore tenus* for defect of parties, were over-ruled: the *Lord Chancellor* being of opinion, that a parliamentary grant of a duty on coal imported into a town, in aid of the pecuniary inability of the inhabitants to protect the town from the encroachment of the sea, is a gift to a charitable use; that a clause in the act directing suits to be prosecuted against the treasurer only, was not applicable to cases in which adequate relief could not be obtained except against the commissioners; and that the information might be sustained against the acting commissioners only, for the purpose of relief in respect of their past acts, and for the purpose of prospective regulation other commissioners might be made parties as they qualified and assumed the functions under the provisions of the act.

By an act of parliament, passed in the 13th year of the king, for paving, lighting, and cleansing the town of *Brighton*, and removing and preventing nuisances and annoyances; for holding and regulating a market within the town; for building and repairing groynes, in order to render the coast safe and commodious for ships or vessels to unload and land sea coal, culm, and other coal, for the use of the inhabitants of the said town, and for laying a duty thereon; and for other purposes (13 *Geo.* 3, c. 34); commissioners were appointed for carrying the act into exe- [266]-cution, with power (among other things) for seven or more of them, to direct the streets, lanes, and ways within the town to be cleansed and lighted in such manner as they should think necessary, and for defraying the expenses so incurred, in every year after passing the act (the first year to be computed from the 25th of December 1772), or oftener if they should think necessary, to make one or more rate or rates, assessment or assessments, to be signed by seven or more of them, on the tenants or occupiers of all houses, shops, warehouses, &c., tenements or hereditaments, within the town, not exceeding in the whole in any one year three shillings in the pound on the rate made for the relief of the poor; the money so raised to be paid to the collector, with powers of distress and sale in case of non-payment. After certain provisions, among others, for enabling any person, under an order from five or more of the commissioners, to inspect the poor-rates, and for authorizing the commissioners to borrow money on the credit of the rates arising under the act, one section, reciting that "the town of *Brighton* is situated by the sea-side, and within six miles of the

port or harbour of *Shoreham*, and belongs to the said port, and that great part having been destroyed by the breaking in of the sea, several groynes were some years since erected which have preserved the town, and the coast is now safe and commodious at several times of the year, for ships and vessels to unload and land sea-coal, culm, and other coal, on the beach of the town, for the use of the inhabitants; and that the said groynes are become greatly out of repair, and the inhabitants of the town are not able to raise money sufficient to repair the same without the aid and authority of parliament," constituted and appointed the commissioners, or any seven or more of them, trustees for repairing, improving, maintaining, and preserving the said groynes, and erecting and building any new groynes, or such other works as to them, or any seven or more of them, at any general meeting assembled for putting in execution the powers by the act given, should seem most proper. The following [267] section enacted that, "for the better effecting and support of the premises, there should, from the 24th day of *June* 1773, be paid to the said trustees and their successors, or such persons as seven or more of them should appoint, the sum of sixpence for every chaldron of sea-coal, culm, and other coal, that should be landed on the beach of the coast at the town of *Brighton*; and the said trustees and their successors, &c., were authorized and empowered to collect and receive the said sum of sixpence from the masters and owners, or other persons having the rule or command of every ship or other vessel, for every chaldron of sea-coal, culm, or other coal, landed and discharged out of any ship or vessel on the beach or coast of *Brighton*, or otherwise brought into the said town within the parish of *Brighton*. The act also authorized the trustees to distrain for non-payment of the rate, and to assign the rate, as a security for money borrowed, not exceeding the sum of £1500.

The information filed the 26th of *November* 1814, stated, that by an act of parliament passed in the fiftieth year of the king, entitled, "An act to repeal an act made in the thirteenth year of his present majesty, for paving, lighting, and cleansing the town of *Brighton*, and removing and preventing nuisances and annoyances therein; for regulating the market, for building and repairing groynes to render the coast safe and commodious, for landing coal and culm, and laying a duty thereon, and for making other provisions in lieu thereof; and for regulating weights and measures, and building a town hall" (50 *Geo.* 3, c. xxxviii.) the former act was repealed, except so far as relates to the market, and certain persons named were constituted commissioners for putting the present act into execution, with power to appoint a treasurer and clerk, and a collector or collectors of the rates or assessments to be levied, and the monies to be received by virtue of the act, and a surveyor or surveyors, and such other [268] officers for the necessary execution of the act as they should think proper; and such persons so to be appointed were to deliver to the commissioners, correct accounts in writing of all monies, matters, and things received or committed to their charge, and the commissioners were to cause proper books to be kept, in which regular entries and accounts should be made of the several meetings held in pursuance of the act, and of the commissioners present thereat respectively, and of all acts and proceedings whatsoever concerning the act, and also an account of all monies assessed or raised and received, or payable by virtue thereof, and of the application and payment thereof, and of all contracts to be made by virtue of the act, all which accounts should be examined and settled by the commissioners, or any thirteen or more of them, assembled at any meeting to be held in pursuance of the act, who, together with their clerk, should subscribe their names to the same; and all entries so signed should be admitted in evidence if necessary in any court; and such books should be kept by the clerk for the time being, or by such other person and at such place as the commissioners should direct, and should at all convenient times be open to the inspection of the commissioners, and of all other persons rated and assessed for the purposes of the act, or otherwise interested therein; and it was enacted, among other things, that for raising money for defraying the several charges and expenses of paving, watching, cleansing, and lighting the town, and all other charges and expenses attending the execution of the act (except so far as therein otherwise provided for), and for defraying the interest, and repaying the monies borrowed for the credit of the rates and assessments for paving, &c. directed to be levied by the former act, it should be lawful for the commissioners once in every year, or oftener if they should think it necessary, the first year to be computed from the 1st day of *January*, 1810, to make one or more

equal rate or rates, assessment or assessments, to be signed by any thirteen or more of the commissioners for the time being, upon the tenants or [269] occupiers of all houses, shops, &c., tenements or hereditaments whatsoever within the town, so as such rates or assessments did not exceed in the whole, in any one year, the sum of 4s. in the pound on the scale for the time being, on which rates are raised for the relief of the poor of the parish aforesaid; and the commissioners were empowered from time to time, when they should judge necessary, to borrow at interest any sums not exceeding the sum thereafter mentioned, upon the credit of the rate for paving, &c., and by any writing under their hands and seals to mortgage or assign the rate, or any part thereof; provided that nothing therein contained should authorize the commissioners to borrow on the credit of the rate for paving, &c., any larger sum than £3000, until the sum of £3720, already borrowed upon the credit of the said rate, was reduced to a sum not exceeding £2000, except for the purpose of building a town hall and offices thereto; and it was further enacted, that it should be lawful for the commissioners to continue the market established under, and to collect the rents or tolls payable by virtue of, the former act, which empowered the commissioners, for the purpose of improving the market, to borrow any farther sums of money, not exceeding in the whole the sum of £5000, upon the credit of the market, and the rents, profits, and tolls thereof; and it was further enacted, that after the monies which were then due, or which should be afterwards borrowed, upon the credit of the market, or the rents, profits, and tolls thereof, should have been fully paid and satisfied, it should be lawful for the commissioners, and they were thereby required, to pay and apply any surplus that might have arisen from the market, or the rents or tolls thereof, either in aid of the rate for paving, &c., or the duty thereafter directed to be levied upon coal and culm, as to them should seem reasonable and proper; and after reciting the provision of the former act, that the commissioners named therein should be trustees for repairing, improving, maintaining, and preserving the groynes that had been erected for the preservation of the town, and [270] erecting and building any new ones, or such other works as should appear to them most proper for that purpose, and that the sum of sixpence should be paid for every chaldron of sea-coal, culm, and other coal, landed on the beach of the coast of the said town, and that the commissioners might borrow any sum not exceeding £1500 upon the security of the said duty; and farther reciting that the commissioners had accordingly borrowed the sum of £1500 upon the security, part of which was then due; and that since the passing of the former act, great encroachments had been made by the sea upon the coast adjoining the said town, and that the said duty had been found inadequate to the charges and expenses of erecting new groynes, walls, and other fences or works which were necessary for the safety and protection of the town against such encroachments; the act authorized and required the commissioners from time to time as to them should seem necessary and expedient, to repair, improve, and maintain, add to, alter, or remove the groynes, or fences, or works, then already erected and built or to be made, erected, and built, or to cause to be made, erected, or built, new groynes or other works whatsoever, which might appear to them necessary or proper for the safety of the town or any part thereof, or any part of the beach or shore within the town, and enacted that there should be paid to the commissioners, or to their collector, &c., any rate or duty which they should think fit to direct, not exceeding the sum of three shillings for every chaldron of sea-coal, culm, or other coal, landed on the beach, or in any other manner by land-carriage or otherwise brought or delivered within the limits of the town: and the act, after divers clauses for enforcing the payment of the last-mentioned tolls, and for other matters relative thereto, authorized the commissioners for the purpose of maintaining, repairing, or improving the present groynes or works for the protection of the town, and for erecting new groynes or works, and for making, repairing, and improving the same, to borrow upon the credit of the said rate £5000 in manner therein mentioned.

[271] The information further stated, that the acting commissioners under the last act of parliament were the Defendants. That at a meeting of the commissioners, held on the 2d of May 1810, it was resolved, that *Thomas Attree* of *Brighton* should be appointed clerk and treasurer to the commissioners, giving security to their satisfaction (which security they had neglected to take, and which offices of treasurer and clerk ought not to be holden by the same person, the duties thereof being incom-

patible); and at the same meeting it was likewise resolved, that *William Gates* of the said town should be appointed collector of the tolls and rates, and *Attree* and *Gates* had ever since, and still acted in the said respective offices, and at the last-mentioned meeting, the commissioners directed that from that day (the 2d *May* 1810), until the 1st of *May* 1811, the duty on coal should be three shillings per chaldron; and at successive annual meetings of the commissioners, the coal-duty was continued at three shillings, until the 1st of *May* 1815. That the duty of three shillings per chaldron was accordingly levied by *Gates* in each of the years from 1810 to 1815, on all the sea-coal, culm, and other coal landed on the beach, or brought to the town, and *Attree* received from *Gates* the sums so levied, and after payment of the interest which accrued due on the debt of £1140, the residue of the debt of £1500, contracted on the credit of the former duty on coal, and of all the expense incurred in erecting or repairing groynes under the said acts, there was at the end of each of the said years a very large surplus of the said monies, which on the 29th of *November* 1813, amounted to £4808, 15s. 7d. That it was the duty of the commissioners to apply a sufficient part of the surplus in payment of the debt of £1140, and the surplus or remainder of the sum of £4808, 15s. 7d. would have been more than sufficient to answer the expenses of erecting or repairing groynes for some years to come; but the commissioners, in breach of their duty, and without any necessity, on or about the 10th of *December* 1813, resolved that the sum of £2000, in four several sums [272] of £500 each, should be borrowed, at 5 *per cent.*, on the credit of the coal-duty, and should be repaid by the treasurer thereof as follows, viz. £500 and interest at the expiration of six months, £500 and interest at the expiration of twelve months, £500 and interest at the expiration of eighteen months, and the remaining £500 and interest at the expiration of twenty-four months, from the time such monies should be advanced.

The information further stated, that on the 12th of *January* 1814, the commissioners, or some of them, in pursuance of the said resolution, signed three several debentures for £500 each, which money was paid to the commissioners or to their treasurer *Attree*, for their use, by Mr. *Thomas West*, one of the commissioners. That the commissioners, or some of them, on the 2d of *March* 1814, signed another debenture for £500 to *West*, which money was also paid to them or to *Attree* their treasurer, for their use. That the commissioners have in every year, from the passing of the act to the present time, misapplied a very considerable part of the money arising from the duty on coal, and that although the act of the fiftieth year of his present majesty gave power to the commissioners to impose a duty on coal, not exceeding three shillings per chaldron, to repair, &c., the groynes, walls, or other fences or works necessary or proper for the safety of the town, or any part thereof, or any part of the beach or shore within the town, yet the commissioners have constantly, during the period aforesaid, applied a very considerable part of the monies arising from the said duty, in aid of the rate for paving, &c., the town; and that the commissioners imposed, at the several times aforesaid, the duty of three shillings per chaldron on coal, not merely for the purpose of erecting and repairing the groynes as aforesaid, but that they might have a much larger fund to apply, in case of the town rate.

The information proceeded to state, that on the 4th of *June* 1810, the balance of the money arising from the [273] coal-duty, after payment of the charges of erecting and repairing groynes and other incidental expenses, amounted to £800, 15s. 3d.; in *November* 1810, such balance amounted to £1613, 5s. 3d.; in *November* 1811, to £2209, 10s. 10d.; on the 31st of *December* 1812, to £3657, 8s. 1d.; and on the 29th of *November* 1813, to £4808, 15s. 7d.; and the total of the duty on coal from the 29th of *November* 1813, to the present time, amounted to a very considerable sum, in addition to the said sum of £4808, 15s. 7d. That it appeared from the treasurer's account, that the expenses of paving, &c., the town, exceeded the receipts under the town rate, on the 4th of *June* 1810, by £1004, 7s. 8d.; on the 23d *November* 1810, by £1222, 0s. 9d.; on the 28th of *November* 1811, by £3078, 5s. 10d.; on the 1st *January* 1813, by £5309, 7s. 11d.; and on the 29th *November* 1813, by £7592, 13s. 0d. That the annual deficiencies of the town-rate to answer the said expenses were in a great measure made good out of the general balances of the coal-duty. That it appeared by the said respective statements that very large sums arising from the coal-duty had been unjustly and improperly applied by the

commissioners in aid of the rate for paving, &c., whereby persons not resident in the town, but occasional visitors thereto, and who greatly contribute to the support thereof, had been compelled to pay a large proportion of the expenses which ought to have been borne by the resident inhabitants, viz. the expenses of paving, lighting, cleansing, and watching the town. That although the act confined the sums of money arising from the coal-duty and the other tolls and duties thereby made, and the town-rate, to the respective purposes before mentioned, yet the commissioners, in breach of their duty, had lately, out of the funds arisen from the rate on coal, caused to be erected a bathing-house on the beach of the town, the building of which was attended with a very considerable expense, and had applied the said trust-fund to several other improper purposes, in violation of the act.

[274] The information then stated, that it appeared by the books kept by the commissioners, that on the 21st of *May* 1811, it was resolved by them that *W. R. Nott* (one of the acting commissioners) should be paid the sum of £500, in addition to the sum of £70 paid by *Attree*, on account of his expenses relative to the act, and that *Attree* should be paid £300 on account of the act; and on the 11th *June* 1810, it was resolved that the sum of £73, 18s. 9d. should be granted to *Nott* as a remuneration for his active services; and accordingly the said sums, or a considerable part thereof, were paid to the said respective persons out of the fund arisen from the coal-duty. That no part of the sum of £2000, borrowed by the commissioners upon the credit of the coal-duty, had been applied by them to the repairing, &c., of any groynes or other works necessary or proper for the safety of the town, or any part thereof, or any part of the beach or shore within the town; but the last-mentioned sum had been applied by the commissioners to very different purposes, contrary to the act, and in violation thereof, and of their duty in the due execution of the same. That the relator had applied to and required the commissioners, and *Attree* and *Gates*, not to proceed to compel payment of the duty on coal so directed by the commissioners to be raised, until the whole amount of the money collected and levied as aforesaid had been justly and fairly expended according to the meaning of the act; but the commissioners, their treasurer and collector, had notwithstanding, proceeded to levy a distress upon the goods of the relator for the duty on coal claimed by them to be due from him, and had actually seized and carried from off the premises of the relator coal to a larger amount than the duty so claimed.

The information charged that the act meant and intended that the commissioners, before they imposed any duty upon coal, should calculate, or procure an estimate [275] of, the probable amount of the expenses to be incurred in the then current year, for repairing, &c., the groynes and other fences which might be necessary for the protection of the town against the encroachment of the sea, and that such a duty only ought to be imposed upon coal as would be sufficient to raise a sum equal to such expense, but for no other purposes; and that if it should happen that the commissioners were mistaken in their calculations, or that the estimate should exceed the sum expended, and that such excess should leave an inconsiderable surplus of the coal-duty after payment of the sums borrowed thereon, and the aforesaid expenses, and if there was no probability that any farther sum would be immediately wanted for the erection and repair of the groynes, then, but not otherwise, such inconsiderable surplus might be applied in aid of the town rate. That the commissioners did not make, or cause to be made, any estimate or survey previously to imposing the coal-duty, for ascertaining the amount of the probable charges and expenses that would be necessary in erecting and repairing, &c., the groynes or other works, so that in imposing the duty of three shillings a chaldron on coal, they did not at all regulate themselves by the amount of such expenses, but, on the contrary, always imposed such duty, in order to raise a sum of money to be applied in aid of the town-rate, and well knew at the respective times when they imposed the duty on coal, that for the mere purpose of repairing, &c., the groynes, and erecting or building any new ones or other works, there was no necessity to impose such duty, and that the money in hand, arising from the previous duty levied, was more than sufficient to answer such expenses, or that at least a much less rate or duty than three shilling per chaldron would have been sufficient. That the expenses of repairing, &c., the groynes and other works never in one year were equal to the sum raised for that purpose, but, on the contrary, the duty in every

year greatly exceeded the expenditure. That in no case were the commissioners at liberty, under the act of the [276] 50 G. 3, to apply any part of the duty arising from coal in aid of the town-rate, until they had paid off all monies which had been borrowed upon the credit of the coal-duty. That *Attree*, the treasurer to the commissioners, by their direction, had carried the amount of duties arising from coal, and the rents and tolls of the market, and the rates and assessments made on the inhabitants of the town, to one general account, and they had thereby appropriated the balance in their hands, or in the hands of *Attree*, on account of the duties arising from coal, to the payment of the deficiency in the rates and assessments on the inhabitants of the town. That the receipts of the duty on coal ought to be applied exclusively to the payment of the monies properly charged on such duty by the commissioners, and the expenses of erecting and repairing, &c., the groynes, and that no farther rate or duty should be imposed upon coal, but for such purposes. That though the money in hand, arising from the receipts of the coal-duty, was more than sufficient to answer the above purposes for a considerable time to come, yet the commissioners threatened to levy three shillings per chaldron under the rate last made, and likewise to impose another similar rate upon the expiration of the old one; and that the commissioners ought to be decreed to replace to the account of the coal-duty all such sums of money which they had improperly taken from the produce of that duty, and applied to purposes to which they were not applicable under the second act.

The information prayed, a declaration that the commissioners are not entitled under the act of the 50 G. 3, to impose any duty on coal landed on the beach of the town of *Brighton*, or in any manner, by land-carriage or otherwise, brought or delivered within the limits of the town, except for the purpose of repairing, &c., the groynes, walls, or fences, or works already erected and built, or to be made, erected, and built, for the safety of the said town; an injunction to restrain the commissioners from imposing [277] any duty or assessment on the coal so landed or brought of *Brighton* but for the purposes last mentioned, and to restrain the commissioners from levying, and *Attree* and *Gates* from receiving or collecting, any sum or sums of money under any duty or assessment on such coal which should not have been made for such last-mentioned purposes; an account of all the monies collected by *Gates* and received by *Attree*, or by the commissioners, in each year from the passing of the second act to the present time, in respect of the duty on coal, and of the application thereof in each of the said years, and of the expenses incurred in each year, in the repairing, &c., the groynes, walls, fences, or works erected for the safety of the town, and in erecting and building new ones, and an account of the money borrowed by the commissioners, and then due, on the credit of the coal-duty, and what money had been applied in payment of the interest on such debt; that the balance of the coal-duty so received by *Attree*, or by the commissioners, after deducting the expenses of supporting and erecting fences against the encroachment of the sea, and the payment of the principal, if any, and the interest of the debt contracted on the said duty, might be ascertained and applied in payment of the debt due thereon, and that the residue of such balance might be applied exclusively to the payment of the expenses of supporting, maintaining, and erecting fences necessary to prevent the encroachment of the sea; and if it should appear that the money arisen from, or borrowed on the credit of, the duty on coal, since the passing of the second act, had been applied to purposes not warranted by the act, then that the commissioners might be decreed to replace such money to the account of the duty on coal, and that in the mean time they might be restrained from borrowing any farther sum on the credit of the coal-duty, and that all the commissioners might be directed to keep distinct accounts of all monies hereafter to be levied under the act.

[278] In addition to the clauses stated by the information, the act of the 50 G. 3, enacted, that all actions or suits which the commissioners might find necessary to prosecute, for the recovery of any damage or sum of money due to them, by virtue of the act, should be commenced and prosecuted in the name of their treasurer for the time being, and that all actions and suits which it might be necessary for any other person to commence or prosecute, on account of any contract made by the commissioners, or any of them, as such, or by any other person on their behalf, in pursuance of the act, for the non-performance of such contract, or for any other

act or thing done by the commissioners, or any of them, or any other person by their order, in pursuance of the act, should be commenced and prosecuted against the treasurer for the time being. The 112th section authorized the churchwardens and overseers of the poor to grant a drawback of the duty to such poor persons as were not able to pay the same, on any coal for their own use, not exceeding two chaldrons in one year. The 116th section enacted, that after the money then due, or which should thereafter be borrowed, upon the credit of the duty arising from coal, and the expenses incurred in erecting and maintaining the groynes and other works, should have been fully paid, it should be lawful for the commissioners to apply any surplus that might thereafter arise from the said duty, in aid of the rate for paving, &c., as to them should seem reasonable and proper.

In December 1814, the Defendants filed a general demurrer, showing "that His Majesty's Attorney-General hath not, by the said information, made such a case as entitles him, in a court of equity, to any such relief against these Defendants, touching the matters in the said information mentioned and complained of, as is thereby prayed, or any other relief in a court of equity."—On the argument before the *Vice-Chancellor*, the Defendants alleged, [279] *ore tenus*, as another cause of demurrer, a want of parties. The demurrer having been allowed by His Honor (21 Jan. 1815, Reg. Lib. A. 1814, fol. 304), was now argued on appeal.

April 10, 1816. Mr. Leach and Mr. Horne, in support of the demurrer. This is a case *primæ impressionis*. No precedent has been produced of an information similar to the present. In the absence of authorities (itself a forcible argument against the relator), it is clear on principle, that the Court cannot entertain jurisdiction in a case such as is here stated, or in any case administer the relief here prayed.

The case stated is, that certain commissioners, authorized by an act of the legislature to impose, within a limited district, two distinct rates, affecting distinct descriptions of property, and applicable respectively to purposes of two distinct classes, each beneficial to the town of *Brighton*, have consumed on purposes of the one class an undue proportion of the rate which was appropriated to purposes of the other class. That statement presents no ground for the interference of a court of equity. Such a provision cannot be represented as a gift to charitable uses. Here is no gift; no transfer of a fund; it is a mere compulsory levy, authorized by the legislature; a local tax. What analogy exists between such an exercise of sovereign power, and the act of an individual proprietor devoting a portion of his property to public purposes?

The cardinal objection to this information is, that it requires the Court of Chancery to administer criminal law. Your Lordship is prayed, first, to declare that the conduct of the commissioners is a crime at law (a singular office for a court of equity); next, to restrain by injunction the commission of that crime, in order that, if repeated, it may be punished in the form of process for contempt of Court; [280] and, finally, to compel the commissioners to replace sums misapplied; in other words, to inflict a fine. A court of equity cannot, either on authority or on principle, assume a jurisdiction of this nature.

The information charges that the commissioners have illegally levied, and illegally applied, certain rates; that is, unquestionably, a misdemeanor at law; and the Attorney-General, representing the public, is competent to require from a criminal tribunal the infliction of a punishment due to the offence; but he has no right to the aid of a court of equity for extorting from the Defendants answers to interrogatories which tend to criminate them, or for enforcing the provisions of the penal code, and interposing the process of contempt as an additional sanction. A court of equity cannot administer criminal law by injunction.

The information requires the Court to make regulations for the conduct of commissioners under an act of parliament, in effect superseding its operation. The act has provided specific remedies for parties aggrieved; directing suits as well as actions to be instituted against the treasurer as the only Defendant. Under that clause can the Attorney-General sustain an information filed, not against the treasurer (the Defendant who holds that office is made a party only in his character of commissioner), but against a moiety of the commissioners, and for the purpose of



transferring to this Court the administration of a fund which by the express provisions of the act is confided to the commissioners ?

For any abuse of their powers the commissioners are responsible at law ; sums illegally levied may be recovered by action ; if the goods of the relator have been distrained for non-payment of an illegal rate he may obtain redress from the ordinary tribunals.

[281] Even were the case within the jurisdiction of the Court, the relief sought is impracticable. The information prays that the sums misapplied by the commissioners, being replaced by them, shall be, not refunded to the persons from whom they were illegally levied, but appropriated to the future purposes for which the coal-duty may be applicable ; in other words, that money unduly taken from particular individuals in 1814 shall be employed in exoneration of persons liable to contribution in 1816 : a proceeding inconsistent with the most obvious principles of equity. If the sums in question have been properly levied the relator's case fails ; if improperly, they are not subject to the act, and cannot be administered under it. On the allegations of the information the money now in the hands of the commissioners, the produce of an unauthorized assessment, is not a fund applicable to the purposes of the act, but may be recovered in an action by the individuals from whom it was illegally taken. Is the *Attorney-General* to repay to each of those individuals his respective quota ? Can he protect the commissioners against their claims ? Were it possible, as this information seeks, to render the commissioners personally responsible, how is the money to be applied ? Clearly not under the act, for the ground of imposing that penalty on the commissioners is that the rates were not such as they were authorized to levy.

Upon these grounds the demurrer on the record must be allowed ; but we allege, *ore tenus*, another cause of demurrer, want of parties. Admitting the jurisdiction, the Court will not interpose till the relator has brought before it all the persons by the regulation of whose conduct the public is to be protected. The individuals to whom powers are given by the act are about a hundred, of whom forty-eight only are parties to this suit.

The commissioners not named, it is said, have not acted ; but they may qualify and act forthwith. They are [282] not to be represented by those now before the Court, and not only would not be restrained by an injunction granted, or bound by an account taken, in their absence, but are entitled to exercise what they consider as their rights, without regard to the decree. No prospective regulations can be made but in the presence of the whole body. The act has not distinguished acting and non-acting commissioners. Upon what principle can a distinction be made between individuals whom the relator has named as parties, and those whom he has thought proper to omit ? There is no allegation that the acts referred to are the acts of the Defendants only. The acts of the acting commissioners, whoever may be present at every meeting, are the acts of all the commissioners. The injunction, if sustained at all, can be sustained against the Defendants only as individuals ; but the suit is instituted against them, not as individuals, but as commissioners, and the terms of the prayer, commensurate with the terms of the appointment in the act, comprehend all the commissioners.

Sir Arthur Pigott, Sir Samuel Romilly, Mr. Bell, and Mr. Newland, in support of the information.

The object of the information is to obtain from the commissioners an account of the money levied and applied under the acts of parliament ; the rest of the relief is incidental to the account. It seems difficult to comprehend the arguments by which the commissioners, entrusted with a fund applicable to specific purposes, and appointed under the express denomination of trustees, seek to protect themselves from accounting in this court.

All property in this kingdom belongs either to private individuals, including bodies corporate, or to the public ; for injuries to the former the ordinary remedy is an action ; for injuries to the latter, an information by the *Attorney-General*. To one species of private property, however, the policy of the law extends a peculiar protection, and injuries [283] to it are redressed neither by action nor by mere information, but by information at the relation of individuals, upon whom the assumption of that character imposes a liability to costs. Property of this description, to a certain degree private, partakes the character of public property, as devoted to

purposes in which, though more peculiarly beneficial to certain individuals, every subject is interested. On this demurrer the question is, whether the purposes declared in these acts of parliament, namely, the preservation and improvement of the coast and town of *Brighton*, purposes in which all His Majesty's subjects have an interest, are not public purposes such as entitle any one, in the character of relator, to state a case of abuse. It is not necessary that the purposes be charitable : in describing the practice of the Court on the subject of informations, Lord *Redesdale* mentions charities only as one instance among many, of the cases in which that remedy is allowed. (*Treatise on Pleadings*, p. 7.) Wherever a fund is appropriated to objects beneficial to the nation at large, any individual is entitled to the aid of the *Attorney-General* for compelling its due administration.

The purpose for which this fund is raised, the protection of the coast from the encroachment of the sea, is expressly enumerated among pious uses in the statute of *Elizabeth* (43 *Eliz.* c. 4), from the terms of which principally the Court derives the definition of charitable purposes. (See 2 *Vern.* 387 ; 9 *Ves.* 405 ; 10 *Ves.* 541.) In describing the property upon which the statute is designed to operate, the preamble specifies property given "for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways." In this instance the funds are appropriated to the preservation of the port and coast, and the repair of sea-banks. Had an estate been conveyed on these trusts, it is indisputable that the due application of the rents might have been secured by information.

It is true that the fund in this case arises not from the spontaneous donations of individuals, but from a public compulsory contribution under the authority of parliament ; but can that circumstance afford a reason for refusing to entertain an information ? If, on the petition of the inhabitants of *Brighton*, the legislature had directed, that towards making provision for poor widows, and placing orphan apprentices, sums should be raised by duties charged on goods imported, and ultimately, therefore, paid by the inhabitants, could the mere fact that the fund was provided by public contribution of that nature preclude the *Attorney-General* from enforcing by this process its just administration ? Is it contended that if toll taken on a canal were devoted to charitable purposes, as trustees could not be brought to a reckoning by information ? or that, when the legislature directed *St. Paul's* church to be built from the produce of a duty on coal, no account could be taken of that duty ? In the exposition of the statute of *Elizabeth*, contained in *Duke's Law of Charitable Uses*, it is expressly stated, that "an imposition granted upon commodities imported and transported, to be employed upon repair of ports or havens, where they shall land, is a charitable use, and within this statute" (p. 35). That authority is decisive.

The argument, that on the allegations of the information there is no fund in the hands of the commissioners for the purposes of the act, is fallacious. They are authorized to levy money in anticipation, for the protection of the groynes, &c., though no repairs were then necessary, to be applied from time to time, and to borrow on the credit of the rates. To what extent they were so authorized is [285] not the present question. The charge against them is, misapplication of the funds levied under the act. The propriety of the levy, and the propriety of the application, are distinct subjects of inquiry.

It is objected that the conduct imputed to the commissioners, as the ground of the relief prayed, amounts to a criminal offence, and cannot, therefore, be cognizable in a court of equity. The information contains no criminal charge ; no allegation that the commissioners have applied the funds to their own benefit. Can it be maintained that the application of them to public purposes, other than those required by the act, is punishable by a criminal proceeding ? The commissioners are answerable for a civil breach of trust, but persons acting with delegated authority on the part of the public cannot be charged criminally unless they act from corrupt motives ; without that imputation, the wilful and direct violation of an act of parliament will not necessarily subject the parties to criminal process.

Even if the acts imputed were criminal, and such as might be made the subject of an indictment for a misdemeanor, the inference would not be correct, that this Court is deprived of jurisdiction. Transactions may be cognizable both by civil and by criminal tribunals, being the subject of a remedial as well as of a vindictive proceeding. An assault and battery is at once actionable and indictable. Though

no suitor can legally entitle himself to a pecuniary demand arising from transactions amounting to felony, he may so entitle himself from transactions amounting to a misdemeanor. (*I.e.* before the trial of the offender on indictment ; after his conviction or acquittal, the person injured may recover damages by action for the civil injury. *Crosby v. Leng*, 12 *East*, 409, and the authorities there cited.) Were the acts imputed indictable, yet if they constitute a breach of trust, the *cestui que trust* is [286] entitled to Your Lordship's declaration that they shall not be repeated. The arguments by which this demurrer has been supported extend to oust the jurisdiction of courts of equity in cases of fraudulent deeds, or conspiracies to obtain wills. It is clear that this Court may administer equitable relief where the subject-matter is criminal ; as in the instance of nuisances. *Baines v. Baker* (*Amb.* 158 ; 3 *Atk.* 750), *Coulson v. White* (3 *Atk.* 21), *Ryder v. Bentham* (1 *Ves. Sen.* 543), *Attorney-General v. Doughty* (2 *Ves. Sen.* 453), *Mayor, &c., of London v. Ward* (5 *Ves.* 129), *Attorney-General v. Cleaver* (18 *Ves.* 211).

The objection of criminality is applicable only to particular interrogatories, and cannot, therefore, support a general demurrer, which proceeds on the assumption that the relator is entitled to no part of the relief sought. Were the information so framed that the commissioners could not be compelled to answer a single question, they might protect themselves against the discovery, but could not for that reason sustain a demurrer to the relief. The Court will distinguish between the question what relief may be proper at the hearing, and the general objection that no relief should be granted.

Upon the statement of the information a clear breach of trust has been committed ; the charge is, systematic misapplication, the levy of the coal-duty at its maximum, for the purpose of applying the surplus arising from that levy in aid of the town-rate ; in effect exonerating the resident inhabitants of the town at the expense of the occasional visitors. Shall these commissioners, appointed for purposes in which all His Majesty's subjects have an interest, and admitting, as for the purposes of the argument they must admit, the truth of these allegations, protect themselves from the jurisdiction of this Court, and refuse to [287] render an account of the fund which they have misapplied ? It is clear that by this mode only can its due administration be secured, and if this Court refuses to interfere, the case is remediless. In the absence of corrupt motive in the commissioners, an indictment or information at law could not be sustained, for a mistaken construction, and undue execution, of the statute under which they act : by action of trespass the proper application of the funds could not be obtained ; and though on appeal to the quarter sessions an illegal rate were quashed, it might at the next meeting be reimposed. The acts have provided no remedy for a case like this : they contain no clause requiring the commissioners to account, nor any provision for examining the propriety of the assessment. The erection of a tribunal for auditing their accounts might have created a difficulty. No other remedy existing, the King, as *parens patriæ*, is entitled, by his *Attorney-General*, to protect the subject from injustice and vexation, to recall such parts of the fund as have been misapplied, and to secure for the future its due application. It is clear that the commissioners are not protected from the jurisdiction of this Court by the mere circumstance of their appointment under an act of parliament. The Court has regulated the administration of the revenues of the free schools of *Berkhampstead* (*Attorney-General v. Price*, 3 *Atk.* 108. *Berkhampstead Free School ex parte*, 2 *Ves. & Beam.* 134) and *Birmingham*, (1) and in a recent case, assumed jurisdiction over commissioners under an inclosure act. (*Speer v. Crawler*, 17 *Ves.* 216.)

The demurrer on the record, therefore, must be over-ruled, and the question on this appeal relates to that demurrer only : on the demurrer at the bar, for want of parties, the *Vice-Chancellor* pronounced no judgment.

[288] The *Lord Chancellor* [Eldon]. If a Defendant cannot sustain the demurrer on the record, he is entitled to demur *ore tenus* ; (2) but, availing himself of that right, he must pay the costs of the demurrer on the record. (3)

*For the Information.* The demurrer for want of parties is untenable ; on the principle that it is necessary to introduce as parties on the record those persons only against whom relief can be obtained. If one of two executors proves the will, the other, though he may at any time obtain probate, is not a necessary party to a suit instituted by a person claiming a legacy in opposition to another claimant, and

praying an injunction to restrain the acting executor ; against the exe-<sup>[289]</sup>-cutor who has not proved, or the non-acting commissioner, no relief is sought.

Mr. *Leach*, in reply. This is by far the most important case that has occurred in this Court since I have known it. The question is, whether in every instance of public contribution under act of parliament not referrible to the head of revenue, a court of equity assumes jurisdiction to render the collecting officer personally responsible for sums levied on an erroneous construction of the act ? It is admitted by the *Attorney-General* that, to this moment, no attempt has ever been made to establish such a jurisdiction. The argument of inconvenience cannot be gravely urged against a system which has prevailed from the Conquest ; but were the fact otherwise, this Court can no more make laws on a principle of convenience, than on any other principle.

The proposition of the relator is, that a court of equity may entertain jurisdiction over commissioners appointed by a local act of parliament, and inflict on them a fine for misconduct. At common law, such commissioners, if they corruptly abuse their powers, are punishable for a misdemeanor ; if they act erroneously, not corruptly, they cannot be made the objects of a criminal proceeding, the law not unjustly visiting error as a crime ; but is no mode provided of instructing them in their duty ? For that purpose, beyond question, an information in the nature of *quo warranto* would lie. The case of the Corporation of *Bedford Level* (6 *East*, 356), and the authorities there cited, clearly designate that as the proper remedy, where any set of men encroach on the prerogatives of the crown, or on the sovereignty of the legislature ; and Mr. Justice *Lawrence* particularly enumerates as fit objects of that proceeding, persons exercising the functions of commis-<sup>[290]</sup>-sioners under an act of parliament to levy rates for paving a town (p. 360). On the other hand, the individual from whom an unjust levy is made, may maintain an action of trespass, if not replevy the distress. Such are the principles of the common law. The commissioners if corrupt, are criminally responsible ; if in error, may be set right, and individuals injured by their acts may obtain redress. Where then is the necessity of giving to a court of equity a jurisdiction without precedent, and, as I contend, against principle ?

The duties of the *Attorney-General*, if I understand them, are these. In courts of criminal jurisdiction, the King, as *parens patriæ*, is the prosecutor ; but the sovereign cannot sue before his own tribunal, or address his own judges ; for those purposes he is represented by the *Attorney-General*. Criminal proceedings, therefore, with few exceptions, are in the control of that officer, and in civil courts, the rights of the crown are under his protection. A nuisance in a river or a harbour, or on a highway, may be abated by the hand of the subject ; but such abatement becomes not the dignity of the crown ; it abates the nuisance by the information of its *Attorney-General* : by information here, or in the Court of Exchequer ; for in every case which concerns not the revenue, the jurisdiction of the two Courts is concurrent. Wherever the subject may abate a nuisance, the Crown may sue by English bill in any court of equity ; on the principle, that a public evil exists, which it is the duty and the prerogative of the Crown to remove.

The *Attorney-General*, the servant, not of the public, but of the crown, exercises another authority, which requires particular consideration. It is the duty of a court of equity, a main part, originally almost the whole, <sup>[291]</sup> of its jurisdiction, to administer trusts ; to protect not the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From this principle has arisen the practice of administering the trust of a public charity : persons possessed of funds appropriated to such purposes are within the general rule ; but no one being entitled by an immediate and peculiar interest to prefer a complaint, who is to compel the performance of their obligations, and to enforce their responsibility ? It is the duty of the King, as *parens patriæ*, to protect property devoted to charitable uses ; and that duty is executed by the officer who represents the Crown for all forensic purposes. On this foundation rests the right of the *Attorney-General* in such cases to obtain by information the interposition of a court of equity ; and the relator has therefore insisted, that these acts of parliament constitute a charitable trust. His argument is, that the statute of *Elizabeth* enumerates building bridges and repairing sea-banks among charitable purposes ; in other words, that because a repair of sea-banks may, therefore every such repair must, be a charitable

use. If a benevolent individual devotes money to the construction and maintenance of a bridge, the design brings the donation within the description of the statute : the motive being charitable there is no distinction whether the gift proceeds from the Crown, or the legislature, or a private subject ; but because a voluntary application of property from such a motive to such a purpose is a charitable trust, can that character be imputed to a compulsory levy, authorised by the legislature ? The argument would prove every county bridge a pious use.

It is next insisted, that the information may be supported on the principle, that the King, by virtue of his prerogative, and his duty to the public, has an interest in harbours, rivers, and the sea-coast. No such point can be raised on this record. The information contains no reference to the right and duty of the Crown to protect navigation ; on the [292] contrary, it expressly asserts that all which ought to have been done for the defence of the coast, and more, has been done ; that the commissioners have exceeded the obligation imposed on them in providing for the repair of the groynes, &c. The authority of Lord *Redesdale* is then alleged, that charities form only one of many instances in which the *Attorney-General* may sustain an information. Lord *Redesdale* has not assumed to declare the law : he undertook no more than to collect decided cases : has he cited any case similar to the present ?

It is contended that the commissioners, being in possession of a surplus, may be compelled by this Court to apply it for the purposes of the trust. The principle is unquestionable ; but omitting the objection, that in a case like the present, the Court will not administer relief at the instance of the *Attorney-General*, the statement from the bar is at variance with the record. The information alleges that whatever sum is in the hands of the commissioners has been illegally levied, and ought to be repaid. Was it ever heard that money, of which a party had improperly possessed himself, was a trust-fund, to be administered under the direction of a court of equity ?

The term trustee in the act (employed once, at least, by mere mistake, for the term treasurer), cannot affect the question. The character of the commissioners is determined, not by the name under which they are casually described, but by the duties assigned to them, the acts which they are to perform. If these commissioners are trustees, what officer of the Crown is not a trustee ? In one sense, undoubtedly, all public offices, even the prerogatives of the Crown, are trusts ; but are they trusts which a court of equity will regulate ? A trustee, in the consideration of this Court, is the legal owner of property, subject to an equitable claim. On the allegations of the information, the [293] commissioners have no legal ownership in the balance of duty misapplied.

The relator, therefore, not being entitled to relief, the general demurrer for want of equity is good, although he may be entitled to discovery ; on the principle, that the discovery is only ancillary to the relief.

Another ground of demurrer urged *ore tenus* is want of parties. It is said that the *Vice Chancellor* has not proceeded on that ground ; that had he over-ruled the demurrer on the record, he must have charged the defendants with costs. I admit the fact. The *Vice Chancellor*, thinking the information bad in substance, forebore to examine its form ; but is it not competent to the Court of Appeal, is it not a part of its duty, to consider every ground of demurrer alleged ? Must we be remitted to argue the objection before the Court below ? or are we to be deprived of its aid, because the *Vice Chancellor* thought we had a better ? The validity of the objection is clear ; the act, to which, as a public act, the Court must advert, appoints commissioners, who are no parties to the record.

The *Lord Chancellor* [Eldon]. Before I pronounce final judgment in this important and difficult case, I shall inform myself of the principles on which the *Vice Chancellor* proceeded.

With respect to the demurrer *ore tenus*, my present opinion, subject to farther consideration, is, that if I have correctly read the information and the act of parliament, there is no want of parties.

The next question is, supposing the information such, with respect to the nature of its subject-matter, as the *Attorney-General* may file, at the relation of private individuals, whether the demurrer on the record can be sustained on any of the grounds stated ? It is objected that the information requires the defendants to answer charges amounting to a criminal accusation. On that objection it is clear not only that if the information requires an answer to matter of criminal accusation,

and also to innocent matter, the demurrer must be over-ruled ; but that if it requires an answer to criminal matter only, yet that alone is not sufficient to sustain this general demurrer to the whole information, to relief as well as to discovery. Though it is now settled (a doctrine introduced by Lord Thurlow (*Fry v. Penn*, 2 Bro. C. C. 280. *Price v. James*, 2 Bro. C. C. 319 ; 2 Dick. 697. *Watkins v. Bush*, 2 Dick. 663) against the ancient practice) that if the bill prays discovery and relief, a plaintiff not entitled to relief is not entitled to discovery (*Pitts v. Short*, 17 Ves. 216. *Gordon v. Simpkinson*, 11 Ves. 509. *Baker v. Mellish*, 10 Ves. 553, and the cases there cited), the converse of that rule will not hold ; because he may be entitled to relief, without being entitled to it through the discovery ; and may then obtain a decree, though he has not established his right by the defendant's answer.(4)

I believe it will be found on principle and precedent, that if the *Attorney-General* can make proof of what he here alleges, though the defendants protect themselves from the discovery, he may obtain relief. The *Attorney-General* is an officer of the Crown, and in that sense only, the officer of the public. (See 4 Burr. 2570. *Wilmot's Opinions and Judgments*, 327, 328.) To decide the question of his competence to sustain this information, the Court must look to every part of it, considering not only whether it contains many points on which he has not, but whether it does not contain some points on which he has, a [295] right to sue. The question then is neither more nor less than this, can the *Attorney-General* proceed in this court under this act of parliament ? a question not depending merely on the construction of the act. If the demurrer was meant to take the opinion of the Court, whether these persons, call them commissioners or trustees, can not only *de tempore in tempus*, levy duties which they from time to time conceive to be necessary, but while a debt remains on the security of one rate, apply the produce of that rate, not in discharge of the debt, but in aid of the other rate, I cannot conceive that such ought to be the construction of the two acts. I take them to mean, not that the commissioners are to calculate so as never to raise more than is required at the time, but that any accidental surplus of the coal-duty, raised on a *bona fide* calculation, may be applied in aid of the parish rate.

The other point is very material. Whether the *Attorney-General* can call in this suit for three objects : first restraint ; secondly, account ; thirdly, application of the money to the purposes of the act ? It is said, that this is not a charitable use, and I am not disposed at present to consider it such. But the two acts, *in pari materia*, must be taken together ; and it is remarkable that the first act never applies to the commissioners the name of trustees, with reference to any other subject than the rate on coal. Unless this Court could interpose, on the first act there would be no remedy any where. The act authorizing the commissioners to raise sixpence on the chaldron would be a defence to the proceeding by information in the nature of *quo warranto*, for levying rates without lawful authority. The duty of sixpence, like the duty of three shillings, is leviable, not on the inhabitants of *Brighton* but on all the King's subjects who shall resort to that town to sell coal. Eventually, indeed, it falls on the inhabitants, who reimburse it to the importer in the price of the commodity ; but it is imposed expressly on all the King's subjects re-[296]-sorting there by land or sea to trade ; and imposed only for a particular purpose, and to be raised from time to time, according to the provisions of the act. Every one of the King's subjects has a right, in some court, to insist that such a duty shall not be levied, except in conformity to those provisions. The second act extends the amount of the duty to three shillings ; and then comes the question on which I am not at present prepared to say that there is not much positive authority, whether, where a duty is laid on all the King's subjects, in respect of their trade, to be raised for particular purposes, the public, and in right of the public, the Crown, have not an interest if the duties are levied improperly, or if properly levied improperly applied, which the *Attorney-General* is entitled to protect ? I am not disposed to hold that the preservation of the coast is not public interest ; but without adverting to that question, this duty is expressly imposed on all the King's subjects. The case requires accurate examination.

Nov. 25, 1816. The Lord Chancellor [Eldon]. (From Mr. Merivale's note.) I have reflected on this case with great anxiety ; since it appears to me, that, supposing the *Attorney-General* right in his construction of the acts of parliament, it will be very

difficult to find an adequate civil remedy for the misapplication of the money collected on the coal-duty, if an information of this kind cannot be supported.

[His Lordship then stated the provisions of the statute 13 G. 3, and made the following observations on the clause conferring a power to distrain.]

It has been thought, that if there is a right of distress, there must be a right to replevy, and that it would therefore be difficult to maintain a suit in this Court; but it seems to me that more weight is laid on that observation than [297] belongs to it; for the question would be, with respect to the groyns, not whether an individual can replevy, if improperly distrained upon, but, attending to the whole matter in the information, whether there are any means for compelling that which has been properly levied, to be properly applied? An action of replevin, if decided against the party replevying, would decide only that he was compellable to pay the rate; but the principle which the *Attorney-General* must maintain here, against the persons who have received that rate, is, that when paid it shall be applied to the purposes of the act, and to no other. Supposing the case rested on this, one great question is, whether this act of parliament, in respect to the coal-duty, would create a charitable use? It seems to have been considered, that because the duty was given by act of parliament it could not be a charitable use. If authority was wanted upon that subject, it would be enough, for my business to day, to refer to the passage cited from *Duke's Exposition of the Statute of Elizabeth*. After the fire of *London*, when acts of parliament imposed a duty on coal imported into the city or the river, among other purposes for rebuilding *St. Paul's church* (19 *Car.* 2, c. 3; 22 *Car.* 2, c. 11; 1 *Jac.* 2, c. 15; 8 *W.* 3, c. 14; 1 *Ann.* st. 2, c. 12; 9 *Ann.* c. 22), beyond doubt that was a charitable use. Money given by a private donor for repairing a church or chapel is a charitable use; and if this is law, there is no reason why money given by the public, if it is applied to a charitable purpose, should not be equally within the statute of *Elizabeth*.

There are many cases which might be the cause of suit against the commissioners, *qua* commissioners, for the treasurer cannot be proceeded against where the act cannot be the act of the treasurer; for instance, suppose the commissioners take possession of the place, by the addition of which the market is to be enlarged; this is a case in which the Court is in the habit of granting an injunction, [298] but the suit must be against the commissioners, and not the treasurer.

It has been argued, that because the poor are not to pay the duty, therefore this is not a charitable use. I cannot accede to that inference: the poor are not protected from payment, if they consume more than two chaldrons of coal in a year; but on what principle is it necessary that the poor should contribute, in order to render this a charitable use?

The demurrer cannot be sustained on the ground that the matters charged in the information may be considered as matter of offence, to be answered otherwise than civilly, and for two reasons; first, because it is a sufficient answer, that although the *Attorney-General* chooses to sue civilly, yet he may take care that no one else shall sue criminally; and secondly, that if the *Attorney-General* can prove his case, without introducing any criminal matter, he will be entitled to relief: but there is another ground of demurrer, which has been stated *ore tenus*, and if it could be sustained, would dispose of this information, without entering into any other consideration; and that is, that there is a want of proper parties. At present, I am inclined to think, that, in this respect, the information is defective; but if that objection can be removed, I should wish this case to be spoken to by one counsel on each side, for I cannot, in opposition to the authority, cited, bring myself to the conclusion that this is not a charitable use. If this is a charitable use, it seems impossible, considering the various objects in view, as they are to be collected from the prayer of the information, to contend that, because the relator may have a remedy for his particular grievance, the *Attorney-General* has no ground of complaint for the misapplication of the duty to be raised.

As to the passage which prays a declaration of the law, if it is part of my duty to declare what is the meaning of [299] an act of parliament, I have no doubt in saying the meaning was, that the commissioners should apply only the occasional surplus, which a miscalculation of the expenses for the repair of the groyns might have produced; for the surplus could not be returned to the individuals, and therefore it was thought convenient that it should be applied to another purpose; but it was

never the meaning of the act of parliament that under colour of the coal-duty they should levy a duty for paving and lighting the town, any more than for the support of the poor. As to the question, whether they should be restrained, it would be difficult to decide, without satisfactory evidence, that there had been this abuse, and that a repetition of it was meditated; but if this duty can be considered within the intent and meaning of a charitable use, on what ground is it to be said, that the *Attorney-General* cannot come here, to have an account of the duty, to know how it has been applied, and to obtain directions for the future application of it, in the ordinary way in which he comes for other charitable purposes? I confess, therefore, that unless I hear more to convince me to the contrary, in my opinion, this is a charitable use within the statute of *Elizabeth*; but at present I cannot overcome the objection of want of parties. The information has made the present commissioners the only defendants, whereas the accounts prayed refer to a period when it is not averred that they were the acting commissioners, and when in probability they were not.

The case was again argued by Mr. *Leach*, in support of the demurrer, and Mr. *Bell* for the relator, but the Editor has no note of the argument.

April 3, 1818. The *Lord Chancellor* [Eldon]. The question in this case turns on the powers and duties of commissioners against whom an information has been [300] filed by the *Attorney-General*. The act of the 13th year of the King appoints certain persons commissioners for paving, lighting, and cleansing the town of *Brighton*, with directions for the execution of their duty, and a provision that actions may be maintained in the name of one commissioner, or of the clerk or treasurer. After a variety of clauses for effecting its objects, the act authorises the commissioners, seven or more of them, for defraying the expenses of paving, lighting, and cleansing the town, to impose upon the tenants of all houses and other property, a rate not exceeding three shillings in the pound, on the rate made for the relief of the poor; and confers a power of inspecting that rate, on inhabitants having an order under the hands of five of the commissioners. The act then empowers the commissioners to borrow money on the credit of the rate; and it is, I think, in the statement of the security for money so borrowed, that the first mention is made of building or repairing groynes. The provisions for this purpose are prefaced by a recital that the town of *Brighton* is situate near the sea, within six miles of the harbour of *Shoreham*, and that great part of the town having been destroyed by the breaking in of the sea, several groynes (by which I understand buttresses constructed for the purpose of supporting the shore) were some years since erected, which had preserved the town, and the coast was then safe and commodious for ships to land coal, &c., and that the groynes were greatly out of repair, and the inhabitants were not able to raise sufficient to repair the same without the aid and authority of parliament; it is therefore enacted, that the commissioners, or any seven or more of them, should be trustees for repairing the old, or building new, groynes, and that for effecting the premises, from the 24th of June 1773, a definite sum should be levied, namely, sixpence on every chaldron of coal landed at the town; and a subsequent clause authorises the trustees to give security by assignment of the rate for any sum borrowed not exceeding £1500.

[301] This act continued in force till the year 1810, when another act was passed, by which, after a recital of the insufficiency of the former rate to provide against the inroads of the sea, certain individuals are appointed to repair and maintain the groynes already built, and, if necessary, to build new groynes or works, and, are authorized to levy a sum not exceeding three shillings for every chaldron of coal, &c., landed on the beach, or otherwise brought into the town, and authorised *ipsisimis verbis* for the safety and protection of the town, the inhabitants of which have been described as unable to protect themselves against the ravages of the sea.

It appears extremely difficult to maintain that there does not exist, in some court in this kingdom, an authority, I do not mean to punish for misapplying, or to replevy in case of undue levying, but to compel the trustees properly to apply, the money which by these acts they were authorized to raise for specific purposes. I have not yet satisfied myself that the recital preceding the power given to the trustees may not, within the doctrines often heard in this court, be represented as the recital of a charitable use; and this is clear, that the fund is set apart for the purpose of aiding the pecuniary inability of the inhabitants to protect themselves from the ravages of the sea.



The act of 1810 contains a clause requiring observation, that all actions or suits by or against the commissioners, shall be prosecuted in the name of the treasurer, or against the treasurer; it then orders books of account to be kept, with liberty of inspection to persons interested, and directs the application of any surplus of the coal rate, but without a similar direction relative to a surplus of the paving rate. Next follows a clause fixing the quantum of the latter rate, no otherwise than by saying that it should not exceed the proportion of four shillings in the pound on the rate for the relief of the poor, and authorizing the imposition of a duty on coal to the extent of three shillings a chaldron.

In my view of this act, it is no more than a continuance and augmentation of the provisions of the former act, in aid of that pecuniary inability, which, though not recited in the second act, was the avowed ground of the first, and must be considered as the ground of the second. It is clear, that though the legislature has given to the commissioners a power of raising any sum not exceeding three shillings in the chaldron, yet that power can be duly exercised only to the extent which shall appear to them requisite for the protection of the town or of the shore; a purpose which limits their discretion. The clause itself restricts the authority which it confers, by describing that purpose as its object. Considering the impracticability of precisely ascertaining what sum would be required, where the wisest calculations might be immediately falsified by the violence of the sea, it was reasonable to anticipate that the rate, imposed upon a probable opinion of propriety and necessity, might produce a surplus, and directions are given for the application of that surplus, in aid of the other duties, but not till the debt contracted had been discharged.

Upon the clause entitling poor persons who have paid the duty to a drawback, it is said that the act seems designed for the taxation of the rich in aid of the poor. That representation is not correct. The principle of the act was the inability of the inhabitants of *Brighton* to provide for their own safety; whether right or wrong, I am not to inquire, but that is the paramount principle. It directs that an aid shall be given to all; which, in a certain way, is a charge upon each; and from which, therefore, a portion of them, the poorer, are exempted.

The information is filed at the relation of *Izard*, an inhabitant; and for the present purpose of deciding the [303] validity of the demurrer, I must assume the allegations of the information to be true. The demurrer extends to the whole relief prayed, and if therefore to any single part it cannot hold, it is bad. Although, for instance, for one of the grievances stated, the relator has a remedy by replevin, and although a portion of the prayer is founded on that statement, yet if any other allegation entitles the relator to relief, the demurrer must be over-ruled. Upon what principle it can be contended, that it was not the duty of the commissioners to apply the surplus of the coal-rate in discharge of the debt contracted by works for resisting the encroachments of the sea, before any application in aid of the town-rate, seems to me incomprehensible; whether I am competent on this record to enforce the performance of that duty, is another question; but the information, stating the fact of the misapplication, to so much, whatever becomes of the rest, the defendants must answer.

It has been argued, that the commissioners are not amenable to the jurisdiction of a court of equity, in respect of transactions which, according to the allegations, constitute a crime at law; but let it be recollected, that a party accountable cannot protect himself from an account in this court, by the mere suggestion that the duty of accounting is blended with duties of another kind. The information contains a charge, which I must at present assume to be true, of misapplication of the funds, and on that the question again arises, what can be done here? (5) [304] It is impossible to maintain that, admitting the truth of the allegation, the act of parliament has been duly executed. Can it be contended, that £4000 ought to have been applied in reduction of the town-rate, while the debt not only remained unpaid, but was increased by new loans? I assent to the doctrine of the *Vice Chancellor*, that the relator might have obtained redress by replevin, provided he could establish a case of illegal distress (Note: On this point see *Fenton v. Boyle*, 2 Bos. & Pull. N. R. 399, and the cases cited in *Pearson v. Roberts*, Willes, 672, n. b.); but the statement of that fact by the *Attorney-General* will not deprive him of his right to relief on other grounds. In determining the validity of this demurrer, the Court is bound to consider the whole relief sought; because, if any part is due, the circumstance of having

prayed too much, will not support a demurrer to the whole. (6) If, on the true construction of these acts, the commissioners can be considered in the sense in which I use the term, as trustees, putting out of the case all that has been done, except as inducements to the Court to look at the balance in hand, the information stating the existence of such a balance, the question would be, whether the Court has not jurisdiction to secure its due application for the purposes of the acts.

[305] One of the grounds on which this demurrer has been supported at the bar, is not necessarily connected with the fact that the suit is instituted by the *Attorney-General*; I mean, that the information calls for disclosure of acts which would constitute criminality in the Defendants: my answer is, that as to parts, the objection may prevail, but as to other parts it cannot; and the Defendants being competent, not only by demurrer, but by answer, to protect themselves from answering, the demurrer as to the whole information cannot be supported, because an answer is required to some questions tending to criminate, if an answer is required to other questions not tending to criminate. How would it be possible, were this an ordinary suit, to sustain, on such grounds, a demurrer to the whole relief?

I observe that it has been considered as mischievous for the *Attorney-General* to come in aid of the relator in this case, with respect to the distress; but if the relator is not allowed to require the assistance of the *Attorney-General*, yet it will not be the less necessary for the Defendants to answer the information in other parts: provided that the suit can be maintained by the *Attorney-General*, the circumstance of his joining as relator, a person who is not entitled to the equitable relief which he seeks, will not vitiate the proceeding; that point has been so determined in a late case before the House of Lords. (7)

[306] The defendants then insist on a defect of parties. I am of opinion that that objection cannot prevail. On the contrary, it is apparent that if the information can be sustained at all, as the information of the *Attorney-General*; and if the acts complained of are the acts of the commissioners, they are the proper parties to the record. The circumstance that the acting commissioners of the time past may not be the acting commissioners during the progress of the suit, may, indeed, present a formidable obstacle to its successful prosecution; but, undoubtedly, as commissioners, they may be compelled to bring forward, from time to time, those accounts for which they were originally brought here; and the act having provided a mode in which their successors are to be appointed, when an injunction is required against the body so formed, the suit, if it can be maintained at all, may certainly be maintained against them. If the *Attorney-General* can sustain the information, the parties may from time to time be changed. That part of the case presents difficulties, but no objection to the progress of the suit. The argument that the treasurer should have been, in that character, the sole Defendant, is untenable; the directions in the act are not applicable to such a case as this, in which the relief sought could not have been granted against the treasurer.

We come then to the most material question, whether this is a case in which the *Attorney-General* can sue? On the best consideration, recollecting the judgment already pronounced, and expressing an opinion subject to review [307] elsewhere (and in order to teach us the delicacy of legislating on such matters, I shall not regret if this case is carried to a higher court), I think that the *Attorney-General* may sustain this information. The first act authorizes me to say, that parliament interfered in favor of persons whose circumstances were such, that they could not, by their own means, support the town, and on that ground directed a sum to be levied and applied to the special purpose of erecting groynes for the preservation of the coast; it was, therefore, an aid given to a deficiency in the pecuniary circumstances of the inhabitants, who must submit to be considered as having represented themselves too poor to make this provision from their own funds. Parliament having by the first act appointed certain persons, under the denomination of trustees, to levy and apply specific sums, I repeat here, that if the question had occurred between the date of that act and 1810, it would have been impossible to contend, that the persons so appointed were any thing less than trustees, for the purpose of applying these sums; and although the act of 1810 renders it somewhat more difficult to adopt that construction, yet I say, that the two acts are *in pari materia*; and that though the commissioners are entitled, under the last act, to raise a larger

sum, they are so entitled in precisely the same character of trustees, and for the same purposes, as were expressed in the first act; namely, for the benefit of the poor inhabitants of *Brighton*.

On this question the Court has been referred to the treatise on the Law of Charitable Uses, by *Duke*, which I have always heard quoted as a book of high authority: it contains the readings of a man of great eminence in his profession; and I believe that the passage cited was a construction of the act by the very individual who drew it. The question comes to this, whether here is a charitable use; a grant within the terms of the statute of *Eliza*-[308]-*beth* (43 *Eliz.* c. 4)? If it is, *cadet questio*. On the words of the statute the following commentary is extracted from the readings of Sir *Francis Moor*: "Ports and havens; such only as tend to safety of ships of sail, not other vessels; and creeks for harbour, which are implied to find lights to guide ships into the haven is a charitable use within these words. An imposition granted upon commodities imported or transported, to be employed upon repair of ports or havens, where they shall land, is a charitable use, and within this statute." (*Duke*, p. 135.)

I should be glad to know whether an impost in aid of the poor inhabitants of *Brighton* to repair groynes for the preservation of the town, and enabling ships to land goods there, is not within the terms of this construction of the statute? I have heard nothing which prevents my concurring in the opinion, that a parliamentary grant, destined to such purposes, is a gift to charitable uses. If that doctrine is to be contradicted, it must be done by higher authority than mine.

Demurrer over-ruled.

Reg. Lib. A. 1817, fol. 767.

From this decision the Defendants appealed to the House of Lords, but before a hearing the parties compromised, the relator consenting to dismiss the information, on payment of costs, as between attorney and client.

(1) *Eden v. Foster*, 2 *P. Wms.* 325; *Gilb. Rep.* 178; *Sel. Ca. in Chan.* 36. And see *Attorney-General v. The Governors of the Foundling Hospital*, 4 *Bro. C. C.* 165; 2 *Ves. Sen.* 42.

(2) "On argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and will support the demurrer." (*Lord Redesdale, Treat. on Plead.* p. 176. *Pile v. Price*, 6 *Ves.* 779. *Cartwright v. Green*, 8 *Ves.* 405.) But "a demurrer *ore tenus* must be to that which the Defendant has demurred to on the record. If the cause of that demurrer on the record is not good, he may at the bar assign other cause; but he cannot demur *ore tenus* upon a ground which he has not made the subject of demurrer on the record." (Per Lord *Eldon*, C., 17 *Ves.* 215, 216.) And, therefore, on a bill by an heir against persons claiming under a devise, praying a discovery, and that witnesses might be examined *de bene esse*, and their testimony recorded, a demurrer to the discovery having been over-ruled, the Defendants were not permitted to demur *ore tenus* to the examination of witnesses. *Pitts v. Short*, 17 *Ves.* 213.

(3) "If any cause of demurrer shall arise, and be insisted on at the debate of the demurrer, more than is particularly alleged, yet the Defendant shall pay the ordinary costs of over-ruling a demurrer, if those causes which are particularly alleged be disallowed; although the bill, in respect of that particular so newly alleged, shall be dismissed by the Court." (Order by Lord *Clarendon*, *Orders in Chancery*, edit. *Beames*, p. 174, copied from an article in the Orders of the Lords Commissioners, published in 1649, *id.* App. p. 488.) Notwithstanding this order, a practice seems to have prevailed of refusing costs to either party, on allowing the demurrer *ore tenus*. See the authorities cited by Mr. *Beames*, p. 174, n. 39.

(4) "You cannot demur to a discovery, unless you demur to the relief; for then you do not demur to the thing required, but you demur to the means by which it is to be obtained." Per Lord *Thurlow*, *Morgan v. Harris*, 2 *Bro. C. C.* 124. And see *Waring v. Mackreth*, *Forrest*, *Excheq. Rep.* 129.

(5) "As to what is said relating to this information, complaining of misapplication of the revenue by the governors, which is a misbehaviour they cannot correct, there is no weight in that objection; for there is no complaint of the governors

applying any thing of it to their own use ; no court of equity, therefore, would decree them to pay that money out of their own pocket backward, but will only regulate for the future, which is by removing those governors." (*Per Lord Hardwicke, Attorney-General v. Middleton*, 2 Ves. Sen. 329.)

(6) "The rule of the Court is upon demurrer of the whole bill, where the demurrer covers more than it ought, the Court will not split and divide it, as it will a plea ; for a demurrer is taken unfavourably, and therefore it will be over-ruled : but that does not deprive the party of his equity ; for the same thing may be insisted on in his answer." *Per Lord Hardwicke, Bishop of Sodor and Man v. Earl of Derby*, 2 Ves. Sen. 357. See *Earl of Suffolk v. Green*, 1 Atk. 451, and the cases cited by Mr. Sanders, to which may be added, *The East-India Company v. Neave*, 5 Ves. 173. *Mayor, &c., of London v. Levy*, 8 Ves. 403. *Baker v. Mellish*, 11 Ves. 70. In some instances, however, a demurrer has been allowed in part, *Radcliffe v. Fursman*, 2 Bro. P. C. edit. Toml. 514. *Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759. *Lord Redesdale, Treat. on Plead.* 174. And the demurrer of several defendants may be good as to one and bad as to another, *Mayor, &c., of London v. Levy*, 8 Ves. 404.

(7) The Court requires a relator, in order to secure to the Defendants costs in the event of the dismissal of the information (*Lord Redesdale, Treat. on Plead.* 18, 79 ; 1 Ves. Sen. 72 ; 2 Ves. Sen. 330 ; 1 Ves. Jun. 247) ; but where a decree of regulation is pronounced, though not in conformity with the prayer, so that the information has a foundation, costs are not given (*Attorney-General v. Bolton*, 3 Anstr. 820). The suit is not abated by his outlawry (*Lord Redesdale*, 185, in the *Attorney-General of the Duchy of Lancaster v. Heath, Prec. in Cha.* 13, the relator sustained the character of Plaintiff, *ibid.* n. d), or death (*Lord Redesdale*, 79. *Waller v. Hanger*, 2 Bulst. 134) ; but the Court suspends farther proceedings until another relator is appointed, on the death (*Lord Redesdale*, 79 ; and see *Attorney-General v. Powell*, 1 Dick. 355) ; or lunacy (*Attorney-General v. Tyler*, 2 Eden, 280 ; 1 Dick. 378 ; *Lord Redesdale*, 23) of a sole relator. No new relator can be introduced without the consent of the *Attorney-General* (*Anon. Sel. Ca. in Ch.* 69). It seems to have been held that the relator must have some (*Attorney-General v. Oglander*, 1 Ves. Jun. 246) though a remote (*Attorney-General v. Bucknall*, 2 Atk. 328) interest in the subject of the suit ; but the technical distinction between an information (with a relator) and an information and bill (*Lord Redesdale*, 18, 78, 79. *Cooper, Treat. on Plead.* 106, 107), appears to proceed on the opposite assumption.

[309] PREBBLE v. BOGHURST. March 19, 1816 ; April 25, May 2, 4, June 2, 9, 1818.

The Lord Chancellor [Eldon] ; Sir Richard Richards, Knight (Lord Chief Baron) ; Sir Charles Abbott, Knight (now Lord Chief Justice).

[See the decree, 1 Swans. 580, App.]

*J. P.*, on his marriage with *M. T.*, executed a bond in the penalty of £2000, with condition to be void if, in the event of *M. T.* surviving *J. P.*, his executors, &c., should, within three months after his decease, pay to trustees £1000 in trust for *M. T.*, and if, in the event of *J. P.* surviving *M. T.*, and there being any child or children of the marriage living at the decease of *J. P.*, his executors, &c., should, within three months after his decease, pay to trustees £1000 in trust for such child or children ; "and farther if *J. P.* should, at any time during his natural life, become seised of any messuages, &c., in possession, and should settle the same upon *M. T.* and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for *M. T.* in case she should happen to survive *J. P.* " ; after the death of *M. T.*, *J. P.* having married again, and then, and not before, become seised of real estates, and having at his death left issue by both marriages, all the real estates of which he became seised during his life were subject to the obligation, and settled on the issue of the first marriage as tenants in common in fee.

By a bond dated the 10th of August 1768, executed in contemplation of marriage with *Mary Townsend*, *John Prebble* bound himself, his heirs, executors, and adminis-

trators to *Hans Sloane* and *John Tilden*, their executors, administrators, and assigns, in the penal sum of £2000. The bond recited the intended marriage, and that *John Prebble* was to receive, on or before the day of marriage, the sum of £200, and that *Mary Townsend* was also possessed of or entitled to a very considerable share or moiety of the personal estate of *Thomas Townsend* her late father, which would come to her immediately after the decease of her mother *Mary Townsend* the elder ; and that in consideration thereof, and of the affection which *John Prebble* bore towards *Mary Townsend* his intended wife, and for making a provision for the said *Mary Townsend*, and the issue of [310] the said intended marriage, in case the same should take effect, *John Prebble* had agreed, not only to pay such sums of money to such persons, and at such times as therein mentioned, but that if at any time during the term of his natural life he should be seized of any messuages, tenements, lands, and hereditaments in possession, he would by such good conveyances in the law as counsel should advise, settle the same upon *Mary Townsend* and the issue of the intended marriage, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her in case she should survive the said *John Prebble* ; and the condition of the bond was, that if the said intended marriage took effect, and *Mary Townsend* should survive *John Prebble*, then if the heirs, executors, administrators, or assigns of *John Prebble* should, within three months next after his decease, pay to *Sloane* and *Tilden*, their executors, &c., £1000 in trust for *Mary Townsend*, her executors, &c., for ever ; and also if the said intended marriage took effect, and *John Prebble* should survive *Mary Townsend*, and there should be any child or children of the said intended marriage, living at the time of the decease of *John Prebble*, then if the heirs, executors, administrators, or assigns of *John Prebble* should, within three months next after his decease, pay to *Sloane* and *Tilden*, their executors, &c., £1000, in trust to pay and dispose of the same unto and among all and every the son and sons, daughter and daughters, of the said intended marriage, in equal shares and proportions, if there should be more than one, and if but one, then wholly to that one, at their respective age or ages of twenty-one years, and in the mean time, to pay and apply the interest and proceeds arising from the said sum of £1000, for the use of such son and sons, daughter and daughters, equally if more than one, and if but one, then wholly to that one ; and farther that if the said intended marriage took effect, and *John Prebble* should, at any time during his natural life, become seized of any messuages, tenements, lands, and heredita-[311]-ments in possession, and should settle the same upon *Mary Townsend* and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for *Mary Townsend* in case she should happen to survive *John Prebble*, then the obligation should be void.

The marriage was solemnized, and in 1776 *Mary Prebble*, formerly *Mary Townsend*, died, leaving several children of the marriage. During her life, *John Prebble* did not become seized of any real estate. In 1782 he contracted a second marriage with *Ann Day*, and after that time became seized in possession of considerable real estates. On the 19th of December 1812, *John Prebble* died, leaving issue by his second wife, in favour of whom he, by his will and codicils, disposed of the greater part of his property.

The bill filed by the children of the first marriage, against the children of the second marriage, the widow, and other persons claiming under a settlement executed in contemplation of that marriage, or under the will and codicils, prayed, that the defendants, the devisees in trust, might set forth a list and description of the freehold, copyhold, and leasehold messuages, &c., of which *John Prebble* was, at any time during his life, seized in possession, and what is become thereof, and of which of the said estates he died seized in possession, and also a list and description of all title-deeds and other evidences in their custody or power relating to the same ; and that the condition of the bond might be specifically performed, and all the freehold and leasehold messuages, &c., of which *John Prebble* died seized in possession, be settled pursuant to such condition ; and that an account might be taken of the rents and profits of all the said messuages, &c., received by, or come to the hands or use of, the devisees in trust, and that what should appear due on taking such account might be paid to the [312] Plaintiffs ; and that the Plaintiffs might be

declared entitled to the said £1000 with interest, after three months from the death of *John Prebble*; and that it might be referred to the Master to inquire what freehold, copyhold, and leasehold messuages, &c., of which *John Prebble* was seised in possession at any time during his life, had been sold and disposed of by him, and at what price, and what would now be the value of the same, and to compute interest on such value from his death; and that the Plaintiffs might be declared entitled to have paid to them the said value and interest, or that the same might be invested in the purchase of freehold estates to be settled as aforesaid; the bill also prayed an admission of assets, or an account of the personal estate, &c.

March 19, 1816. On this day the Plaintiffs moved for a receiver.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, and Mr. *Wakefield*, in support of the motion, insisted on the clear construction of the bond, as affecting all the real estates of which the obligor became seised during his life; and on the right of the Plaintiffs to have the rents secured, subject to the jointure of the second wife.

Sir *Arthur Pigott*, Mr. *Leach*, Mr. *Roupel*, and Mr. *Wingfield*, against the motion, contended, that the bond affected those estates only which were acquired during the coverture, as in *Cusack v. Cusack* (5 Bro. P. C. 116, edit. *Toml.*); that on the Plaintiffs' construction, the agreement was unreasonable; and that the Court would not, in the absence of fraud, disturb the legal possession of the trustees. *Lloyd v. Passingham* (16 Ves. 59).

The Lord Chancellor [Eldon]. This agreement, having been distinctly entered into, and on the consideration of marriage, is such as, when [313] its meaning is once ascertained, a court of equity will enforce. If there has been a breach of the bond at law, the Plaintiffs are entitled to relief in equity; but they have no title in equity, if there has been no breach at law. The principal question therefore is, whether the omission to make a settlement of estates purchased after the death of the wife, is a breach of the condition of the bond? On that question, it will be proper to obtain the opinion of a court of law. As to the particular object of this motion, if the trustees consent to pay the rents and profits into Court, I shall not appoint a receiver. (From Mr. *Merivale's* note.)

At the hearing, the Lord Chancellor directed a case for the opinion of the Judges of the Court of Common Pleas, on the question whether *John Prebble*, not having become seised of any real estate during the continuance of the first marriage, committed a breach of the condition of the bond, by not making a settlement of the estates of which he afterwards became seised in possession, on the issue of that marriage.<sup>(1)</sup>

[314] The Court of Common Pleas certified in the negative. (*Prebble v. Boghurst*, 7 Taunt. 588.) The Lord Chancellor not being satisfied with the certificate, the question was now argued before his Lordship, in the presence of the Lord Chief Baron, and Mr. Justice *Abbott*.

April 25, 1818. Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, and Mr. *Wakefield*, for the Plaintiffs. The question arises on the construction of the bond executed by *John Prebble*, on his marriage with *Mary Townsend*. During the continuance of that marriage, he had no real estate; but his first wife having died in his life, he married again, and afterwards became seised of considerable real estates, some of which he sold, and continued in possession of others, to the value of £30,000, till his death. On that event, the bond, which had been before unknown in the family, was discovered, and the consequence of that discovery, is the present suit. It is contended, by the Plaintiffs, that the obligor was absolutely bound to settle all the real estate of which he became seised during his life; by the Defendants, that the obligation was limited to the real estate of which he became [315] seised during the continuance of the first marriage, and to the event of the survivorship of the wife.

The strict construction of the bond is clear in favor of the plaintiffs. The condition contains three distinct provisions: first, in the event of the wife surviving the husband, it directs payment of £1000, on certain trusts, for the benefit of the wife; secondly, in the event of the husband surviving the wife, it directs payment of the like sum on other trusts, for the benefit of the issue; then follows the third clause, which is an absolute engagement, not dependent on any condition of survivorship, that all the real estate of which the husband should at any time during his natural life become seised, should be settled upon the wife and the issue of the marriage. The words which ensue, "the better to make a provision for the said

*Mary Townsend*, in case she should happen to survive *John Prebble*," may be understood, not as restraining the provision to the event of the wife's survivorship (a construction which would exclude the issue), but as expressive of one object of the provision. There is a substantial reason for the insertion of these words, which at first seem useless, namely, to express that the provision was designed for *Mary Townsend*, when she became a widow, not in the nature of pin-money, while she remained a wife. The preceding pecuniary provisions are contingent on survivorship; the agreement for a settlement is absolute at the moment of marriage: the Court cannot insert words of contingency for the purpose of excluding the issue. It is the office of a recital to explain the operative part of a deed when obscure, not to control it when clear. The Court is not authorized to alter the express terms of the condition, by reference to a supposed design to provide for the children, only in the event of the survivorship of the wife, and by a settlement under which she might take a benefit.

[316] The other construction for which the Defendants contend, that the clause shall apply to those estates only of which the husband became seised during the joint lives of himself and his wife, offers farther violence to the terms. On what principle can the Court, in contradiction to the obvious meaning, expunge the words "at any time during his natural life," and substitute "during their joint lives"? All his real estate, without exception, is evidently comprehended within the literal import of this clause; and to limit the period of seisin to the coverture, would be, not to construe but to contradict it.

The meaning of the instrument being clear, it is needless to vindicate the intent; the construction of the Plaintiffs, however, does not prevent a provision for a second family: the operation of the bond is confined to real property; his whole personal estate remained under the absolute control of the obligor.

The *Solicitor-General* [Gifford], Sir *Arthur Piggott*, Mr. *Roupel*, and Mr. *Wingfield*, for different Defendants. The case presents no grounds to justify a dissent from the unanimous opinion of the Court of Common Pleas.

On the strict construction of the bond, no settlement of real estates was to be made, unless the wife survived the husband. The express direction is, that a settlement shall be made, the better to provide for the wife in case she should happen to survive; the settlement intended, is, therefore, one by which some benefit is secured to the wife: a settlement made after her death, in which she could never have an interest, cannot be comprehended within this description.

The agreement, so understood, discovers a consistent and rational design. The sum of £1000 is secured in all events, [317] on the death of the husband, to the wife, if she survives, or if she is dead, to the children. The provision for making a settlement is framed in contemplation of two distinct contingencies; if the husband died, leaving his wife surviving, a moral obligation attached on him to provide for his widow and for her children (by the supposition there could be no subsequent marriage, and therefore no other children), and in discharge of that obligation, this agreement secures all his real estate for their benefit. In the event of surviving his wife, he meant to reserve to himself the discretion of providing for the children of that marriage, as subsequent contingencies, including a second marriage and the birth of a new family, might render just and expedient; and in that case, therefore this agreement imposes no obligation. The policy of a settlement so framed is obvious, and may be advantageously contrasted with the intention, imputed by the opposite construction, of securing the whole real estate for the benefit of the offspring of the first marriage, to the exclusion of all future claims, however imperious.

In support of so just and reasonable a design, the Court would resort, if needful, to the principle constantly established from the earliest times (14 H. 4, 19 a), recognized by Lord *Coke* (5 Co. 21 b), and adopted in subsequent decisions, (2) of construing the condition of a bond favorably to the obligor, in order to relieve him from the penalty. The amount of that penalty affords some evidence, that it could not be intended to secure the settlement of all the real estate of which the obligor might become seised, at any time during his life.

[318] The *Lord Chancellor* [Eldon] It strikes me, that the argument in the Common Pleas did not unfold all the difficulties of the case. The bond, with this condition, was executed in contemplation of marriage, and there is no doubt that

it constitutes an agreement, which courts of equity will perform.(3) It was not on that question, that I desired the opinion of the court of law, or of the Judges who now assist me ; but on this, whether, according to the true intent and meaning of this bond, an estate, call it *Blackacre*, of which the husband became seised after the death of the wife, is subject to the obligation ? The question, whether the bond is forfeited and the penalty to be raised, is proper for a court of law, but equity, considering the bond as an agreement, the doubt there would be, whether the obligee should have performance or compensation ? At present, the simple question is, whether *Blackacre* is affected by the condition ? It strikes me thus : The obligor on the marriage was to become entitled to £200 absolutely, and also to a moiety or share of the personal estate of his wife's father, on the death of her mother : what was his interest during the [319] coverture in this part of the property, does not appear ; and it is unnecessary to state here, what he could or could not have done with it. A part of the consideration, besides these pecuniary benefits is marriage. I do not apprehend that the quantum of pecuniary benefit will affect the question ; and I am surprised to find observations about the amount of the penalty as varying the reciprocity (7 *Taunt.* 543), where marriage is one of the considerations. An obligation to make a settlement on the wife and the issue, clearly includes an obligation to make a settlement on the issue after the death of the wife. The obligor, undertaking to make a settlement on his wife and issue, engages, first, if the wife survives him, to pay £1000 for her use ; and so far there is no provision for the children, either from this fund, or from the moiety of her father's estate, to which the wife was entitled at the death of her mother ; he then adverts to the contingency of his wife dying in his life leaving children ; and providing that in that case the sum of £1000 shall belong only to the children, he proceeds to state in what shares it shall be distributed among them ; he then takes into consideration estates of which he might become seised. It is clear that this bond would not embrace copyhold or leasehold, and left it entirely in the option of the obligor, whether he would ever acquire seisin ; and unless, therefore, freehold property devolved to him, independently on his own act, so that he could be said to have become seised, the condition would never take effect except by his instrumentality. Having before recited, that his intention was to provide, not for his wife only, but for his wife and children with respect to all the subjects of provision ; and having first mentioned the contingencies of their respective survivorship, he proceeds to undertake, that if he shall become seised of any real property, he will settle it in such parts and proportions ; the word "such" having reference to something which [320] had preceded with respect to proportions. He then recollects that the previous directions are not sufficient for this case, except in the event of the death of the wife during his life ; that if she should survive, she would become entitled to the whole of the £1000 ; but his intention being, that the real estates should in every event be a joint provision for the wife and the children, he therefore introduces the words, to such use and uses as may be thought proper, the better to make a provision for the wife ; terms which may denote a design to secure to her a partial, and only a partial, interest in the real estates. The question may be thus stated, whether on the whole he did not mean, that if his wife survived, she should have £1000, which in the event of her death during his life should devolve to the children ; that the lands should be settled, if she did not survive, entirely on the children, but in the event of her surviving, to such uses as would secure to her a proper share.

I entertain no doubt, that the decision of the Judges of the Common Pleas was founded on an opinion that, according to the true intent and meaning of the bond, there would be no breach, unless there had been a non-conveyance of lands of which the obligor had become seised during the life of his wife ; and I think that they meant to mark that, by the insertion in the certificate of the words, "the said *John Prebble* having survived the said *Mary Prebble*, formerly *Mary Townshend*." (7 *Taunt.* 545.) On the original hearing of the cause, little was said : when it came from the Common Pleas, I should have felt great relief, could I have acceded to the opinion of the Judges ; but I thought, and still think, that the case requires farther consideration ; and it is clear, that this Court is not bound by the certificate of the Court of law.

[321] The obligation, as collected from the condition, is threefold ; the first two acts are to be performed, not in the life of the obligor, but by his representatives



after his decease. Contemplating two contingencies, of his wife surviving him, or dying in his life, he stipulates, that in the first event, she should have £1000, of which the issue would not participate; that in the other event, the issue should have £1000 of which she would not participate; he then adverts to the real estate of which he might become seised (any real estate which he then had would not be comprehended in the clause, for the words are, "if he shall become seised"), and undertakes to settle it on the wife and the issue, as counsel shall advise. Had it proceeded no farther, the circumstance of his having covenanted to convey to her and her issue, would not have been the ground of a necessary inference, that unless she survived, there should be no conveyance to the issue. That is not the construction. The doubt is, whether the subsequent words are intended only to secure a provision for her in case she survived him, or whether they are to narrow the benefit which the issue would take if the clause had stood without them, and reduce their claim to the estates of which the obligor became seised before her death, limiting the extent of the phrase "during his natural life" to such part only of his natural life as passed during the coverture. On the point, whether there is a breach of the condition, the construction is the same at law and in equity; but if a breach is established, the form of conveyance will remain to be determined, and the considerations may be different. The question for the opinion of the learned judges is, whether the obligor, on the death of his first wife, having married, and then and not before, become seised of real estates, and having died without making a settlement of those estates in favor of the issue of the first marriage, has committed a breach of the condition?

[322] *May 2. Abbott, Justice.* This case, my Lord, has arisen upon a bond executed by *John Prebble*, upon his intended marriage with *Mary Townsend*. The marriage took place, and there were issue of the marriage, and the obligor *John Prebble*, after the death of his wife *Mary Townsend*, but not before, became seised of an estate in fee in possession, called *White Close*, and died without making any conveyance thereof, in favor of his issue by *Mary Townsend*; which issue survived the obligor, the obligor having in fact, after the death of *Mary Townsend*, married a second wife, and left issue by that marriage also; and the only question upon which I understand your Lordship to desire the opinion of my Lord Chief Baron and myself is, "whether attending to the legal construction of the condition of the bond, the obligor committed a breach of that condition." And upon that question, after considering the case, and attending to the very full and able discussion, that the matter has received in this court, I am of opinion, upon the facts before mentioned, that the obligor did commit a breach of that condition.

I have not formed this opinion without some reluctance, because I am aware that I differ from the very learned Judges of the Court of Common Pleas. I hope, however, that I shall not have the further misfortune of being found to differ from my Lord Chief Baron and your Lordship. The terms of the bond, upon which the question arises, have been so recently before your Lordship, that I do not think it necessary to trouble you with a detail of them, but shall proceed at once to mention the grounds and reasons of the opinion that I have formed. I think the second marriage of the obligor, and the birth of issue of that marriage, are facts not material to the question proposed. I conceive the answer to the question must depend only upon the words of the bond, and the intent of the obligor, as it may be collected from the words; and must be the same in the present state of facts as it would have been if there had been no second marriage, or no issue of such second marriage. There is no allusion to a second marriage in the bond. It is probable that the obligor, did not, when he executed this bond, contemplate a second marriage; in fact, I believe a second marriage is very rarely thought of by those who are about to contract a first. And if these facts are immaterial to the question, the topic of hardship, which was much urged at the bar, by some of the learned counsel for the issue of the second marriage, must be excluded from our consideration. Indeed, it would be very easy to suppose a state of facts in which such a topic might have been urged, with at least equal propriety, on the part of the issue of the first marriage, if I am not mistaken in the construction of this instrument; and perhaps it might be so, even upon the state of facts now before the Court.

Now, as to the construction of the bond itself, this instrument manifests a general intention to provide for the intended wife, *Mary Townsend*, and her issue, and to do

this in two modes ; first, by the payment of a specific sum of money, viz. £1000, to the obligees and trustees ; and secondly, by the settlement of real estate, if he should ever become seised of any such in possession ; but whether the settlement of such real estate was to depend upon the contingency of her survivorship, and the fact of the seisin taking place during her life, is the question. Payment of the £1000 is certainly not to depend upon the contingency of her survivorship ; that contingency only regulates the trust to which the £1000 shall be applied. It is to be applied to her use absolutely if she survives, whether there be or be not issue of the marriage. If she dies before him, and he dies leaving issue, it is to be applied to the use of their children. These two events are made the subject of two distinct clauses, which might well be done, [324] because the contingency would cease before the payment was to be made. The condition of the bond then proceeds to provide for a settlement of real estate, if he shall ever become seised of any. And this is done by a single clause, which begins by mentioning the whole period of the natural life of the obligor, as the period of his becoming seised, and it provides, that if the marriage shall take effect, and he shall at any time during his natural life become seised of any messuages, &c., in possession, he shall settle the same upon *Mary Townsend*, and the issue of the marriage.

If nothing further had been introduced, but the words, " then the bond shall be void," had followed immediately, I conceive it to be unquestionable that the bond would have been forfeited, if the obligor had died before his wife without issue, and had not settled the real estate upon her ; or if he had survived her, and died leaving issue by her, and had not settled the real estate upon their issue ; or if he had died first, leaving both her, and issue by her surviving, and had not settled the real estate both upon her and their issue (always assuming that he had acquired any such in possession). If, however, nothing further had been added, it might be matter of doubt and controversy, in what way the settlement should be made, whether the whole should be settled after his decease, upon the wife for life, with a remainder to the issue, or jointly upon her and the issue, or even in such a way as to give her some beneficial interest during the life of the obligor. And to obviate these doubts, and others of the like nature, and for no other purpose, as it seems to me, and to shew that the wife was to have no interest during his life, but was to have a substantial, and not a merely nominal, interest after his death, if she should be the survivor, the subsequent words are introduced ; providing expressly for such a division of the estate, and such a declaration of uses, as should be thought requisite, the better to make a provision for her in the event of her becoming the sur-[325]-vivor ; an event that might be uncertain at the instant when it might be necessary to execute a settlement, in order to guard against a possible forfeiture of the bond, by his sudden death. And I think the contingency of her survivorship, which comes to be mentioned at the end of the clause, refers only to the shares and uses, that is, to the mode and form of the settlement, supposing him to have become seised during her life, and does not govern the whole clause, and make the necessity of any settlement at all to depend upon the contingency of his becoming seised during her life-time. A construction that should make the whole clause to depend upon this event, would render it necessary to narrow the words, " at any time during his natural life," and to construe them to mean only, at any time during the joint lives of himself and his wife ; whereas, these latter words are so obvious, that I think they must have occurred to the obligor, if his meaning had been conformable to them. On the other hand, the construction which I think ought to be put upon this instrument, gives effect to every part of the clause, by requiring the obligor to settle all that he should at any time acquire, but to settle it in such a way, that is in such shares, and to such uses, as would make a suitable provision for her, if he should become seised before her death, and she should be the survivor, and not allow in that event, of a merely formal and fallacious settlement upon her, giving every thing short of the entire beneficial interest to her issue.

For these reasons, my Lord, I am of opinion, upon the facts proposed, that the obligor did, according to the legal construction of the condition of this bond, commit a breach of that condition. All which, I submit to your Lordship's judgment.

*Richards*, Chief Baron. Concurring in the opinion of my learned brother, and in the reasons which he has assigned, I shall not detain the [326] Court by examining the question at length. From the recital it is clear that the intended husband agreed

to provide for his wife and the issue of the marriage ; the object was to make a provision for both ; and there can be no doubt that the issue are in this court entitled to be considered as purchasers of every thing which, according to the true construction, was intended for them, by this condition. He then recites an engagement, that if he should become seised of real estates during his natural life, not during their joint lives, he would settle them by such conveyances as counsel should think necessary, not such as he should choose (and in default of counsel, a court of equity would decide what is proper), in such parts and proportions as should be thought requisite ; when counsel, or the Court in defect of counsel, has decided the proper settlement, that share, whatever it might be, which was intended for the wife, was clearly intended the better to make a provision for her in case she survived him : in that event the children are entitled to no provision from the sum of £1000. The amount of the penalty, on which some stress was laid, cannot assist the construction ; because in all events £1000 must be paid, and a penalty of £200 is not sufficient to secure that payment.

The condition follows the words of the recital, not confining the seisin to any period shorter than his life ; and it seems to me that the construction which I have taken the liberty of putting on the words in the recital, must be the construction of the same words in the condition. I think that they mean only a mode of distributing the estate as counsel or the court shall think proper, the wife taking a share in the event of her surviving. This argument seems to me conclusive in favour of the construction which my learned brother has put on this instrument. It was admitted in the discussion, that any estate acquired by the obligor during the coverture would have been subject to the obligation. I see no ground for the distinction suggested. We cannot advert to the facts of the case as they [327] have since occurred ; but the consequence must have been the same had the obligor exhausted all his personal estate, and left the issue of the second marriage without hope of provision. No words in the instrument authorize a distinction between estates acquired during the coverture, and estates acquired after its determination.

To your Lordship's judgment I submit this conclusion, at which I have arrived not without anxiety, feeling the respect due to the high authority which has already pronounced a different decision.

The *Lord Chancellor* [Eldon]. In this case the first question in which it became necessary to determine was, whether there had been any breach of the condition of the bond ; a question on which this Court is competent to declare an opinion, but which must be dealt with in the same way in equity as at law, and which I, therefore, took the benefit of sending to a court of law. It must be assumed that the Judges of the Common Pleas entertained an unanimous opinion, that the condition of the bond affected such lands only of which the obligor became seised during the coverture ; the question is, whether they were right in that construction, or whether the condition did not impose an obligation to settle all the lands of which the obligor should be seised during his natural life ? In the anxious office of deciding between the discordant opinions of six most able and learned Judges, I think it due to the parties to pause and weigh the reasons on both sides, before I give judgment.

May 4. The *Lord Chancellor* [Eldon]. The question on which, in the discharge of my duty, I am now to pronounce an opinion, amid the discordance of high authorities, is, whether, the obligation of this bond is confined to lands of which *John Prebble* became seised [328] during the continuance of the marriage, on the solemnization of which it was executed, or extends to all lands of which he became seised during the term of his natural life. The question must depend on the terms of the bond. The amount of the penalty (which I observe the Lord Chief Baron conceived to be £200, but which is in fact exactly double the stipulated sum of £1000) is, I think, quite immaterial ; because the penalty seems to have no relation in point of computation to the value of the lands. Marriage bonds being considered in this court as agreements, the question is, what lands are affected by the agreement contained in the condition ? The stipulation relative to the sum of £1000 has not provided for any act to be done in the life of the obligor ; it provides first for an act to be done by his representatives, three months after his decease ; namely, payment of £1000 for the sole use of the wife, if she shall survive ; and it then provides for another act to be done by his representatives, three months after his decease, in case the wife shall not survive, but there shall be at his decease one or more child or children,

namely, payment of £1000 for the use of the children. It is farther to be observed that, in this part of the condition, there is an express contemplation of the coverture ceasing, by the obligor's surviving, or by his predeceasing, his wife ; so that the duration and the determination of the coverture are explicitly recognized in both those cases, the case of his surviving her, and of her surviving him. These two provisions are followed by the words on which the doubt arises ; and it must not escape attention, that though he had been speaking of the determination of the coverture in both ways, by his death, and by her death, if he meant that the subsequent clause of the condition should refer to the period of coverture, he at least omitted to introduce any words relative to its duration, unless the conclusion of that clause is to be understood as affecting the beginning. The obligor must be taken to say, " If my wife dies during [329] my life, my children shall have £1000 ; if I die in the life of my wife, she shall have £1000 " ; and having so provided in the event of the determination of the coverture, the condition proceeds, " and further, that if the said intended marriage took effect, and *John Prebble* should at any time during his natural life become seised of any messuages, tenements, lands, and hereditaments in possession, and should convey, settle, and assure the same on *Mary Townsend*, and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise." Had it stopped there, no doubt could exist : the question is, whether the succeeding words so qualify the introductory words relative to his being seised during his natural life, as to shew that the obligation is confined to lands of which he was seised during the coverture ; or whether these words are to have their natural construction.

The case has been represented by the Defendants as a case of hardship ; the issue of the first marriage claiming all the lands of which the obligor became seised during the second coverture, as subject to the obligation, or, to give it another name, the agreement : but, unless hardship arises to a degree of inconvenience and absurdity so great that the Court can judicially say, Such could not be the meaning of the parties, it cannot influence the decision. The question might have arisen without a second marriage ; supposing the husband to have continued a widower, and purchased lands ; the wife, being dead, could have had no benefit, and the contest, on his death, would have been between the eldest son and the younger children. It is impossible to deny, that in many cases, the parties to marriage agreements, not adverting to a second, devote their whole fortune to the children of the first, marriage. In this case, if the wife had survived, the children would have taken no pecuniary provision, and the obligor might have [330] disposed as he pleased of the fortune of his first wife ; might have given it to the issue of the second marriage. He had also a power, by very little providence in the mode of acquisition, to exclude from the operation of this obligation all property which he should acquire by purchase in the ordinary sense of that term ; for it clearly included no estate of which he did not become seised.

It has been insisted, that the words which introduce the covenant relative to lands are to be restricted, that their natural meaning is to be denied to them, and the obligation which the obligor has incurred, relative to any lands of which he might become seised during his life, is to be confined to lands of which he should become seised during the coverture ; or, in other words, to lands, the benefit of which the wife might have had. Considering the whole instrument, I cannot assent to the opinion that the latter is the true construction. First, the recital is, that the husband shall make a provision for the wife and the issue. With respect to the money provision, which is intended in one event for the wife entirely, and in another event entirely for the children, the word " and " must be construed " or " ; that provision refers not to any act to be done during his life, and supposes, therefore, an express contemplation of her surviving him in the first instance, and of her not surviving him in the second ; or in other words, the express consideration what shall be done in one case, within three months after the coverture shall cease, and in the other, within three months after his natural life shall cease. Then is introduced the provision with respect to the lands ; an explicit engagement, that if, at any time during his natural life, the husband shall become seised of lands, those lands shall be settled for the benefit of the wife and issue. It is not and could not be contended, that if the wife had died before the settlement, the children would not have been entitled ; but then follows the expression, the better to make a provision

for the wife [331] in case she should survive. Here, again, he adverts to the circumstance, that his death may terminate the coverture during her life; must I not consider that he had contemplated the opposite event? The question is, whether the obligor did not mean, as to the money provision, that in one event it should go wholly to the wife, in another wholly to the children, but that the lands should not go wholly to the wife in one event, or wholly to the children in another, but that each should take in certain proportions? Whether, intending the money entirely for one in one contingency, and entirely for the other in another contingency, he did not intend that the lands should be for the benefit of both, so far as circumstances would admit? On that construction, if the wife happened to be dead at his decease, there was no need for a specification of a provision which could not be made; but the concluding words are a declaration, that if then alive, she and the issue should take jointly. My opinion, therefore, after repeated consideration, is, that the bond affects all the lands of which the obligor was seised during his life. (4)

June 2. It was this day stated, by Sir Samuel Romilly, for the Plaintiffs, and Sir Arthur Piggoth, for the Defendants, that the parties had agreed to refer to arbitration the subsequent questions in this case, subject to the decision of the Court, what equitable interest the children of the first marriage took under the settlement; whether they took (according to the argument of the Plaintiffs) as tenants in common in fee, or (according to the argument of the Defendants) as tenants in common in tail with cross remainders, and with the ultimate remainder to the settlor in fee.

[332] The Lord Chancellor [Eldon]. I will state my present impression. The term "issue," must be understood to mean child or children, sons or daughters; and I think that the wife not having survived the husband, and, therefore, not having become capable of any provision, the conveyance must be made to the children as tenants in common in fee. The words "parts and proportions," appear to refer to the antecedent pecuniary provision; and the trust of the money affords a construction of the trust of the real estate. The money was to be taken by the children, in the actual event of the death of the wife, equally and absolutely; and I think, therefore, that their interests in the real estate are absolute and equal. The question, however, is not exempt from difficulty, and I will not now finally dispose of it.

June 9. The Lord Chancellor [Eldon]. I remain of opinion, that the settlement could be made only in one of two ways, either on the children of the first marriage as tenants in tail, with cross remainders, with remainder to the father in fee, which, being of age, they may destroy by virtue of their vested remainders; or (and I think that the true construction) on the children of the first marriage in fee. Whichever of these constructions prevails, is equally fatal to the interests of the children of the second marriage.

The other questions were afterwards compromised.

(1) "19th March 1816. His Lordship doth order, that a case be made for the opinion of the Judges of the Court of Common Pleas; and it is ordered, that there be stated in such case, the bond in the pleadings in this cause mentioned; that during the marriage in the said bond mentioned as intended to be had, and which was afterwards had, the obligor therein, *John Prebble*, did not become seised of any messuages, tenements, lands, and hereditaments in possession; that the wife died in the lifetime of the said *John Prebble*, leaving children of such marriage, who are now living; that after her death, the said *John Prebble* married again, and had issue several children of his second marriage, who are now living; and after the said second marriage he became seised of an estate called *Blackacre* in possession; and it is ordered that the question therein be, whether, according to the true intent and meaning of the condition of the said bond, the said *John Prebble* would commit a breach of such condition, if he did not make a settlement of the estate called *Blackacre* upon the issue of the first marriage, according to the condition of the said bond; and it is ordered that the said Judges be attended with such case: and it is ordered that it be referred to Mr. *Stephen*, one of the Masters of this court, to settle such case if the parties differ; and after the Judges shall have made their certificate, such farther order shall be made as shall be just: and in the mean time it is ordered, that the Defendants, the said devisees in trust, *Philip Boghurst*, *James Taggart*, *Christopher Prebble*, and *Ann Prebble*, do pay to the said *Ann Prebble* the yearly sum of £60, secured to her by the settlement in the pleadings mentioned, made and

executed previous to her marriage with the said *John Prebble*, out of the rents and profits of the freehold and copyhold estates of the said testator, now in their or any of their hands, or hereafter to be received by them or any of them; and it is ordered that they do pay the residue of such rents and profits now in their hands, or hereafter to be received by them or any of them, as the same shall be received by them or any of them, the amount to be verified by affidavit, into the Bank, with the privity of the *Accountant-General* of this Court, to be there placed to the credit of this cause, subject to the further order of this Court." Reg. Lib. B. 1815, fol. 940.

(2) "A single obligation is always taken most in advantage of the obligee and against the obligor; but it is otherwise of the condition of an obligation; for this is always taken most in advantage of the obligor and against the obligee." *Shephard's Touchstone*, ch. 21. And see *Buller v. Wigge*, 1 *Saund.* 65, and the cases cited by *Serjeant Williams*, p. 66 a, n. 1.

(3) "Where penalties are inserted in a case of non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding." Per Lord *Hardwicke*, *Howard v. Hopkins*, 2 *Atk.* 371. And see *Chilliner v. Chilliner*, 2 *Ves. Sen.* 528. *Hobson v. Trevor*, 2 *P. Wms.* 191; 10 *Mod.* 517; *Str.* 533. *Holtham v. Ryland*, *Nels.* 205. *Anon. Mos.* 37. The rule being, that the penalty is not to be considered as of the essence of the contract, *Magrane v. Archbold*, 1 *Dowe*, 107. But if, on a construction of the whole contract, it appears, that the stipulated sum was designed not as a penalty, but as liquidated damages, a court of equity will not relieve against the payment. *Roy v. Duke of Beaufort*, 2 *Atk.* 194. *East India Company v. Blake*, *Finch*, 117. *Small v. Lord Fitzwilliams*, *Prec. in Ch.* 102. *Ponsonby v. Adams*, 2 *Bro. P. C.* edit. *Toml.* 431. *Rolfe v. Peterson*, *ibid.* 436. *Low v. Peers*, 4 *Burr.* 2228, 2229. *Astley v. Weldon*, 2 *Bos. & Pull.* 346. *Street v. Rigby*, 6 *Ves.* 818; nor, as it seems, enforce the performance of the agreement, for the breach of which the parties have provided this specific remedy. *Woodward v. Eyles*, 2 *Vern.* 119. *Street v. Rigby*, 6 *Ves.* 818. And see 1 *Fonbl.* *Treatise of Equity*, 151, 152, n., on the principle that that provision is an essential term of the contract.

(4) On the effect of a marriage contract to convey or assure all the personal estate of which the husband should become possessed during the joint lives of himself and his wife, to the use of them and the survivor, see *Lewis v. Madocks*, 8 *Ves.* 150; 17 *Ves.* 48; 19 *Ves.* 66.

[337] *Ex parte SMYTH*. In the Matter of *SMYTH*, a Lunatic. March 19, [1818].

Under a parol demise from year to year, by a tenant for life, with power to lease by deed, &c., the interest of the lessee determines with the life of the lessor, and the rent is apportionable.(1)

By lease and release of the 8th and 9th of *May* 1781, certain estates were conveyed to the use of *Ann Smyth*, the wife of *Sir William Smyth*, for her life, remainder to trustees to preserve contingent remainders, remainder to trustees for a term of two thousand years, and, subject to the term, to the use of the first and other sons of *Ann Smyth*, in tail male, with ulterior remainders; and a power to her, by deed, &c., to let for any term, not exceeding twenty-one years, in possession, &c.

[338] By the will of *M. W. Bowyer*, other lands were limited to the same uses. *William Wyndham*, by his will, [339] dated 21 *October* 1784, devised certain estates to *Ann Smyth* for life, with remainder to *William Smyth*, her first [340] son (since deceased) for life, with remainder to the use of his first and other sons, in tail male; with like re-[341]-mainder to *Thomas Smyth*, her second son, and with a like leasing power.

[342] *Ann Smyth*, died in possession of the estates, on the 20th of *December* 1815, leaving *Thomas Smyth*, the [343] lunatic, her eldest surviving son and heir. At her death, some of the estates were let under parol agree-[344]-ments to tenants from year to year, on rents payable half yearly, at *Michaelmas* and *Lady-day*, which [345] were afterwards paid to the receiver of the lunatic's estates.

[346] On a reference to inquire whether any, and what part of the estates which, on the death of *Ann Smyth*, [347] devolved to the lunatic, were at her death let from

year to year, or at will ; and whether Sir William [348] Smyth, her administrator, was entitled to any, and what part of the rents : the Master reported, that Sir Wil-[349]-liam Smyth was entitled, as her administrator, to such proportion of the rents of the estates let from year to [350] year, for the half-year ending at Lady-day 1816, as accrued from Michaelmas 1815, to the 20th December following, being the day of her death.

Two petitions were presented, one by Sir William Smyth, praying the confirmation of the report ; the other by Edward Smyth, committee of the lunatic, praying, that the lunatic might be declared entitled to the whole of the rents of the estates let from year to year, for the half-year ending at Lady-day, 1816.

[351] Mr. Wetherell, for the latter petition. Since the modern doctrine of courts of law has substituted tenancy from year to year, for tenancy at will, the lessee of a tenant for life with a power to let, under a lease not conformable to the power, is entitled after the death of the tenant for life to retain possession till the expiration of the year : the right of the lessee surviving, although the interest of the lessor is determined ; as in the instance of emblements. The rent being entire, follows the reversion, and belongs to the remainder-man. The statute (11 Geo. 2, c. 19, s. 15) has supplied the principle that apportionment shall be made, where the rent would otherwise be lost (as if by the terms of the lease, the tenancy ends with the life of the lessor), not where it would be saved. Lord Kenyon, while at the bar, gave a decided opinion, that in such cases, rent is not apportionable.(2)

[352] Sir Sam. Romilly, for the report. Lord Kenyon's opinion proceeds on the supposition, that the leases, though void at law, are good in equity, [353] under the authority of *Leach v. Campbell* (Amb. 740. *Sugden on Powers*, App. p. 673), which is supported by *Shannon v. Bradstreet* (1 Schoales & Lefr. 52). In those instances courts of equity gave validity to leases void at [354] law ; but the decisions were founded on special circumstances, and not on any general doctrine, that if a tenant for life, with leasing power, grants a lease not conformable to his power, a court of equity, considering the lessee as a purchaser for valuable consideration, will, as matter of course, supply the defect. Upon the supposition, that the lease is valid at law after the death of the tenant for life, the statute was useless. The question occurred before the late Master of the Rolls in *Clarkson v. Lord Scarborough*,(3) and His Honor, [355] taking time for consideration, decided that the rent is apportionable.

The Lord Chancellor [Eldon]. I always understood, that when the landlord was tenant for life only, whether the lease was to be considered as creating a tenancy at will, or, according to the inclination of the courts, a tenancy from year to year, the tenancy was, in either case, qualified by the restriction, that it continued so long only as the estate of the landlord authorised its continuance. Before the statute (11 Geo. 2, c. 19), therefore, if the tenant for life died while the half year was incomplete, the rent was lost, his representatives not being entitled to recover a part. Such I have conceived to be the law, except with regard to cases of a peculiar description, which have long been the subject of discussion in this Court. A tenant for life, possessing a leasing power, which he might have exercised (there being a seisin that would have fed the demise, and have interposed a tenancy between the lessee and the remainder-man), much controversy has occurred upon the question, what shall be an equitable execution of such a power ? The doctrine to be found in *Leach v. Campbell* always struck me as most extraordinary, that when a man does what is least like, or rather what is most opposite to the execution of the power, he shall be considered as executing it.

I learn with satisfaction, the decision of the Master of the Rolls. That the law was such as he has declared, may be shown, not only by the cases on demises of tithes, but by the doctrine of Lord Thurlow approving the decision of Lord Hardwicke in *Paget v. Gee*. There, on a lease executed by tenant in tail, not conformable to the statute, and determining, therefore, with his life, the lessees continuing in possession, having paid the whole rent to the remainder-man, Lord Hardwicke decreed apportionment ; holding, that the remainder-man having received the whole rent accruing since the last day of payment, and accruing, therefore, partly in respect of occupation during the life of the tenant in tail, had received for his representatives, so much of the rent as was paid in respect of an enjoyment of the estate during the term of his life. On that decision, Lord Thurlow at first felt a difficulty, in admitting the application

of the statute of *Geo. 2.*(1) but eventually approved it, and in giving judgment in the *Shrewsbury* case took occasion to express his approbation (*Note*: That case is reported 3 *Bro. C. C.* 120; 1 *Ves. Jun.* 227, but the *dictum* in question seems to have escaped the attention of the reporters.)

[357] I entertain not the slightest doubt, that the lease of a tenant for life expires with his interest, unless it is a lease made under a power, the farther execution of which can be sanctioned in a court of equity, by the particular circumstances of the case. A man dealing for his own estate, cannot be understood as meaning to affect the interest of another.(4)

Confirm the Report. Reg. Lib. B. 1817, fol. 642.

(1) The rule of the common law, that on the death of a lessor, tenant for life, in the interval between two periods, at each of which a portion of rent becomes due from the lessee, no rent can be recovered for the occupation since the first of those periods, rests on two propositions; 1. that an entire contract cannot be apportioned; \* 2, that under a lease, with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire.

In its familiar practical applications, the principle that an entire contract cannot be apportioned, seems founded on reasoning of this nature; that the subject of the contract being a complex event constituted by the performance of various acts, the imperfect completion of the event, by the performance of some only of those acts (as service during a portion of the specified period, navigation to an extent less than the voyage undertaken), cannot, by virtue of that contract of which it is not the subject, afford a title to the whole, or to any part, of the stipulated benefit.

Whatever be the origin or the policy of the principle, it has, unquestionably, been established as a general rule, from the earliest period of our judicial history. The following are some of the authorities, by which it is enforced or qualified: *Bro. Abr. Apportion*, pl. 7, 13, 22, 26. *Id. Contract*, pl. 8, 16, 30, 31, 35. *Id. Laborers*, pl. 48. 10 *H.* 6, 23. 3 *Vin. Abr.* 8, 9. *Finch Law*, lib. 2, c. 18. *Countess of Plymouth v. Throgmorton*, 1 *Salk.* 65. *Tyrie v. Fletcher*, *Cowp.* 666. *Robinson v. Bland*, 2 *Burr.* 1077, 1 *Bl.* 234. *Loraine v. Thomlinson*, *Doug.* 585. *Bermon v. Woodbridge*, *Doug.* 781. *Rothwell v. Cooke*, 1 *B. & P.* 172. *Meyer v. Gregson*, *Marsh.* on Insurance, 658. *Chater v. Becket*, 7 *T. R.* 201. *Cook v. Jennings*, 7 *T. R.* 381. *Cutler v. Powell*, 6 *T. R.* 320. *Wiggins v. Ingleton*, *Lord Raym.* 1211. *Cook v. Tombs*, 2 *Anstr.* 420. *Lea v. Barber*, 2 *Anstr.* 425, *v.* *Mulloy v. Backer*, 5 *East*, 316. *Liddard v. Lopes*, 10 *East*, 526. *How v. Synge*, 15 *East*, 440. *Fuller v. Abbott*, 4 *Taunt.* 105. *Stevenson v. Snow*, 3 *Burr.* 1237. *Long v. Allen*, *Marsh.* on Insurance, 660; *Park on Insurance*, 529. *Ritchie v. Atkinson*, 10 *East*, 295. *Waddington v. Oliver*, 2 *N. R.* 61; and see *Abbott's Law of Merchant Ships*, p. 292 *et seq.*

From this principle it followed, that on the determination of a lease, by the death of the lessor, before the day appointed for payment of the rent, the event, on the completion of which that payment was stipulated (namely, occupation of the lands during the period specified), never occurring, no rent became payable; and, in respect of time, apportionment was in no case permitted. (*Clun's case*, 10 *Co.* 127.) But in the instance of real contracts, the general principle received a partial qualification, on the division of the subject matter, to which the contract referred (*West v. Lassels*, *Cro. El.* 851. *Stephenson v. Lambard*, 2 *East*, 575) and apportionment of rent was, therefore, under certain circumstances, allowed, by the common law (2 *Inst.* 504), on severance of the land from which it issued, or of the reversion to which it was incident. (*Clun's case*, 10 *Co.* 127; *Co. Litt.* 150 *a*, 292 *b.* *Huntley's case*, *Dyer*, 326 *a*; *Moor*, 114, pl. 255; and see *Doe v. Meyler*, 2 *M. & S.* 276.) An attempt to state the distinctions on this subject, would be foreign to the present purpose; it may be sufficient to remark, that while courts of equity seem to have assumed jurisdiction to extend the common law doctrine of apportionment of rent, in respect of eviction of the land, to cases which, though not within the definition of legal eviction, involved a substantial diminution of the benefit for the enjoyment of which the lessee contracted (3 *Rep. in Cha.* 7; 1 *Ca. in Cha.* 31; 2 *Freem.* 174; but see *Duckenfield v. Whichcott*, 2 *Ca. in Cha.* 204); or to substitute apportionment, where good faith required it, for extinguishment (*Slater v. Buck*, *Mos.* 256. *Doctor and Student*, *Dial.* 2, c. xvi. — *v. Hawkes*, 1 *Ca. in Cha.* 273. *Elliot v. Hancock*,



2 Vern. 143 ; but see *Vincent v. Beverley, Noy*, 82), they never qualified, but distinctly recognised, the rule, that rent can not be apportioned in respect of time. (*Jenner v. Morgan*, 1 P. W. 392. *Hay v. Palmer*, 2 P. W. 502 ; and see *Bentham v. Alston*, 2 Vern. 204.)

On the determination of a lease, therefore, by the death of the lessor, tenant for life, in the interval between two days of payment, no rent was paid by the lessee for the occupation of the estate, during the fractional portion of the year. To prevent this loss, the statute 11 Geo. 2, c. 19, s. 15, provides, that where any tenant for life (the expression in the preamble of the section is, any lessor having only an estate for life in the lands demised), shall happen to die before or on the day on which any rent was reserved, or made payable, upon any demise, &c., which determined on the death of such tenant for life, his executors may recover from the under-tenant, if such tenant for life, die on the day on which the same was made payable, the whole, or, if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time, in which the rent was growing due, making all just allowances.

Almost the only decision on the construction of this statute is *Whitfield v. Pindar* (Cit. 2 Bro. C. C. 662 ; 8 Ves. 311), 1781, in which the Court of Common Pleas declared the representatives of a tenant in tail, who had demised the entailed estate by a lease void against the remainder man, entitled to apportionment ; deciding, therefore, that a tenant in tail is, within the description of the statute, a lessor having only an estate for life.

In *Wykham v. Wykham*, Sir James Mansfield inquired whether " it had ever been determined that the executor of a tenant *pur autre vie* is entitled to recover a portion of the rent from the last quarter-day under the statute ? " observing, that " he is certainly within the mischief ; for otherwise, the tenant of the land may keep the rent for his own benefit." 3 Taunt. 331.

*Clarkson v. Scarborough*, 2 Swans. 354, and the present case, establishing the general doctrine, that under a demise from year to year by tenant for life, with power to lease, not executed conformably to his power, the lessee, in the absence of special circumstances, is not entitled to the aid of equity for sustaining his interest against the remainder man, and the tenure therefore determining with the life of the lessor ; by the terms of the statute, the rent becomes apportionable.

In *Paget v. Gee, Amb.* 198. *Burn's Just. tit. Distress* [3 Swans. 694 (app.)]. Reg. Lib. B. 1753, fol. 68, Lord Hardwicke intimated an opinion, that, in the instances of tenant in tail, after possibility of issue extinct, and tenant for a term of years determinable on his life, though not within the words of the act, whatever might be the decision of courts of law, a court of equity would direct apportionment. " As to the equity arising from the statute," his Lordship proceeds, " I know no better rule than this, *equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to reasons of acts of parliament ? " It must be confessed, that this reasoning is little distinguished by the sagacity and discrimination which seldom deserted the eminent person to whom it is ascribed, and that the severe animadversion of a judicious writer (*Evans's Collection of Statutes*, Part iv. cl. xix. p. 738, n.) seems not wholly unmerited. The application of the maxim cited, to the rules of law, is founded indeed in each particular instance, not on the origin, but on the existence, of the rule. A period of limitation, or a principle of distribution, being established at law, becomes, for that reason, wherever it is not inconsistent with their peculiar doctrines, a guide to courts of equity, whether introduced by express enactment, by immemorial tradition, or by the exercise of the power of interpretation inherent in every judicial tribunal.† The statutes of distribution and of limitation have afforded familiar instances of equitable decisions by analogy (some of them, more accurately perhaps, decisions in obedience) to acts of the legislature. But the distinction is palpable between statutes designed to introduce a general principle (whether with or without an enumeration of individual examples), and statutes which provide only for particular cases. In the former instance, a new rule of law is established, the analogy of which may be consistently adopted, as its authority must be admitted, by courts of equity ; in the latter, the ancient rule of law remaining, subject to the specific exceptions, the exercise of a power to extend in equity the

provisions of the act to cases confessedly not within its legal operation, seems a function rather legislative than judicial. It is at least a function which the maxim alleged, so far from justifying, condemns. By the supposition, equity would not follow, but contradict the law, and exhibit a signal instance of the violation of the very principle which it professed to administer. The doctrine imputed to Lord *Hardwicke* has not been sanctioned by adjudication. The decisions commonly described as founded in analogy to the statute, proceeded on circumstances constituting a distinct equity. In explanation of those decisions it may be convenient to premise a summary of the doctrine on the time at which rent becomes due, and the effect of the death of the lessor at different periods of the rent-day.

Rent (although the proper time of demand, in order to take advantage of a condition of re-entry for non-payment, or of tender, in order to save a forfeiture, is sunset of the day of payment, *Hale*, C. B. 1 *Saund.* 287; *Plowd.* 172; or, more accurately, perhaps, such period before sunset as leaves interval sufficient for the payment. *Fabian v. Rewinston* (al. *Winston*), 1 *And.* 252; 2 *Lutw.* 1139; *Cro. El.* 209. *Clun's case*, 10 *Co.* 127. *Thomson v. Field*, *Cro. Jac.* 499; *Co. Litt.* 202 a, the demand, in the former case, being continued till the instant of sunset, *Wood v. Chivers* 4 *Leon.* 179 is not due until midnight (see *Cutting v. Derby*, 2 *Bl.* 1077. *Lefilly v. Mills*, 4 *T. R.* 173), and if a lessor tenant in fee dies on the rent-day between sunset and midnight, his heir (not his executor) is entitled to the rent. (*Hale*, C. B., 1 *Saund.* 287, and see *Clun's case*, *ubi supra*.) Payment before the appointed day (although sufficient, if made for that purpose, to confer seisin of the rent, *Clun's case ubi supra*, 4 *Co.* 10 a, *Co. Litt.* 315 a) is not satisfactory at law (*Clun's case*, *Co. Litt.* 315 a; 4 *Co.* 10 a. *Lord Cromwell v. Andrews*, *Cro. El.* 15), *secus* it seems in equity (*Lord Rockingham v. Penrice*, from the register, 1 *Swans.* 346), but payment on the morning of the rent-day, the lessor dying before noon, is valid against the heir (*Clun's case*), not against the king. (*Ibid.*)

In deciding on conflicting claims to rent, with reference to these distinctions, courts, both of law and of equity, established a farther distinction between cases in which (before the statute of *Geo. 2*) the rent would have been lost unless paid to the personal representative of the tenant for life, and those in which, being in all events payable by the lessee, the question arose, whether it should be paid to the heir or remainder-man, on the one hand, or to the personal representative of the tenant for life, on the other. Thus the grantee of a rent-charge for life payable at *Michaelmas* and *Lady-day*, having died on *Michaelmas-day* between sunset and midnight, her administrator was declared at law entitled to the rent, on the ground that she had survived the time (namely sunset) when it was demandable and to be paid by the lessee, on pain of forfeiting his lease. *Southern v. Bellasis*, 1 *P. W.* 179, n.

In a subsequent case, a tenant for life with leasing power having granted leases, some by virtue of his interest, others by virtue of his power, reserving rent payable at *Michaelmas* and *Lady-day*, and having died on *Michaelmas-day*, about noon, Lord *Macclesfield*, C. declared his representatives entitled to the rent accruing under the former leases, on the distinction, that it had actually become due to the tenant for life, and his right to it was vested in him, by the continuance of the term, through some part, though not to the last instant, of the day of payment; but the rent accruing under the latter leases, was declared to belong to the person entitled in remainder; for the terms continuing notwithstanding the death of the lessor, the tenant had, till the last instant of the days of payment ("the rent being payable on those days during the term"), to pay the rent, and it was, therefore, never completely due to the lessor, but followed the reversion. *Earl of Strafford v. Lady Wentworth*, *Prec. in Cha.* 555. The case is briefly reported to the same effect. 1 *P. W.* 180, the Court distinguishing between a rent incident to a reversion that must go somewhere, (if not to the executor, to the heir), and a rent which would go nowhere, unless to the executor; and holding that in the latter case, if the lessor lived to the beginning of the day, at which time a voluntary payment might be made, this would be sufficient to entitle the executor or administrator, rather than the rent should be lost. But in another report of the same case, 9 *Mod.* 21, it is stated, that the tenants had paid the rent to the person entitled in remainder, and the judgment proceeds thus, "The single question is, whether this rent was due to the intestate.

or not ? for if it was, then the Plaintiff, who is his administrator, ought to have it. It is true that it was not due from the tenants, until the last minute of the day on which it is payable, neither could they be compelled to pay it, until after that day ; but they having paid the rent, they admitted it was due from them, and it is plain the Defendant had no right to receive it ; therefore, it being paid into a wrong hand, who received it without any title, it ought to be paid over to the Plaintiff, who had a colourable title to receive it, as administrator of the intestate." If the decree in favor of the personal representative was founded on the fact of payment by the tenant, to the person entitled in remainder, and on the reasoning contained in the last report, it is a precedent for decisions subsequent to the statute of *Geo. 2*, proceeding on a similar fact, which have been commonly, but it is believed erroneously, referred to a supposed equitable analogy to the provisions of the statute. The decree, as it appears in the Register, declared, that Sir *Henry Johnson*, the tenant for life, dying on *Michaelmas-day*, about two o'clock in the afternoon, the Defendant Lady *Wentworth* (tenant for life in remainder), was entitled to the rents of such of the estates of which leases were made by Sir *H. J.*, pursuant to his power, and subsisting at his death (and also of estates in the occupation of two tenants, one under a lease for life, the other under an agreement for a term of years, but the reasons for establishing their interest after the determination of Sir *H. J.*'s estate, are not mentioned), that as to the rents of the rest of the estates, whereof leases were not made pursuant to his power, or whereof such leases were expired, due at *Michaelmas-day*, the Plaintiff, as administrator of Sir *H. J.*, was entitled to them ; and directed an account against Lady *Wentworth* of such rent due at *Michaelmas-day*, and afterwards received by her, or any person for her use. Reg. Lib. A. 1720, fol. 346. The receipt of the rent by the person entitled in remainder, is therefore ascertained ; the influence of that fact on the decree, seems by no means clear.

In *Lord Rockingham v. Penrice*, 1 P. W. 177 ; *Salk.* 578, a tenant for life, with leasing power, dying on *Michaelmas-day*, before sun-set, the rent due on that day, from tenants under leases conformable to the power, was declared payable, not to the executor of the lessor, but to the jointress taking a life estate in remainder, on the ground that the lessor dying, before sunset, had no remedy before his death to compel payment, and the rent, therefore, passed to the jointress with the reversion. The report in *Peere Williams*, states, that one of the lessees having paid his rent to the tenant for life on the morning of *Michaelmas-day*, the Court declared the payment good as to the lessee, but directed the executor of the tenant for life to account for it to the jointress ; and the reporter subjoins a question, why, if the payment was good at law (as it was according to *Clun's* case), it must not be so in equity ? On reference to the Register-book, it appears, that the payment was made, not on the morning of *Michaelmas-day*, but on the 21st of *September*, the lessee (on occasion of surrendering the old and taking a new lease) then paying the rent which would have become due on the 29th. The decree declared that, " Sir *J. Oxenden* (the tenant for life), dying on *Michaelmas-day* before sun-set, and before the tenants of the jointure estate were by law obliged to pay the half-year's rent, the said rent belonged to Lady *Oxenden*, the jointress, and not to the executor of Sir *J. O.*," and directed an inquiry what had been received by Sir *J. O.*, or his representative, for the half year's rent due at *Michaelmas* 1708, and what was still due from the respective tenants of the jointure estate ; and as to the tenant who had paid the rent before it became due, declared that Sir *J. O.* living till *Michaelmas-day*, it was a good payment as to the tenant, but that the executor of Sir *J. O.* must make the same good to the jointress. Reg. Lib. A. 1711, fol. 341.

In a very recent case, a tenant for life having granted leases in conformity to his power, and dying before midnight though after sun-set, on the rent day, the remainder-man was declared entitled to the rent. (*Norris v. Harrison*, 2 Madd. 268.)

The decision in *Paget v. Gee*, the first of the class currently cited as decisions by an equitable analogy to the statute, is explicitly founded, by the distinguished Judge who pronounced it, on the fact of payment.

In that case a tenant in tail having executed leases, not conformable to the statute of *Hen. 8*, and dying without issue, between the rent days, and the whole

of the rent accruing at the rent day ensuing his death having been paid to the remainder-man, by the lessee, on a bill filed by the executors of the tenant in tail. Lord *Hardwicke* decreed an apportionment. Declining (though with a strong intimation of opinion) to decide the question whether the case was within either the legal or the equitable construction of the statute, he expressly states, as the foundation of his decree, the fact of "the tenant having paid the rent; the payment had been for the use and occupation, during all the half-year; and it would be against conscience, for the remainder-man to retain the whole." And his Lordship added, "a case to that purpose was before Lord *Macclesfield*" (*Amb.* 200, 201), referring probably to *Lord Strafford v. Lady Wentworth*, 1 *Swans.* as reported in 9 *Mod.*

In *Vernon v. Vernon*, 2 *Bro. C. C.* 659, lessees under demises from year to year, by the testamentary guardian of an infant tenant in tail, who died between two rent days, having paid the rent to the receiver, Lord *Thurlow* decided that the representatives of the infant, were entitled to apportionment. This decision, so far as it can be collected from the short, and not very clear, report of the judgment, proceeded on the fact, that the tenants holding under a guardian, without lease or covenant, were considered in equity, rather as tenants at will, than from year to year (see 8 *Ves.* 312); a more intelligible ground, seems the actual payment. It is impossible, indeed, to avoid entertaining very considerable doubt of the accuracy of the report, which represents Lord *Thurlow* to have characterised the case of *Paget v. Gee*, as rather a decision what the statute ought to have done, than what it has done. It seems extraordinary, that when Lord *Hardwicke* had expressly rested his decree on the fact of payment, Lord *Thurlow* should persist in describing it as a decision on the effect of the statute; and should in that view dissent from it, without noticing the case of *Whitfield v. Pindar*, cited in the argument, in which the statute had actually received that construction from a court of law. It is understood, however, that the decision of Lord *Hardwicke* was originally doubted, but eventually approved, by Lord *Thurlow*; see 2 *Swans.* 356.

In *Hawkins v. Kelly*, 8 *Ves.* 308, a lease for years of tithes by a rector, under a rent payable annually, ceasing on his death, and the succeeding incumbent having received from the lessee a sum of money as the rent due for the whole year, in the course of which the lessor died, apportionment was decreed in favor of his executor. The nature of the equity of the personal representative of the lessor, arising from the receipt of the whole rent, by an individual entitled to a part only, is there fully considered; and the decision in *Paget v. Gee* is unequivocally referred to that principle. (See also 10 *East*, 272.) A like account of that decision is given in *Aynsley v. Wordsworth*, 2 *Ves. & Beam.* 331, where the amount of compositions (payable annually) for tithes by a rector, having been received after his decease by his successor, apportionment was directed in favor of his executrix.†

The foundation of these decisions is, that the money being paid in respect of the enjoyment of the subject, is understood as paid to the use of the person from whom that enjoyment is derived (*Note*; Some ingenious strictures on this reasoning may be found in the valuable dissertation already cited; *Evan's Collection of Statutes*, part iv. cl. xix. p. 739, n.); and the principle of apportionment is therefore *TIME*, *Aynsley v. Wordsworth*, 2 *Ves. & Beam.* 331; the total payment being distributed in proportion to the respective periods of enjoyment. That principle of apportionment, consequent on the nature of the equity, is supported by the analogy of the statute: and the decision in *Williams v. Powell*, 10 *East*, 269, if intended to establish a different principle, may be considered as overruled; or, at least, as not adopted in equity.

Courts of equity will not apportion land-tax and quit-rents, between the representatives of the tenant for life and the tenant in remainder; the statute of *Geo. 2*, not being applicable to that case. *Sutton v. Chaplin*, 10 *Ves.* 66. A strong authority against the assumption of analogical jurisdiction.

The rule of law, which refuses apportionment of rent in respect of time, is applicable to all periodical payments becoming due at fixed intervals; not to sums accruing *de die in diem*. Annuities, therefore (3 *Atk.* 261; 2 *Bl.* 1016), and dividends on money in the funds, are not apportionable. (*Rashleigh v. Master*, 3 *Bro. C. C.* 101. *Wilson v. Harman*, 2 *Ves. Sen.* 672; *Amb.* 279. *Pearly v. Smith*, 3 *Atk.* 260. *Sherrard v. Sherrard*, 3 *Atk.* 502.) But interest, whether the principal is

secured by mortgage (*Wilson v. Harman, Sherrard v. Sherrard*) or by bond, notwithstanding that it is expressly made payable half yearly (*Banner v. Lowe*, 13 *Ves.* 135), may be apportioned; for though reserved at fixed periods, it becomes due *de die in diem* for forbearance of the principal, which the creditor is entitled to recall at pleasure. Thus a sum of money, which it was covenanted in marriage-articles should be invested in lands, having been lent on mortgage, at the death of the person entitled to an estate tail in the land, the interest was apportioned in favor of his administratrix. (*Edwards v. Countess of Warwick*, 2 *P. W.* 176; 1 *Bro. P. C.* ed. *Toml.* 207.)

In strictness these are not cases of apportionment (2 *P. W.* ed. *Cox*, 503, n. 1); they are not instances of the distribution of one entire subject among individuals entitled each to a part, but the appropriation of distinct subjects to the respective owners.

A remarkable exception to the general rule has been introduced in the instance of annuities for the maintenance of infants (*Hay v. Palmer*, 2 *P. W.* 501. *Rhenish v. Martin*, 1746, MS.), or of married women living separate from their husbands (*Howel v. Hanforth*, 2 *Bl.* 1016; 2 *Schoales & Lefr.* 303); an exception supported by the necessity of the case, and the consequent presumption of intention (2 *Bl.* 1017; 2 *P. W.* 503), and therefore not extending to an annuity for the separate use of a married woman, living with her husband and maintained by him. (*Anderson v. Dwyer*, 1 *Schoales & Lefr.* 301.)§

An annuity payable quarterly, secured by the bond of a testator whose will charged his real, in aid of his personal, estate, being, under an order of the Court of Chancery, directed to be paid half yearly at *Midsummer* and *Christmas*, and the annuitant having died between *Lady-day* and *Midsummer* her representative was declared entitled to the arrears due at *Lady-day*. *Webb v. Lady Shaftesbury*, 11 *Ves.* 361.

(2) The following is a copy of that opinion, and of the case on which it was given :

C. L. a tenant for life, granted a lease pursuant to a power or that purpose, of part of the estates of which he was tenant for life, but other parts he had let by parol only *i.e.* from year to year, reserving the rents to be paid on the 5th *April* and 10th *October*, and he died eight days before the half-year's rent became payable. The question is, whether the reversioner is entitled to the whole of the half-year's rent, which was payable on the 5th *April* 1780; or, whether, under the words of the statute 11th *Geo.* 2, c. 19, the executor of the tenant for life, is entitled to the proportion of the rents due at his death?—Lord *Kenyon's* opinion.—Supposing formal leases had been made conformable to the power, it would have been clear that the remainder-man would have been entitled; it is equally clear, that if the agreements under which these tenants held, were not binding on the remainder-man, the rent ought to be apportioned; but I think the agreements did bind in equity, for the interests of the tenants, under the agreements, did not exceed the interest which the tenant for life had power to grant; and since the case of *Leach v. Campbell*, determined by Lord *Bathurst*, assisted by *de Grey*, C. J., and *Smythe*, C. B., it is understood, that tenants, being purchasers for a valuable consideration of the interest contracted for by them, have a right in equity to have forms dispensed with, supposing the interest they have contracted for, is within the limits of the power given to the party who contracts to confer it. Upon that ground, therefore, and as, if that be so, the rent would not have been in any part lost, but would have been recoverable by the remainder-man; and, as the statute only apportions rent which would otherwise have been in part lost, I incline to think that the remainder-man is entitled to all the rent from the rent-day next preceding the death of the tenant for life. I believe this point has not been judicially decided. It may probably come in judgment in a case depending in the Earl of *Bristol's* family, and some time ago I concurred with Mr. *Dunning* and Mr. *Maddocks* in an opinion to the effect of that I have now given, between the executrix of Sir *Thomas Aston* and the remainder-man. I ought to say that Mr. *Maddocks* was at first of a contrary opinion.

On a case involving the same question, the following opinion was given by Sir *Samuel Romilly*.

"The case cannot, I think, be distinguished from that on which Lord *Kenyon's* opinion was given. It appears, therefore, that in the opinion of Lord *Kenyon* and of Lord *Ashburton*, and Mr. *Maddocks* (for Lord *K.* states that they concurred

with him in the opinion he gave), the rent in this case is not to be apportioned, and the remainder-man is entitled to the whole of the half-year's rent, which became due at *Lady-day* last. I cannot venture to differ from such high authority, especially where I do not know of any direct decision that I can oppose to it. If, indeed, it be clear that a court of equity would in this case have established the interests of the tenants, as tenants from year to year, against the remainder-man, I think it would follow of necessity, that the remainder-man would be entitled to the whole rent, because the case would then be not a case within the statute, and the remainder-man finding a tenant upon the estate, whom he could not turn out of possession, ought to have the benefit of receiving the rent from the last day of payment, before he became entitled in possession. I should, however, if it had not been for the authority of such opinions, have doubted whether the Court would have supplied the defects in the execution of the power in favour of the tenants against the remainder-man. I should have thought it by no means clear, that a tenant from year to year, who does not reckon upon having any permanent interest, and who is only to pay for the enjoyment of the estate while he is permitted to enjoy it, could be considered as a purchaser; and I should have thought the case of *Leach v. Campbell*, which is referred to by Lord *Kenyon*, and has been since reported, *Amb.* 740, was distinguishable from the present case, that being the case of a lessee who had laid out large sums of money upon the faith of his contract, by which he was to hold the estate for 21 years. The doctrine laid down in *Leach v. Campbell* has not been extended, but on the contrary has rather been narrowed by later decisions, particularly the case of *Medwin v. Sandham*, in the *Exchequer*, 2d March 1789. || However it must certainly be advisable for the remainder-man, upon the authority of such opinions as have been given on this point, to insist upon his right to the whole of the half-year's rent of the testator's real estate, which became due at *Lady-day* last.

(3) The late Earl of *Scarborough*, under a settlement dated the 20th January 1775, was tenant for life of certain estates, with remainder to his first and other sons in strict settlement, with remainder to the present Earl for life. The settlement contained a proviso, that it should be lawful for the Earl of *Scarborough*, when in actual possession of the premises, by indentures sealed and delivered in the presence of, and attested by, two or more credible witnesses, to lease any part of the premises (except the capital mansion-house and certain lands therein described), for any term of years not exceeding 21 in possession, so as upon every such lease there were reserved half-yearly, or quarterly, the most improved yearly rent; and so as such leases respectively were not made dispunishable of waste by any express words, and there were contained therein a clause of re-entry for non-payment of the rent; and the several lessees should respectively execute counterparts thereof. The Earl of *Scarborough* let various parts of the lands comprised in the settlement, by articles of agreement (under the hand and seal of his agent, some on deed stamps, and others without stamps, attested by one witness), by indentures (under the hand and seal of his agent, and attested by one witness, some on deed stamps, some on agreement stamps, and others without stamps), and by parol, to tenants from year to year; and the articles of agreement and indentures respectively, did not make the lessees dispunishable of waste by express words, nor contained any clause of re-entry for non-payment of rent. On the 5th of September 1807, the late Earl of *Scarborough* dying without issue male, the estates descended to the present Earl, and rents accruing in respect of the demises, and becoming payable at certain times after the death of the former, were received by his successor. On the 30th June 1815, the cause of *Clarkson v. Earl of Scarborough* was heard before the late *Master of the Rolls*, for further directions, on the *Master's* report stating these facts, and stood for judgment till the 2d April 1816, when His Honor declared, that the rents of the estates of which the late Earl of *Scarborough* was tenant for life, with remainder to the present Earl, ought to be apportioned between the present, and the estate of the late, Earl. Reg. Lib. A. 1815, fol. 1009.

(4) A comparison of the authorities on this subject, seems to establish the conclusion, that in the case of a written agreement for a lease (*Shannon v. Bradstreet*. 1 *Schoales & Lefr.* 52), or an actual lease not pursuant to the power (*Campbell v. Leach*, *Amb.* 740; *Sugd. on Powers*, App. 673), but defective only in form (7 *T. R.* 480), courts of equity may, to the extent of the leasing power, enforce the contract

of a tenant for life against the remainder-man, in favour of a lessee, upon whom the circumstances of the transaction have conferred the character of a purchaser (*Sugden on Powers*, p. 363 *et seq.*); but that no such relief can be afforded in the instance of a parol agreement, though rendered valid against the tenant for life, by acts of part performance (*Blore v. Sutton*, 3 Mer. 237; 1 *Schoales & Lefr.* 72; the reason of exempting from the operation of the statute of frauds, parol agreements partially performed (namely the fraud of impeaching, for the want of evidence in writing, a contract after acquiescence in the performance of onerous acts on the faith of its validity), being applicable to the tenant for life only, not to the remainder-man who has neither agreed nor acquiesced. In order to constitute a title to relief, therefore, two circumstances must concur; the agreement must be in writing, and the lessee must sustain the character of purchaser. The cases in which agreements of the tenant for life have been established by acts of acceptance, or acquiescence of the remainder-man, rest on different principles.

\* "Apportion," says Lord Coke, "signifieth a division or partition of a rent, common, &c., or a making of it into parts." *Co. Litt.* 147. The definition seems incomplete. Apportionment frequently denotes not division, but distribution; and, in its ordinary technical sense, the distribution of one subject *in proportion to another previously distributed*.

† The maxim, that equity follows the law, is founded on the consideration that courts of equity are authorised, by the theory of their jurisdiction, to qualify the rules of law, so far only, as their peculiar principles require. See 2 *P. W.* 753, 754; *Ca. Temp. Talb.* 237; 1 *Schoales & Lefr.* 431, and the reasoning of Lord Cowper in the *Earl of Bath v. Sherwin*, 10 *Mod.*; 1 *Gilb. Rep. in Eq.*; 2 *Pre. in Cha.* 261, although his decision was reversed on appeal, 4 *Bro. P. C.* ed. *Toml.* 373. Lord Redesdale, in the course of a very able judgment, has remarked, "that it is a mistake of language to say that courts of equity act merely by analogy to the statute" (of limitation), "they act in obedience to it." 2 *Schoales & Lefr.* 630, and see 1 *Ball & Beat.* 166, 167. The criticism seems merited by the logical inaccuracy of the expression, if employed to denote the *principle* of decision, in one class of the cases in question; but to act by analogy, is *effectually* to act in obedience. "Equity," his Lordship adds, "which in all cases follows the law, acts on legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies; nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law."

‡ The Court of Exchequer is represented to have decreed apportionment of rent on a lease of tithes, in one instance by the incumbent (*Meeley v. Webber*, 2 *Eq. Ca. Ab.* 704, n. a; *Amb.* 201); in another instance, on a lease *pur auter vie*, at the death of one of the *cestuis que vie* (*Talbot v. Salmon*, 2 *Eq. Ca. Ab.* 704, n. a; *Amb.* 201), but whether these decrees were prior or subsequent to the statute, and on what principle they proceed, is not stated.

§ In a much earlier case, not cited in the course of these discussions, the Court of Common Pleas held, that a contract, by a father, to pay an annual sum for the "tabling" of his son, was apportionable; "because, it being for tabling, there ought to be a recompence, although he departed within the year, or that the contractor died within the year" (*Bret. v. I. S. Cro. El.* 756; and see *Parslow v. Dearlove*, 4 *East*, 438), and it seems, that the rigorous application of the general rule to contracts of service (*Bro. Abr. Apporcion*, pl. 13, 22, 26; *Contract*, pl. 30, 31: *Laborers*, pl. 48; 3 *Vin. Ab.* 8, 9. *Countess of Plymouth v. Throgmorton*, 1 *Salk.* 65), is now relaxed at law. "A servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he does not continue in the service during the whole year." *Lawrence, J.*, 6 *T. R.* 326.

|| In that case, under a power to grant leases with usual covenants, a lease having been granted containing an unusual covenant, and for that reason declared void at law (*Doe v. Sandham*, 1 *T. R.* 703), a bill filed by the lessee against the remainder-man to expunge the unusual covenant, was dismissed. See *Sugden on Powers*, p. 365. [See 3 *Swans.* 685 (App.).]

## [358] MORTIMER v. WEST. FORDE v. WEST. Feb. 12, [1818].

Infants being made co-plaintiffs in two suits relative to the same matter, the court will not, before a decree, on the master's report, that one suit is more for the benefit of the infants, dismiss the bill in the other suit, unless by consent.

The Bills, in these cases, were filed by persons claiming under the will of *Richard Mortimer*, and in each, three infants, interested in his estate, were made Co-plaintiffs. The Master, to whom it had been referred to inquire, whether the bills were for the same matter, and which of them was most proper, and for the benefit of the infants, to be prosecuted, having reported, "that both the said bills, so far as they relate to the personal estate, were for the same matters, but that the bill in the first-mentioned cause, contained the proper charges, and prayed the proper relief, respecting the real estates of the testator, which the bill in the second-mentioned cause had omitted to do, for which reason he was of opinion, that the bill filed in the first-mentioned cause, was the most proper, and for the benefit of the infants, to be prosecuted;" some of the Defendants now moved, that the bill filed in the second cause, might be dismissed with costs.

Mr. *Bell*, in support of the motion.

Mr. *Hart* opposed the motion as unprecedented. It may be proper after the Master's report, to expunge the names of the infant Plaintiffs, but no decree having been pronounced, the Court has no authority to dismiss the bill. On payment of costs to the Plaintiffs in the second suit, proceedings may be staid.

[359] The *Lord Chancellor* [Eldon]. If two bills are filed by creditors, the Court cannot, before a decree, stop either suit; because, *non constat*, that a decree will ever be obtained. In this instance, the second suit can be staid only by consent, and on the terms proposed by the parties.

By consent of the Plaintiffs and Defendants in both suits it was ordered, that proceedings in the second suit should be staid, on payment of costs, with liberty to them, in case the Plaintiffs in the first suit delay to bring their cause to a hearing, to apply for leave to proceed in the second cause, or to have the carriage of the first cause. Reg. Lib. B. 1817, fol. 506.

DILLON v. PARKER. *Rolls*. April 9, 13, 21, 23, June 2, [1818].

[S. C. 1 Wils. Ch. 253; Jac. 505; 1 Cl. & Fin. 303; 7 Bli. N. S. 325. See *Douglas v. Douglas*, 1871, L. R. 12 Eq. 637.]

Construction of instruments as imposing an obligation to elect, and of acts as constituting election. The acts of a party bound to elect between two inconsistent rights, in order to constitute election, must imply a knowledge of the rights, and an intention to elect; possession being, under the circumstances, equivocal, as referrible to either right, the execution of deeds containing recitals of the character in which the party claimed, and the exercise of a power to dispose of the estates in that character, amount to conclusive evidence of election.

Sir *Henry John Parker Bart.*, being seised in fee of the manor of *Talton* in *Worcestershire*, and of a house in *Salisbury Court, Fleet-street*, and being peossessed of a farm in the manor of *Tredington*, in *Worcestershire*, held under a lease for lives from the Bishop of *Worcester*, by indentures of lease and release dated the 1st and 2d October 1741, in consideration of marriage (afterwards solemnised) with *Catherine Page*, his second wife, and of £5000 her portion, conveyed the estates before mentioned, and all other lands or hereditaments in which he or any person in trust for him had any estate of inheritance or freehold, within the manor of *Talton* or *Tredington*, to *John Page* and *William Trawell*, their heirs and assigns, to the use of Sir *Henry John Parker*, [360] until the marriage, and after the solemnisation thereof, to the use of Sir *Henry* for his life; with remainder, as to the estates of inheritance, to trustees to preserve contingent remainders remainder to the first and other sons of Sir *Henry* by his intended wife, in tail male, remainder to the use of Sir *Henry* in fee; and after the decease of the survivor of Sir *Henry* and his wife, as to the leasehold estate in the manor of *Tredington*, to the use of such son of Sir *Henry*



by his intended wife as should be his heir for the time being, during the continuance of that estate, and of such life or lives then or thereafter in being, for which the leasehold premises were or should be granted; and in case such son should not, at the decease of the survivor of Sir *Henry* and his wife, have attained, or should not afterwards attain, the age of 21 years, then to the use of such son and heir of the body of Sir *Henry* by his intended wife, as should first attain that age during the continuance of the said estate, and of such life or lives as aforesaid; and in default of such son and heir in being at the decease of the survivor of Sir *Henry* and his intended wife, or then in *ventre sa mere*, and afterwards born alive, or in case every such son of Sir *Henry* by his intended wife, as should be living at the death of Sir *Henry* and his wife, or the survivor of them, or born after the decease of Sir *Henry*, should happen to die before any such son should attain the age of twenty-one years, then to the use of Sir *Henry*, his heirs and assigns, during the life or lives in being for which the premises then were or thereafter might be held and enjoyed.

The issue of the marriage were a son, *John Parker*, and two daughters, *Catherine* (afterwards married to *C. F. Garstin*), and *Margaret Sophia* (afterwards married to *John Strode*), who all survived the death of their mother in 1750.

[361] *John Parker*, on attaining the age of twenty-one, in the beginning of the year 1766, became, under a conveyance from Sir *Henry John Parker*, dated in *October* 1753, tenant in fee simple of one moiety of certain estates situate at *Hatch* in the county of *Wilts*, and, under the will of *John Page*, his maternal grandfather, tenant in tail of the other moiety of those estates; he also became seised (in fee simple) of a messuage in *Shorter's Court* in the city of *London*, and of an estate tail in remainder in the estates comprised in the settlement of 1741, and entitled to considerable sums of money under the will of *John Page*, including a debt due to *Page's* estate from Sir *Henry John Parker*; and he soon afterwards levied fines and suffered recoveries of the estates devised to him by *Page*, limiting them to such uses as he should by deed or will appoint, and for default of appointment to himself for life, with remainder to his father Sir *Henry John Parker* in fee. By his will dated the 2d of *August* 1769, *John Parker* devised all his freehold and leasehold estates whatsoever that he was seised or possessed of, or was or should be entitled unto, in reversion, remainder, or expectancy, to his father Sir *Henry John Parker* and his assigns for his life; and after his decease he gave his estates in *Shorter's Court*, and the moiety of his estates at *Hatch*, and all other his real estates devised to him by the will of his late grandfather *John Page*, to *Harry*, afterwards Sir *Harry, Parker*, and *Daniel Fox*, in fee, upon certain trusts for the benefit of his sisters *Catherine* and *Margaret Sophia*, and their issue. He also devised, after the decease of his father, the manor and capital messuage called *Talton*, with the estate thereto belonging, the farms called *Tredington*, and *Nolland's farm*, in the parish of *Tredington*, and all other his manors and estates in *Worcestershire* and *Warwickshire*, his house in *Salisbury Court*, the other moiety of his estates at *Hatch*, and all other estates whatsoever which descended or came, or which should descend or come, to him from his father, to his two sisters *Margaret* and *Ann Parker* (daughters of Sir *Henry John Parker* by his first wife) their heirs, executors, &c., for ever, as tenants in common. All the residue of his personal estate he gave to his father, and appointed him, if he survived, sole executor.

After the date of his will, *John Parker* purchased a freehold estate at *Arnscoth*, in the parish of *Tredington*, and by a codicil dated the 2d of *September* 1769, noticing his will, he devised that estate to his father Sir *Henry* in fee; and reciting that his father formerly executed a bond in the penal sum of £2000 conditioned for the payment of £1000 with interest to his late grandfather *John Page*, whereof the testator was entitled to one-third, and his sisters *Catherine* and *Margaret Sophia* to two-thirds, he declared that no part of the principal or interest due on the said bond, or on any other bond or security, should be paid by his father, but that the same and all other bonds and securities should be delivered up to him to be cancelled; and he enjoined his sisters to forbear any suit or prosecution of his father, on account of the said bond, or in any other respect, under pain of forfeiting all bequests in their favour.

*John Parker* died in *September* 1769, unmarried and without issue, his father, and *Margaret* and *Ann Parker*, his sisters of the half blood, and *Catherine Garstin* and *Margaret Sophia Strode*, his sisters of the whole blood and co-heiresses at law, surviving.

Sir *Henry John Parker*, on the death of his son, proved his will, and possessed himself of his personal estate, and entered upon and enjoyed during his life the estates devised to him ; and in *May 1770* mortgaged the *Arnscoth* estate for £900.

[363] By his will dated the 10th of *November 1769*, Sir *Henry John Parker*, after directing his debts to be paid, devised to *Henry Parker* and *Daniel Fox*, in fee, his manor of *Talton*, and his capital messuage or tenement, wherein he then dwelt, called *Talton* house, and all the farms and tenements thereunto belonging ; and all other, his freehold manors, lands, and hereditaments in *Worcestershire*, and *Warwickshire* ; his freehold house in *Salisbury Court* ; one undivided moiety of the manor lands and hereditaments situate at *Hatch*, or elsewhere in the county of *Wills*, which descended to him as heir at law of the family of the *Hydes* ; and all other his freehold estates, whatsoever and wheresoever, that he had power to dispose of ; to the use of *Parker* and *Fox*, their executors, &c., for the term of one thousand years from his decease, upon the trusts thereafter declared ; with remainder, as to one undivided moiety of all the premises, to the use of his daughter *Margaret Parker*, for life, with limitations to her first and other sons successively in tail male, and as to the other moiety to the use of his daughter *Ann Parker*, with like limitations to her first and other sons, with various ulterior remainders, including a limitation to Sir *William Parker* for life, and to his first and other sons in tail male ; declaring it to be the meaning of his will, that the above-mentioned estates should, after the decease of his daughters *Margaret* and *Ann* without issue male, constantly descend to the right heir male of the *Parker* family, in the manner he had above limited the same, as such heir male would inherit his title ; it being his intent that such his estates and title should descend and be enjoyed together as long as the laws of *England* would permit. He then devised to *Henry Parker* and *Daniel Fox*, all his leasehold estates in the parish of *Tredington* in the county of *Worcester*, and in the parish of *Hampton* in *Arden* in the county of *Warwick*, and all [364] other his leasehold estates, for all the estates, terms of years, and interests that he should have therein respectively at the time of his decease, subject to the rents and covenants in the several original lease or leases reserved and contained, upon trust to permit the same persons one after another respectively, to enjoy his leasehold premises, and to receive the rents and profits thereof, in the same manner as such persons would by his will be entitled to his freehold estates ; it being his intent that his leasehold, should be enjoyed with his freehold, estates, and remain to the same persons and to the same uses, as long as the laws of *England* would permit.

The testator declared, that the term of one thousand years was limited to *Parker* and *Fox*, on trust from time to time, by sale or mortgage of the freehold and leasehold manors, messuages, &c., or with the rents and profits, or otherwise as they should think fit, to raise such sums of money as should from time to time be sufficient and necessary for payment of his just debts and legacies, or any part thereof, in case his personal estate should be insufficient for those purposes ; and also such further sums of money as should from time to time be sufficient and necessary to pay any fines for the renewal of any lease or leases, or putting in any life or lives in the place of such as might happen to drop in such leasehold premises, or any part thereof ; and that all such new leases should be vested in *Parker* and *Fox*, or the survivor of them, his executors, &c., upon the same trusts as he had before declared, concerning the leasehold premises ; and that in case the several sums of money above mentioned, should be paid as they were wanted, by the person or persons to whom the immediate reversion or remainder of the premises expectant on the term of one thousand years should for [365] the time being, belong under his will, then the said monies should not be raised by virtue of the term, but the said term should cease for the benefit of such person or persons.

The testator then, after reciting that, by the will of *John Page*, late of *Putney*, Esq. deceased, several sums of money therein particularly mentioned, were given to his grandson, the testator's late son, *John Parker*, his executors or administrators, upon the contingencies in such will particularly expressed, declared that in case any sum or sums of money should become due and payable to, or vested in, the testator (as executor of his said son), or the testator's executors or administrators, by virtue of the said will, he bequeathed all such sum and sums of money, as he was, or might be entitled unto, or have a power of disposing of, unto *Henry Parker* and *Daniel Fox*, their executors, &c., upon trust, as soon as conveniently might

be, after the said trust money should become vested in them, by virtue of his will, to invest the same in the purchase of freehold lands or hereditaments in the counties of *Worcester* or *Warwick*, which when purchased, should be conveyed to *Henry Parker* and *Daniel Fox*, or to some other proper trustees, and their heirs, upon the trusts and for the uses, &c., above declared, concerning his freehold estates. After farther reciting, that by virtue of the will and codicil of his said son *John Parker*, he might become entitled to certain devises and estates, by reason of certain forfeitures which would become vested in the testator, his heirs, executors and administrators, when such forfeitures should be incurred; the testator devised all the freehold and leasehold estates and hereditaments which he could or might be entitled to, by virtue of the will and codicil of his said son, or otherwise howsoever, to *Henry Parker* and *Daniel Fox*, their [366] heirs, executors, &c., upon the trusts, and for the uses, &c., before declared, concerning his freehold estates.

The testator, after some pecuniary legacies, bequeathed the residue of his personal estate, to his daughters *Margaret* and *Ann Parker*, and appointed them executrices.

By a codicil dated the 18th of *June* 1771, *Sir Henry*, in the event of the death of both his daughters *Margaret* and *Ann Parker*, without issue male, limited remainders to his daughters *Margaret Sophia Strode*, and *Catherine Garstin*, and their first and other sons in tail male, to take effect before the remainders limited by his will; and exempted his personal estate from the payment of his debts and legacies, "in order that it might go clear to his executrices."

*Sir Henry John Parker*, died in *October* 1771, leaving his daughters *Margaret* and *Ann Parker*, *Margaret Sophia Strode*, and *Catherine Garstin*, his co-heiresses. On his decease, *Margaret* and *Ann Parker*, proved his will, and entered into possession of the estates devised to them by their father and brother.

*Margaret Parker* died in *May* 1785, unmarried, having by her will dated 1st *May* 1780, devised to her sister *Ann Parker* in fee, her moiety of certain estates in the counties of *Leicester* and *Northampton*, inherited by her and her sister from their mother, her moiety of the *Hatch* and other estates in *Wiltshire*, devised to her sister and herself, by their brother, *John Parker* and all other her estates; and appointed her sister residuary legatee and executrix.

On the death of *Margaret*, *Ann Parker* entered into [367] possession of the whole of the estates devised to her by her father, brother and sister. By her will dated the 1st of *August* 1811, she devised among other estates, the dwelling-house in *Salisbury Court*, to *John Joseph Dillon*, Esq., and his heirs, and the manor and mansion-house of *Talton*, the farm at *Tredington*, and her estates at *Hatch*, to *Harry Parker*, father of *Sir William Parker*, in fee, and appointed *Sir William Parker* executor of her will, with a legacy of £500, bequeathing the residue of her personal property to *John Joseph Dillon* and his sister.

*Ann Parker* died on the 26th of *January* 1814, unmarried, leaving *John Joseph Dillon* her heir at law, and *Sir William Parker* proved her will. The devise to *Harry Parker* lapsed by his death, in the life of the testatrix.

The bill, filed by *Mr. Dillon* against *Sir William Parker*, stated, in addition to these facts, that *Sir Henry John Parker*, having become embarrassed, applied to his son *John Parker*, for pecuniary assistance, proposing that his son should purchase his interest and reversion in the estates comprised in the settlement of 1741; that some agreement in writing was executed between them, for that purpose, in consideration of which, and of a conveyance of the estates to be made by *Sir Henry*, his son agreed to pay to him the sum of £700, and an annuity of £200 during his life; that the sum of £700 was accordingly paid, by means of which, *Sir Henry* was enabled to make an arrangement with his creditors; and that, in pursuance of that agreement, or some other to the like effect, *John Parker* entered into possession of all the lands described in the settlement, and occupied the mansion-house at *Talton*, which he fitted up at considerable expense, and paying or allowing all [368] the charges of housekeeping, resided there as the owner till his death; that he was also admitted into possession of the house in *Salisbury Court*, having expended £1500 in rebuilding it; and that he paid other sums for repairs and improvements of the settled estates.

The bill prayed, a declaration, that *Sir Henry John Parker*, by accepting the benefits given to him by the will and codicil of *John Parker*, his son, elected and bound himself to conform thereto, in regard to the devises contained in the said

will of the settled estates, and that the Plaintiff was entitled to those estates; and that the Defendant might be ordered to convey or release the same to the Plaintiff, and deliver up all title deeds, &c., relating thereto, and might be restrained by injunction, from proceeding at law, concerning the estates in question.

The Plaintiff also filed a supplemental bill, praying, that the Defendant might elect to take under or against the will of *Ann Parker*; and that the Plaintiff might be quieted in the possession of the estates at *Talton* and *Tredington*; and an account of the rents received and timber cut by the Defendant.

The answer stated, that the agreement between *Sir Henry John Parker* and his son, for conveying to the latter his father's interest in the settled estates, was subject to a proviso making it void in the event (which afterwards happened) of the death of the son in the life of his father; that the Defendant believed the articles of agreement had long been lost, and that *Sir Henry John Parker* always considered the will of his son as void, so far as it affected to devise the hereditaments in the county of *Worcester* and the house in *Salisbury Court*, and did not elect to take the benefits given to [369] him by that will in the manner in which they were thereby given; admitted, that *Sir Henry John Parker* died indebted, and that his legacies exceeded the amount of his personal estate, and were discharged by means of a mortgage of the leasehold estates, the sum advanced on which *Ann Parker* afterwards paid, taking an assignment to herself; insisted, that *Margaret* and *Ann Parker*, on the death of *Sir Henry*, took possession of the estates as his devisees, claiming under his will, and not under that of their brother, and in divers deeds and letters admitted that they claimed in that character; and the Defendant made title to the estates under the limitation in the will of *Sir Henry John Parker*.

The deeds and letters produced in support of the Defendant's allegation, that *Margaret* and *Ann Parker* had elected to take under the will of their father, are fully stated in the judgment.

The articles of agreement executed between *Sir Henry John Parker*, and his son, were not produced; the secondary evidence of their contents offered by the Defendant, was rejected by the Court.

*Mr. Hart*, *Mr. Bell*, and *Mr. G. Wilson*, for the Plaintiff. The Plaintiff's claim is founded on the will of *John Parker*, by which a remainder in fee (expectant on the decease of *Sir Henry John Parker*), in the estates in question, is given to *Margaret* and *Ann Parker*; to the latter of whom, the survivor and devisee of her sister, the Plaintiff is heir at law. The agreement between *Sir Henry* and his son for conveying, as we insist, the absolute fee simple of these estates to the son, not being in evidence, can not be used by either party; but we contend that validity is given to the son's will by the acts of *Sir [370] Henry* amounting to an election to take under it. It is a familiar principle of this Court, that he who accepts a benefit under a deed or will, must confirm the whole instrument, conforming to all its provisions, and renouncing every right inconsistent with them. *Noys v. Mor-daunt* (2 Vern. 581). *Cowper v. Scott* (3 P. W. 119). *Streatfield v. Streatfield* (Ca. Temp. Talb. 176). *Boughton v. Boughton* (2 Ves. Sen. 12). *Villareal v. Lord Galway* (Amb. 682; 1 Bro. C. C. 292, n.). *Roberts v. Kingsley* (1 Ves. Sen. 238). *Allen v. Poulton* (1 Ves. Sen. 121). *Bigland v. Huddleston* (3 Bro. C. C. 285, n.). *Finch v. Finch* (4 Bro. C. C. 38; 1 Ves. Jun. 534). *Macnamara v. Jones* (1 Bro. C. C. 481). *Blake v. Bunbury* (4 Bro. C. C. 21; 1 Ves. Jun. 514). *Wilson v. Lord John Townshend* (2 Ves. Jun. 693). *Broome v. Monck* (10 Ves. 609). *Thelluson v. Woodford* (13 Ves. 209; 1 Dowe, 249), an anonymous case before Lord *Rosslyn* (cit. 2 Schoal. & Lefr. 267). *Birmingham v. Kirwan* (2 Schoal. & Lefr. 444).

The first question in this case, therefore, is, whether *Sir Henry* elected to take under the will of his son? On that question the evidence is conclusive. By virtue of the will he possessed himself of the residuary personal estate of his son, executed a mortgage of one real estate, and received the rents of others, to none of which he had any other title; and no part of the debt, from the payment of which that will protected him, was ever paid. In addition to these unequivocal acts, the recitals of his own will are incontrovertible evidence of his intention to claim as devisee and legatee of his son. We admit that the Court would not hold a party bound by acts performed in ignorance of the existence, or of the value, of his respective rights; but there is no pretence of such ignorance in *Sir Henry*; nor can it be

material that he [371] survived his son only two years ; the extent of benefit which he took under the will, not the validity of his election, was affected by that event. He had already chosen the benefits secured to him by that will, which might be greater or less in proportion to the duration of his life.

The effect of election is to compel a renunciation of every title inconsistent with the instrument, the benefit of which the party elects to take. Claiming in one of two inconsistent characters, he forfeits all the rights incident to the other ; nor is it sufficient that he makes compensation to those whom his election disappoints ; the consequence of election is forfeiture. Such is the doctrine of *Noys v. Mordaunt* (2 Vern. 581) ; and though in some cases of pecuniary benefit (cases for example on the custom of London, the children of a freeman claiming either as legatees under the will, or under the custom as orphans), the Court has proceeded on a comparison of quantity, only one instance occurs of a specific devise in which the doctrine of compensation has been adopted, *Streatfield v. Streatfield* (Ca. Temp. Talb. 176. See the decree extracted from the Register) ; the accuracy of the statement of the directory part of the decree in that case may be reasonably questioned ; it is certainly contrary to the opinion intimated by Lord Eldon in *Green v. Green* (2 Mer. 86. It was stated at the bar that this case ended in a compromise), and *Tibbits v. Tibbits* (2 Mer. 96). Sir Henry John Parker therefore taking the benefit of his son's will, renounced all rights in these estates, the assertion of which would have been inconsistent with its provisions. That election is conclusive on him, and on his representatives. The party having elected is not allowed at a future time to retract, and making compensation for [372] the benefits which he has enjoyed under the will, to assert rights inconsistent with it. *Harvey v. Ashley* (3 Atk. 607). *Butricke v. Broadhurst* (3 Bro. C. C. 88 ; 1 Ves. Jun. 171). *Earl of Northumberland v. Earl of Aylesford* (Amb. 540. 657. S. C. under the title of *Earl of Northumberland v. Marquess of Granby*, 1 Eden, 489). *Stratford v. Powell* (1 Ball & Beat. 23, 24). In this instance compensation is impracticable ; the parties cannot be placed *in statu quo* ; the amount of the son's residuary personal estate cannot be ascertained, nor is there any fund from which compensation may be made.

Sir Henry being thus irrevocably bound to give effect to the will of his son, assumes a power to alter the disposition of the property, and by his own will attempts to reduce the estates in fee devised to his daughters *Margaret* and *Ann*, to estates for life only. That attempt is ineffectual. At Sir Henry's death, *Margaret* and *Ann* were clearly entitled to the fee simple in these lands, under the limitations in their brother's will, to which Sir Henry, by his election, had given validity. To this point, therefore, the claim of the plaintiff is clear ; but the Defendant retaliates the argument of election, and insists that *Margaret* and *Ann Parker* elected to abandon their rights under their brother's will, and abide by the will of their father. A most extraordinary election ; to take a life interest in the very estates to the fee simple of which they were already entitled. Election supposes distinct benefits as objects of choice ; but Sir Henry's will conferred no benefit on his daughters ; the answer admits that his personal estate was insufficient to discharge his legacies, and the inheritance of the freehold estates was already vested in *Margaret* and *Ann* by their brother's will. To such a case the doctrine of election is inapplicable ; but the acts alleged by the Defendant [373] are not sufficient to denote, in the daughters, an intention of recognising the validity of their father's will, and giving effect to it. Possession taken is for this purpose wholly insignificant : they were entitled to possession in all events ; under their father's will as tenants for life, or under their brother's as tenants in fee. What act evinces their intention to take possession in the former character ? But it is said, the deeds executed by the daughters amount to a confirmation of their father's will. The deeds were not executed *eo intuitu* : the object was to raise certain sums, or to ratify certain acts of the trustees. Such deeds will not be construed as amounting to a species of indirect and collateral confirmation, but their operation will be confined to the particular purpose for which they were executed, *Innes v. Jackson*.(1) No act of the daughters amounts to an explicit recognition of their father's will, and it is clear that they did not intend an election, or understand that they had elected, for they both assumed an absolute power of devising the estates. The devise of *Ann Parker*, the survivor and devisee of her sister, being defeated by the death of Sir Harry Parker in her life, the fee simple vests in the Plaintiff as her heir.

See *Sir Henry, Mr. Henry, and Mr. Marshall* for the Defendant. The title under which the Plaintiff claims, if it now exists, existed thirty-three years ago; and he requires this Court to enforce an equity, which on his own statement is now adverse against an uninterrupted legal possession during that period. But his equitable claim is destitute of foundation. The will of *John Parker*, the [374] son, raises no case of election. The Court never presumes that a testator intended to devise that which is not his; if he is entitled to estates which satisfy the words of the will, he is not understood as devolving any other. Of that intention, clear evidence; as in *Pulney v. Lord Dartington*, is required; and whether for that purpose, evidence shows the will can be received is an extremely difficult question. The will of *John Parker* contains no trace of a design to dispose of the property of his father. The first general words, "all his freehold and leasehold estates," denote no intention to give what was not his; the particular devise of the *Talton* estates occurs in a clause describing some estates *nomination*, and concluding with a phrase qualifying every subject comprehended by the more extensive expressions interposed, "which had descended or come, or should descend or come to him, from his father"; the interest, therefore, which he intended to devise in the *Talton* estate, is either the interest which he had purchased under the agreement with *Sir Henry*, contingent on the event of survivorship, or the interest which without that agreement might descend to him as heir to his father. The context offers nothing to authorise the Court in inferring an intention to devise an interest which was not his own. Supposing that the will presented a case of election, there is no proof that *Sir Henry* elected. That he enjoyed benefits under the will is indeed unquestionable; but he also asserted claims inconsistent with it; in the absence of direct evidence on either side, the case presents indirect evidence on both sides; some acts denote an intention to take under the will, others, an intention to take against it. On what principle can circumstances thus equivocal, be construed into election? The Court must be satisfied, that he was apprised of the obligation to elect, and of the value of his different rights. *Wake v. Wake* (3 Bro. C. C. 255; 1 Ves. Jun. 335). The mere mortgage is not conclusive; in an unreported case relating to property near *Birmingham*, even the sale of the estate, was held not to constitute election.

Admitting that *Sir Henry* was bound to elect, and had elected to take against the will of his son, at the same time enjoying benefits under it, what is the effect of his election? An obligation to refund the two years' rents, and the personal estate which he had received by virtue of the will, and to pay the debt from which it exempted him. Electing to retain the estate against the will, he must make compensation for the benefits which he had taken under it. In *Dashwood v. Peyton*, Lord *Eldon* says, "Where a case of election is raised, it does not give a right to retain the thing itself; though it may give a right to compensation out of something else." (18 Ves. 49.) In this instance, the claim to compensation is nugatory; the Plaintiff being jointly with his sister, residuary legatee of *Ann Parker*, who was residuary legatee of her sister *Margaret*, and *Margaret* and *Ann* being executrices and residuary legatees of *Sir Henry*, the Plaintiff is himself the owner of the fund from which compensation must be made.

The second question is decisive against the Plaintiff. *Sir Henry's* will raised a case of election, and his daughters elected to take under it. They were his residuary legatees, and the Plaintiff cannot, at this period, [376] be permitted to represent, that he left no personal property. The legal estate passed under *Sir Henry's* will to his devisees, and the enjoyment has been conformable to the legal right; had the daughters claimed in opposition to his will, they must have required a conveyance from the trustees. By numerous solemn acts, they recognised their father's will; acts amounting, if not to election, to acquiescence and confirmation. (Note: The substance of the argument for the defendant on this point, is fully stated in the judgment.) It is not now competent to a remote relation happening to be heir, after the death of parties interested, and the loss of evidence, to question a disposition of property so confirmed; a disposition which they could not have impeached without a gross violation of good faith.

June 2. The *Master of the Rolls* [Sir Thomas Plumer]. The claim of the Plaintiff is confined to the estates originally comprised in the settlement of October 1741, and for the purpose of establishing his title, the bill begins with stating, as the origin of it, the deeds of that date, by which the estates were conveyed to the

use of Sir Henry John Parker for life, with remainder to his first and other sons in tail male, remainder to himself in fee. Under that settlement, therefore, on the death of John Parker, the son, without issue, the estates became the absolute property of his father Sir Henry; the Defendant claims as his devisee, and unless he had by some act deprived himself of the power of devise, the equitable estate would be, as the legal estate unquestionably is, effectually vested in the defendant. The Plaintiff, however, undertakes to prove that, in the actual circumstances, the will of Sir Henry is invalid, and that the estates pass by the will of John Parker, the son. For that purpose, two propositions must be established, first, affirmatively, that Sir Henry John Parker had relinquished his right of disposition over his own estates, by making his election to abandon them, on accepting the benefits given to him by the will of his son; next, negatively, that the daughters, to whom Sir Henry devised a life interest in the estates to which, under their brother's will, they were already entitled in fee, never made an election to abide by the will of their father, in opposition to that of their brother. It being clearly admitted, that during the joint lives of the father and the son, the settlement (unless altered by contract) was the rule between those two parties; the father having possession, and the right of possession during his life, with a remainder in fee, the son had no title to the immediate enjoyment of the estate, unless he acquired it by an agreement with his father. The plaintiff has endeavoured to establish that such an agreement was concluded, and that Sir Henry, who appears to have been in embarrassed circumstances, for a sum of £700, and an annuity, parted with his interest in the estate. It is in evidence that the son, after he attained the age of majority in 1766, actually occupied the house at Talton, expended considerable sums on the repairs of the house in Salisbury Court, and performed other acts which denote possession of the estate during the life of his father; payment of the sum of £700 is not proved, and though both parties admit the existence of an agreement, neither has been able to produce it, or to offer to the Court satisfactory secondary evidence of its terms; one side representing it as an absolute surrender of his rights, by the father, the other, as qualified with a condition that the estate should revert to him in the event of his surviving his son. On this subject, the great lapse of time renders it impossible to ascertain the truth. I was of opinion, that the evidence tendered by the Defendant, of the existence, the loss, and the terms of the agreement, was not sufficient; the Court is, therefore, deprived of the light, which a knowledge of its contents would have afforded; but the Plaintiff, who is bound to establish a clear case, certainly cannot assume, without proof, that his statement is correct. Unless by the agreement, Sir Henry surrendered his reversion in fee, it would not enable the son to make an absolute disposition of the estate. Without knowing, therefore, the particulars of that transaction, the Court finds, as the first instrument proved in the cause, the will of the son, dated the 2d of August 1769, followed by a codicil of the 2d of September in the same year. By that will, John Parker, who had acquired considerable property as devisee and legatee of his grandfather Page, first devised to his father for life, all the estates of which he had power to dispose, and after a limitation in favour of his sisters of the whole blood, on which no question arises, he proceeds to give the Talton estates and other premises by name, concluding with a general description of a singular nature, "all his estates which had descended, or which should descend or come to him from his father"; an extraordinary reference, in an instrument executed during his father's life, to estates which had already descended from him; but the will was evidently prepared under a doubt, whether he should not survive his father; he provides for both events, nominating as his executor, his father if surviving, and substituting others in case of his death; and anticipating a descent which, in his apprehension, would render the devise valid, he gives the estates to his sisters of the half blood in fee. The Plaintiff, as their heir claims by this devise. John Parker died in October 1769, and under his will, supposing the settled estates to pass (he seems to have imagined that he had power to dispose of them, and it may therefore be [379] contended, that they are included in the first devise), Sir Henry became entitled to a life interest in those estates (an interest which he had already), to a life interest in any other freehold estates of his son, and to the absolute interest in his personalty. By his codicil, the son devises to his father in fee, the Arnscott estate, acquired since the date of his will: and directs

that his father's bond for the payment of £1000 should be cancelled, and that his sisters should forbear all suit against his father, under the penalty of forfeiting the benefits conferred on them by his will.

In these circumstances it is insisted by the Plaintiff, that, after the death of his son, Sir *Henry* ought to have been put to his election ; that the son having assumed to dispose of an estate which belonged to his father, to whom he had given valuable property, it was not competent to the father at once to take the benefit of the will, and to defeat it. From the undisputed principle, that no one can frustrate an instrument under which he claims, Sir *Henry* might clearly have been put to his election ; but the Plaintiff maintains that he has actually elected. Supposing that election implies intention, a voluntary relinquishment by Sir *Henry* of the settled estates, an acceptance of the benefits given by the son at the price of renouncing his own property, and, as the term election seems to denote, a preference of one estate as matter of choice ; is the fact of election so clearly established that the Court will be authorised in acting on that assumption ? It seems difficult to prove all the circumstances necessary to constitute an election ; that Sir *Henry* was apprised of the necessity of electing ; that, knowing that he could not hold both the property to which he was previously entitled, and that which was given to him by his son, he voluntarily abandoned the former and took the latter. That he proved the [380] will of his son, and entered on the estates devised to him, is not sufficient. Did he not exercise dominion over his own estates as if the son had not devised them ? Taking both estates, enjoying that which was his own, and also that given to him by his son, how can it be said that he relinquishes one and elects to take the other ? Has he not rather elected to take both ? It is clear that he thought the power of disposition which his son had assumed over his estates was in the actual circumstances inoperative ; either that it was to take effect only in the event of the son's surviving, or that for some other reason he was not bound to submit to it ; for in less than six weeks from the death of the son, in the next month after proving his will, on the 10th of *November* 1769, he makes his own, containing a full disposition of his estates, long and elaborate limitations, settling them on his daughters *Margaret* and *Ann* for their lives, with successive remainders to their issue and other branches of the family, not considering himself bound by the devise which his son had made to the same daughter, in fee. That was not relinquishing the estates, but, as far as choice was concerned, asserting a right to dispose of them, and an actual disposition ; the same solicitor prepares, and the same witnesses attest, both wills ; evidently no one conceiving that one instrument deprived Sir *Henry* of the power to make the other. With reference to intention, therefore, the evidence contained in these transactions, of his intention to retain his own estate, is at least as strong as the evidence of his intention to accept the property given to him by his son, derived from the mortgage and other acts of ownership exercised over it ; how then can the Court declare that he elected to take one and renounce the other ? The utmost that can be contended is that he has no right to enjoy both ; that he was bound, and that the daughters might have compelled him, to make an election [381] ; but they took no measure for that purpose ; and in the short interval, about two years, which elapsed between the death of his son and his own, the acts of Sir *Henry* are equivocal, manifesting as much design to retain one estate as to accept the other.

The point made by the plaintiff is, that acceptance binds, and operates forfeiture without reference to intent. It is said that Sir *Henry* accepting his son's gift, by that act renounced his own estate ; that is not election, but forfeiture : if such is the effect of acceptance, even though in ignorance that it was not competent to the party to retain both benefits, but that on taking one, the consequence of law was that he renounced the other, then, by inadvertence without choice, an estate may be lost ; but in all cases of election the Court is anxious, while it enforces the rule of equity, that the party shall not avail himself of both his claims, still to secure to him the option of either ; not to hold him concluded by equivocal acts performed perhaps in ignorance of the value of the funds ; a principle strongly illustrated by the decision in *Wake v. Wake*. The rule of the Court is not forfeiture but election ; *utrum horum*. What acts will amount to election, what length of time, is matter of more doubt. (3) If I am to determine it as a question [382] of fact, I feel great difficulty in saying that Sir *Henry* ever meant, or even thought that he was bound to elect ; [383] whether his acts would have concluded him, had his daughters



insisted during his life that he had made his [384] election, is a very different inquiry ; but it may be doubtful, whether on his death the daughters had any [385] farther right than that of requiring his representatives to make their election. On that point, the Court has intimated a disposition to hold, that if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation and place the other party in the same situation as if those benefits had not been accepted, they may renounce them, and elect for themselves. (2 *Bro. C. C.* 5 ; 2 *Schoales & Lefr.* 268 ; but see 2 *Ves. Sen.* 593, 525.) If, therefore, immediately on his death it had been contended that Sir *Henry* had elected, and was bound to relinquish the settled estates, it would have been a question, whether his representatives might not have claimed a right to make their own election, rendering satisfaction for the benefits which he had enjoyed. This first part of the case is full of difficulty. The Plaintiff, who desires the Court to deprive the Defendant of his legal estate, is bound to establish an indisputable title ; he must show that the son pos-[386]-sessed power to devise the estate, or that Sir *Henry* elected to abide by his will ; the bill is not framed for the purpose of putting Sir *Henry's* representatives to election, and the fact of election by him is negatived by his will made immediately after the death of his son. The argument which represents lapse of time and acts performed as conclusive, without regard to intent, is subject to great difficulties.

These difficulties, the second point in the case renders it quite unnecessary to encounter ; for, assuming that Sir *Henry* made his election to abide by the will of his son, may not every argument which establishes that conclusion be applied with tenfold force to the conduct of the daughters after his decease ? By his will of the 10th of *November* 1769, Sir *Henry* devised all the estates to which he was entitled, including therefore the *Arnscoth* estate and the leaseholds, to trustees to the use of his daughters, *Margaret* and *Ann*, for life, with remainder to their issue, and ulterior remainders to other branches of the family ; but, in preference to all these limitations, he created a term of 1000 years for raising a sum to defray his debts and legacies ; and his codicil expressly states, that that sum was to be applied in exoneration of his personal estate, in order that it might go free to his executrixes *Margaret* and *Ann*, the primary objects of his bounty. These instruments, therefore, import to confer on his daughters very considerable benefits, both real and personal. The second codicil was dated the 18th of *June* 1771, and Sir *Henry* died on the 8th of *October* following. Then, at the latest, his daughters were put to their election ; for it is quite clear that they were then, if ever, entitled to the settled estates in fee under the will of the son, and to a life-interest only in the same estates under the will of their father. If they claimed under the latter, they were entitled also to Sir *Henry's* personalty, [387] and to a life interest in the *Arnscoth*, and in any other real, estate of which he was seised.

It is difficult to suppose that, situated as they were, they would omit to have recourse to professional assistance for information ; an opinion was, in fact, given that they were bound to elect ; but without adverting to that circumstance, the probability is, that they were apprized of their obligation. Knowing then that they must elect, what election have they made ? Have they claimed under the will of their father, or of their brother ? On this subject every principle of argument used to induce the Court to pronounce, as matter of fact, an election, in the first instance, by Sir *Henry*, concurs to prove that the daughters elected to abide by his will, and reject that of the son ; for it is established, not upon mere presumption, but by direct proof, that they expressly and unequivocally renounced their character of devisees in fee, and adopted the character of devisees for life. Sir *Henry* never explicitly abandoned his own estate ; that dereliction is alleged only as matter of inference from his acceptance of the alternative benefits ; but the daughters, adult and competent, by a series of explicit deeds, assume the estates devised by their father in the character of tenants for life constituted by that devise ; a title totally inconsistent with their claim as tenants in fee of the same estates under the will of the son.

Their first act towards determining the question, whether they were tenants for life, under the will of their father, or tenants in fee, under that of their brother, is the execution of certain deeds, dated the 14th and 15th of *April* 1772. It had become necessary to raise the sum of £1100 for paying a fine to the Bishop of Wor-

*cester*, on renewing the lease of that part of the settled estates which was leasehold ; two of the lives, on which [388] the existing lease was held, having failed. Sir *Henry's* will created the term of one thousand years for the express purpose of raising money to pay the fines on renewal. The Plaintiff in the character of heir of the two daughters, and having no right which they had not, insists that this will, and, therefore, the term which it attempted to create, is void *quoad* the settled estates. What is the first act to show that the daughters so considered it ? These deeds of April 1772, executed by both *Margaret* and *Ann*, in which they begin by describing themselves as devisees for life, under their father's will ; and in which, the trustees of the term are joined, as having the interest in the term, by the description of trustees named in the will of Sir *Henry John Parker* ; an open assumption of the character of devisees for life, and recognition of their father's will as a valid instrument. To whom is the right of redemption reserved ? It may be said, that the daughters concurred in the mortgage only for the purpose of raising money, and that, subject to the claim of the mortgagee, their interest remained unchanged. On that supposition, they alone were entitled to redeem ; but the right of redemption is expressly reserved to them, *or the persons entitled under the will of Sir Henry*. Can that reservation be reconciled with the argument, that the right to redeem belonged absolutely to the daughters, and could not belong to any one by virtue of that will ? The deeds contain a covenant that, as long as the interest is regularly paid, the persons entitled under the will and codicil of Sir *Henry* shall quietly enjoy ; another direct acknowledgment of his will as the rule of property. These deeds executed under the hands and seals of the daughters, in the year ensuing the death of their father, are a strong manifestation of their intent to adopt the character of devisees for life, and to admit all the disposition which their father had made of their estates. [389] If such was their choice, however contrary to their interest, those claiming under them are bound by it.

Next follow the deeds of the 21st and 22d of May 1773, to which *Margaret* and *Ann* are parties, reciting that Sir *Henry John Parker* had mortgaged the *Arnscoth* estate, which he took under the codicil of his son (a life-interest in the equity of redemption, having been devised by Sir *Henry* to *Margaret* and *Ann*, who had no title to it, except from his will), and conveying that estate to a purchaser, who had discharged the original mortgage, and advanced an additional sum, constituting a total of £1350 as the price. These deeds, one transferring the fee, and the other the term of 1000 years, afford unequivocal evidence of the election of the daughters to take that estate ; and to take it as devisees for life ; a manifest assumption of property by virtue of their father's will. It is material also to recollect, for what purpose the money was raised. After payment of the mortgage, a surplus of about £400 remained, which, added to the sum of £2980 obtained by the subsequent mortgage of Sir *Henry's* estate, was applied in discharge of his debts and legacies. It has been said, that he left no personal estate ; but it clearly appears, that that sum of about £3300 constituted (with the single exception of one debt of £5) the amount of his debts and legacies, and being thus defrayed from his real estate, if Sir *Henry* left any personal property whatever, any articles of furniture, &c., the whole devolved without deduction, to his residuary legatees. In March 1775, follows the mortgage to which I have referred, for raising the sum of £2980 on the security of a long term of years, with a like reservation of the equity of redemption ; the estates being evidently considered as passing under the will of Sir *Henry*, unaffected by that of his son. Here, therefore, are repeated [390] deeds, all treating the father's will as a valid instrument, by which his daughters chose to abide. This mortgage having been assigned in 1777, was again assigned on the 21st of June 1794, to Doctor *Kenrick*, in trust for Mrs. *Ann Parker*, recognising, in the strongest way, the validity of the title under which it was made. In April 1798, by another deed, to which Mrs. *Ann Parker* is a party, reciting that *Margaret* and *Ann*, as devisees for life, had paid out of the rents all interest due, the mortgage is once more assigned. On the 21st of April 1777, a deed was executed by both the sisters, describing them as devisees for life of the estates devised by Sir *Henry* ; a deed of indemnity, ratifying all antecedent conveyances, and all acts done in furtherance of the will of their father ; executed by all parties, to prevent dispute and litigation. Can it be doubted then, that they designed to give validity to the transactions under his will ?

It has been insisted, that all this is confirmation of particular acts only ; partial

recognition, as in the case stated by Sir William Grant.(4) That case has no [391] application to the present. The parties here, were cognisant of their rights, professional advice had been [392] taken on the subject, the deeds were not executed in ignorance, nor are they equivocal. It cannot be contended, that they were not meant for the purpose of declaring the intention of the daughters, that their father's will should be established. *Margaret Parker*, [393] the elder daughter, died in 1785, having devised to her sister, all her property, specifying one moiety of the *Hatch* estate, which she derived from her brother; a specification affording tolerably strong evidence, that she possessed a knowledge of her brother's will. In 1811, *Ann Parker* devised the *Tallon* estate to the person who would have been entitled to it under the will of Sir *Henry*; the Plaintiff claiming, not by any intention of the testatrix in his favour, but as her heir, on failure of the devise. These acts, it may be said, show a disposition to abide by the will of the son; but when in so many other transactions with third persons, the daughters had recognised their title as devisees for life, could they after so long an interval, assume another character? Can the Plaintiff, insisting that it was not competent to Sir *Henry*, to claim against his son's will at the expiration of a month from his death, maintain that in 1811, after the lapse of forty years, Mrs. *Ann Parker* might, in defiance of these repeated deeds, [394] assert her claim under the will of the son? The letters of Mrs. *Ann Parker* to Sir *Harry Parker*, concur to prove that she elected to take under her father's will. (The *Master of the Rolls* here read her letters of the 10th of *March* 1800, and the 8th of *September* 1806.)

On this evidence, I am of opinion, that the Plaintiff has not established the second proposition on which his title depends, namely, that the daughters never elected to take under their father's will. I cannot pronounce the equitable right of the Plaintiff, which, if it exists at all, existed in those ladies forty years ago, so clearly proved, as to authorise me to make the declaration prayed against the legal estate of the Defendant. That legal estate has constantly remained with the title, which the Plaintiff seeks to impeach, by establishing a disposition, the validity of which requires the supposition of facts, of which I find no sufficient evidence. So much of the bills, therefore, must be dismissed. With respect to the supplemental bill, which calls on the Defendant to make his election of taking under or against the will of Mrs. *Ann Parker*, and, if he retains the house in *Salisbury Court*, to relinquish the legacy of £500, to that relief the Plaintiff is entitled.(5)

After concluding his judgment, the *Master of the Rolls*, referred to *Cooks* and *Hellier* (1 *Ves. Sen.* 234), as a case in which the party was bound by the title which he had assumed.

[395] "His Honour doth order, that the Plaintiff's bills (except so much of the supplemental bill, as prays [396] that the Defendant may elect, whether he will take under or against the will of *Ann Parker* in the plead-[397]-ings named), do stand dismissed out of this Court; and the Defendant Sir *William Parker*, by his counsel, [398] now electing to take against the will of the said *Ann Parker*, the premises in *Salisbury Court*, *London*, therein [399] mentioned, to be devised to the Plaintiff, His Honor doth declare, that the Defendant is bound to relinquish [400] the legacy of £500 by the said will, given to him, and that he is bound to account for the personal estate of [401] the said testatrix, without retaining the same; and His Honor doth order and decree, that the said Defendant [402] Sir *William Parker*, be let into possession of the said house and premises situated in *Salisbury Court*, in the [403] pleadings mentioned, and any of the parties are to be at liberty to apply to this Court, as there shall be occasion. Reg. Lib. A. 1817, fol. 1893-1900. (See *Gretton v. Haward*, 1 *Swans.* 409.)

(1) 16 *Ves.* 356; reversed on appeal, 1 *Bligh*, 104, and see *Cholmondeley v. Clinton*, 2 *Mer.* 350-357, and the cases cited, p. 209, 233, 234, 273, 329, to which may be added *Baden v. Earl of Pembroke*, 2 *Vern.* 52, 213; 1 *P. W.* 281, and the dictum *Mos.* 257.

(2) That case on the question of election is not reported, but is referred to in *Lady Cavan v. Pulteney*, 2 *Ves. Jun.* 544; 3 *Ves.* 384. *Hinchcliffe v. Hinchcliffe*, 3 *Ves.* 516. *Pole v. Lord Somers*, 6 *Ves.* 309. *Druce v. Denison*, 6 *Ves.* 385; and the proceedings are stated in the report of the appeal on the subsequent question of conversion. *Pulteney v. Earl of Darlington*, 7 *Bro. P. C.* ed. Toml. 530.

(3) A party bound to elect is entitled first to ascertain the value of the funds. *Newman v. Newman*, 1 Bro. C. C. 186. *Boynnton v. Boynnton*, 1 Bro. C. C. 445. *Wake v. Wake*, 3 Bro. C. C. 255; 1 Ves. Jun. 335. *Whistler v. Webster*, 2 Ves. Jun. 371. *Chalmers v. Storil*, 2 Ves. & Beam. 222. *Hender v. Rose*, 3 P. W. 124. n. And for that purpose may sustain a bill to have all necessary accounts taken, *Buttrick v. Broadhurst*, 3 Bro. C. C. 88; 1 Ves. Jun. 171. *Pusey v. Desbouverie*, 3 P. W. 315. And election, under a misconception of the extent of claims on the fund elected, is not conclusive. *Kidney v. Coussmaker*, 12 Ves. 136.

What acts of acceptance or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle. The questions are, whether the parties acting or acquiescing were cognisant of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed: or whether (on the principle *interest reipublicæ ut sit finis litium*), these inquiries are precluded by lapse of time. The following are some of the principal authorities: *Ardesoife v. Bennet*, 2 Dick. 463. *Wilson v. Lord John Townshend*, 2 Ves. Jun. 693. *Buttrick v. Broadhurst*, 3 Bro. C. C. 88; 1 Ves. Jun. 171, 336, n. *Wake v. Wake*, 3 Bro. C. C. 255; 1 Ves. Jun. 335. *Earl of Northumberland v. Earl of Aylesford*, Amb. 540, 657; 1 Eden, 489. *Rumbold v. Rumbold*, 3 Ves. 65. *Bor v. Bor*, 3 Bro. P. C. ed. Toml. 167. *Simpson v. Vickers*, 14 Ves. 341. *Welby v. Welby*, 2 Ves. & Beam. 200. *Stratford v. Powell*, 1 Ball & Beat. 1, and see 2 Ves. Sen. 593, 668; 3 Atk. 616. *Griffyn v. Griffyn*, 3 Barnard. 391; 2 Schoal. & Lefr. 268. The decision of the House of Lords in the *Duke of Montagu v. Lord Beaulieu*, 3 Bro. P. C. ed. Toml. 277, reversing Lord Northington's decree, Amb. 533, has been frequently disapproved, 3 Bro. C. C. 88, 281; 1 Ves. Jun. 172, 336; 5 Ves. 483, 484, but see 14 Ves. 348. The question of election if doubtful, may be sent to a jury. *Roundell v. Curren*, 2 Bro. C. C. 73.

It seems that acts by which the party himself would not be bound, may bind his representatives; on the principle of "not disturbing things long acquiesced in by families, upon the foot of rights, which those in whose place they (the representatives) stand, never called in question," *Confer*. 2 Ves. Sen. 593, 525. If in satisfaction of previous claims, a benefit is given to a parent, and after his decease to his children, the children are not bound by the election of the parent; *Ward v. Baugh*, 4 Ves. 623, and see *Long v. Long*, 5 Ves. 445, and the reasoning of the Court in *Forrester v. Cotton*, Amb. 388; 1 Eden, 532. Under a covenant on marriage to purchase and settle lands worth £400 a-year, to the use of the covenantor for life, remainder to his wife for life, remainder to the heirs of their bodies, with election to the wife, if the husband died before a settlement, to take either the £400 a-year, or £3000 in lieu of dower and thirds; the husband dying before a settlement, although the wife elected, to take the £3000, a settlement of £400 *per annum* on her for life, with remainder to the children, was decreed against creditors. *Hancock v. Hancock*, 2 Vern. 605.

Election, on the part of an adult, may be compelled, by a direction (in the decree on the original hearing), that if he neglects or refuses to signify his election within a time limited (six months), he shall be understood as electing to assert his rights paramount to the instrument which imposes the obligation of election. See the decree in *Streatfield v. Streatfield* from the Register, 1 Swans. 447 (C).

The following note of the judgment in *Roundell v. Curren* [2 Bro. C. C. 73], cited above, affording a better view of the reasoning than the printed report, is extracted from the very valuable collection of MSS. for the use of which, the editor is indebted to the kindness of *Master Cox*.

*Master of the Rolls* [Kenyon]. The important question in this cause is, whether the remainder in fee, which the defendant claims as right heir of *Dorothy Richardson*, is not liable to be conveyed to the plaintiff, and the other persons claiming under the will of *John Richardson*? Much stress has been laid on the election, and argued whether the acts done by *Henry Richardson* amount to such election; but I do not think this is a question of election, for if I did, I should send it to a jury, to determine the fact, whether such election was made. It would be more accurate to state the question to be, whether *Henry Richardson* did all which he was required to do, to entitle himself to the benefit, under the will of *John Richardson*? The general plan of *John Richardson's* will, was, that before *Henry* should be entitled to *John*

*Richardson's* real estates, he should settle the estate which he took from *Sarah Currer*, according to the limitations there mentioned. The means of doing this are specified in the will. I will not say whether any other means except suffering a recovery would have satisfied this will. I doubt whether even levying a fine would have done. It is said, that a fine might possibly have been equivalent; but if there had been any specific incumbrances affecting the reversion, a fine would have let them in: however, I will not take upon myself to decide this question, as no fine has been levied. The apology for *Henry Richardson* not suffering a recovery, has been, that his death happened so soon after the death of *John Richardson*, as to deprive him of the opportunity; and it is said, that where a condition becomes impossible, it is gone and extinguished; but this is not true in law. If lands are given to A. on condition that A. shall enfeoff B. of other lands, and B. refuse livery of seisin, A. cannot help himself. In the present case, the great ground upon which I form my opinion is this, that the estates of *John Richardson* were to be conveyed to *Henry Richardson*, on certain terms, which amounted to a fine to be paid by *Henry* for them. Before he could take the estates of *John*, he was bound by some means or other, at all events, to settle *Sarah Currer's* estates according to the will of *John Richardson*. It has been argued, that nothing was wanting but the actual execution of deeds, and that what *Henry* did, would in equity amount to a conveyance. It is not necessary to decide what would have been the consequence if *Henry* had been tenant in fee; but in this case, there was an estate tail in existence, and it was absolutely necessary to bar the issue male by a recovery. It is then argued, that in the event which has happened, the estate tail is gone; but I cannot think this a fair argument: the wife was enseint, and the child might have proved a boy; if that had been the case, *Henry Richardson* certainly would not have done sufficient, and this cannot be struck out of the argument; for before *Henry* had paid the price required of him by *John Richardson's* will, he must have done so much as to have put it out of the reach of any possible event to defeat the intention of *John Richardson* as to the other estate, for he never had acquired such an interest in *Sarah Currer's* lands, as to bind them in all events; and I am, therefore, of opinion, that he has not performed the conditions required of him. I will not say, that a recovery was absolutely necessary (though I rather incline to think so), but at all events, he should have acquired such an absolute property in *Sarah Currer's* lands as to have barred his issue male; and I, therefore, declare, that the defendant, *Francis Currer*, is not bound to convey the said estate to the uses of the will of *John Richardson*.

(4) 2 Mer. 353. The following note of what passed on the motion for a new trial in this case, in some respects more full than the printed report, 2 P. W. 563, is taken from a MS. in the possession of the editor.

*Coker v. Farewell.* 10th February 1729.

Motion for a new trial upon an issue directed out of this Court. By the decree two issues were directed; 1st, whether Plaintiff at the time of executing a general release, was apprised of her right to the remainder of the estate in question, expectant upon an estate tail; 2d, whether she did not intend by the said release to convey the remainder to tenant in tail by the release.

There was a trial at assizes, and a verdict for the Plaintiff, who brought the bill to set aside the release, *quoad* this remainder, as obtained by surprise.

*Price, J.*, who tried the cause, made a special certificate, stating the facts in a doubtful way, but concludes against a new trial, because a material witness died since the trial. But, however, upon application to the Court of Chancery, a new trial was granted, with special directions that the Plaintiff should be at liberty to read the depositions of this witness taken in Chancery, and to give evidence of what he swore at the former trial, at the new trial. (*Coker v. Farewell*, M. 3, G. 2, C. B. The Court of Chancery ordered a new trial at bar, C. B., and one of the witnesses being dead, who gave evidence at the former trial, the Court of Chancery directed that evidence of what he said at the first trial, should be given by hearsay; and so it was done. Serjeant *Hill's* MSS. 3 D. 111.) This second trial was at the bar of the Court of Common Pleas, and a verdict for Defendant *Farewell*. Now Plaintiff moved for a new trial, there being verdict against verdict; and it would be hard for an inheritance to be bound by one verdict.

*Jekyl, Master of the Rolls.* Of opinion there should not be a new trial; the judges



of the Common Pleas certifying that the verdict was not against evidence, though there was strong evidence on the other side, and room for the jury to find either way, and if they had found for the other side, they could not have found fault with the verdict. It is true this Court will not bind an inheritance upon one verdict, where the title is properly a title at law ; but in the present case, the matter in issue is properly a matter in equity, founded upon the intention of the parties, and not upon the operations of law ; for it is admitted the release is sufficient at law, to pass the legal estate, and the bill is to be relieved against the operation at law of this release, and to restrain it in equity by the intention of the parties, which is properly a point of equity ; and in matters of equity, an issue directed, is only directed to try the fact, to inform the conscience of the Court, and not to try the right of the parties, as where the matter in issue is a legal title ; and one verdict may be sufficient to inform the conscience of the Court ; and the Court, if satisfied of the fact, upon the depositions in the cause, need not direct an issue at all, but make a decree without it. This decree is not to bind the inheritance, but only to enjoin the party from making use of this release any farther than it was intended, and leave the legal title at large.

As to verdict against verdict, he said the last verdict was at a trial at bar, which is the most solemn trial, and it is not usual to grant a new trial, after a trial at bar, unless the Court be very clear and strong against the verdict, which is not the present case, for the judges are far from certifying the verdict to be against evidence, but admit the evidence to be sufficient, though there was much evidence on both sides ; which is only to say, it was a doubtful point ; and since this fact has undergone strict examination of so solemn a trial, where there is not pretended to be the least surprise on either side, but both parties come well prepared, and with their full strength. I think such a trial and verdict sufficient to inform the conscience of the Court, and a good foundation for a decree in equity, upon a point of equity, which does not determine or bind the legal title to the inheritance. No new trial.

*King, Chancellor*, of the same opinion, that after a solemn trial at bar, a verdict supported, or at least not contrary to evidence, is sufficient to inform the conscience of the Court, of a fact upon which the equity is to arise, and it is not like a trial directed out of this Court upon a legal title ; there it may be reasonable not finally to conclude the parties upon one trial ; in this case, if the Court were satisfied of the fact, they might make a decree without any trial at all.

*Farewell v. Coker ; Coker v. Farewell.* 18 December 1729.

On motion for a new trial, Ordered " that the parties should be at liberty to attend the justices of the Court of Common Pleas, upon the matter of the said trial at bar, lately had of the issues directed in these causes, and to desire them to certify whether, by any thing appearing at the said trial, there is any reason to grant a new trial, and whether they are of opinion, any new trial ought to be had of the said issues or not." Reg. Lib. A. 1729, fol. 62. 10 February 1730. " His Lordship now declaring that he had received a certificate by word of mouth, from the Lord Chief Justice of the Court of Common Pleas, relating to the said last trial, upon hearing, &c., his Lordship declared that he did not see any cause for granting a new trial." Reg. Lib. A. 1729, fol. 200.

(5) The doctrine of election originates in inconsistent or alternative donations ; a plurality of gifts, with intention, express or implied, that one shall be a substitute for the rest. In the judgment of tribunals, therefore, whose decision is regulated by that intention, the donee will be entitled, not to both benefits, but to the choice of either. The second gift is designed to be effectual, only in the event of his declining the first ; and the substance of the gifts combined is an option.

If the individual to whom, by an instrument of donation, a benefit is offered, possesses a previous claim on the author of the instrument, and an intention appears that he shall not both receive the benefit and enforce the claim, the same principle of executing the purpose of the donor, requires the donee to elect between his original and his substituted rights ; the gift being designed as a satisfaction of the claim he cannot accept the former without renouncing the latter. (*Note* : Some of the principal cases on the subject of satisfaction, are collected 2 *Swans*. 221, n.)

A new modification of the doctrine arises on the occurrence of gifts of a peculiar nature. The owner of an estate having in an instrument of donation, applied to the property of another, expressions which, were that property his own, would amount to

an effectual disposition of it to a third person, and having by the same instrument disposed of a portion of his estate in favour of the proprietor whose rights he assumed, is understood to impose on that proprietor the obligation of either relinquishing (to the extent at least of indemnifying those whom, by defeating the intended disposition, he disappoints), the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights, or if he accepts that benefit, of completing the intended disposition by the conveyance in conformity to it of that portion of his property which it purports to affect. The *foundation* of the doctrine is still the intention of the author of the instrument; an intention which extending to the whole disposition, is frustrated by the failure of any part; and its *characteristic*, in its application to these cases is, that by equitable arrangement effect is given to a donation of that which is not the property of the donor; a valid gift, in terms absolute, being qualified by reference to a distinct clause, which though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition (though destitute of legal validity), not express but implied, annexed to the benefit proposed to him. To accept the benefit, while he declines the burthen, is to defraud the design of the donor.

The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law. In that system, a bequest of property which the testator knew to belong to another was not void, but entitled the legatee to recover from his heir, either the subject of the bequest, or, if the owner was unwilling to part with it at a reasonable price, the pecuniary value. (*Inst. lib. 2, tit. 20, s. 4; tit. 24, s. 1. Dig. lib. 30, l. 39, s. 7; l. 104, s. 2; l. 71, s. 3; lib. 32, l. 30, s. 6.*) It was also competent to the testator, by express direction (originally in the form of *fidei commissum*, at a later period in terms of gift, under the denomination of *legatum ab aliquo*) to impose the obligation of providing the bequest or its value, on any person deriving a benefit under his will (*Dig. lib. 32, l. 1, s. 6; l. 14, s. 2. Cod. lib. 6, tit. 37, l. 10; tit. 42, l. 9*), to the extent of that benefit. (*Inst. lib. 2, tit. 24, s. 1. Dig. lib. 30, l. 114, s. 3.*) But a bequest, on the erroneous supposition that the subject belonged to the testator was, it seems, void; (*Inst. lib. 2, tit. 20, s. 4. Dig. lib. 31, l. 67, s. 8*); unless the legatee stood in a certain degree of relation to the testator (*Cod. lib. 6, tit. 37, l. 10*), or the subject was the property of the heir. (*Dig. lib. 31, l. 67, s. 8. Cod. lib. 6, tit. 42, l. 25.*)

In every instance, the heir or legatee possessed the option of accepting or renouncing the inheritance or legacy thus burthened; but it seems that no medium was permitted between these alternatives; no text has occurred recognising the right of the heir or legatee at once to accept the benefit offered by the will, and to retain the property of which it assumed to dispose, on the terms of compensation or indemnity to the disappointed claimant. The effect, therefore, of election to take in opposition to the will was forfeiture of the benefit offered by it. The effect of election to take under the will varied, as the property of which the will assumed to deprive the legatee was pecuniary, or specific; in the former case, he was compelled to perform the bequest to the extent of the principal and interest which he had received; in the latter, a peremptory obligation was imposed, to deliver the specific object, though exceeding the amount of the benefit conferred. (*Dig. lib. 31, l. 70, s. 1.*)

In the following decisions, the reader will recognise the doctrine of election, applied in circumstances constituting what in our courts of equity are technically denominated cases of satisfaction. Cum pater pro filia sua, dotis nomine, centum promississet, deinde eidem centum eadem legasset, doli mali exceptione heres tutus erit, si et gener ex promissione, et puella ex testamento agere institueret; convenire enim inter eos oportet, ut alterutra actione contenti sint. (*Dig. lib. 30, l. 84, s. 6.*)

Lucius Titius, cum duos filios heredes relinqueret, testamento ita cavit; Quisquis mihi liberorum meorum heres erit, ejus fidei committo, ut si quis ex his sine liberis decedat, hereditatis meæ bessem, cum morietur, fratribus suis restituat; frater decedens fratrem suum ex dodrante fecit heredem; Quæro an fideicommisso satisfecerit? Marcellus respondit, id quod ex testamento Lucii Titii fratri testator debuisse, pro ea parte, qua alius heres extitisset, peti posse, nisi diversum sensisse eum probaretur: nam parvum inter hanc speciem interest, et cum alias creditor debitori suo extitit heres: sed plane audiendus erit coheres, si probare possit, ea mente testatorem heredem instituisse fratrem suum, ut contentus institutione fideicommisso abstinere deberet. (*Dig. lib. 30, l. 123, pr.*)

By the civil law the doctrine of election seems to have been confined to wills, and in that application it originated in English jurisprudence. One of the earliest instances of interference by a court of equity to restrain the assertion of a legal claim, by reason of its inconsistency with the intention expressed or implied in an instrument conferring a benefit on the claimant, is *Lacy v. Anderson*, in the reign of *Elizabeth*. "The suit is to stay a suit at law in a writ of dower made by the Defendant for that the Defendant's wife had certain copyhold lands devised unto her in lieu of her thirds at law, which she accepted of and enjoyed twenty years, and yet seeketh now to recover dower of the freehold lands. The Defendants demurred, because copyhold lands can be no bar of dower. But the Court thinks it no conscience she should have both; therefore ordered to answer. *Lacy et Uxor*, Plaintiffs, *Anderson et Uxor*, Defendants. An. 24 El." (*Choice Cases in Chancery*, p. 155, 156.) A copy of the entry in the Register is subjoined. 1 Swans. 445 (A). In an earlier case contained in the same collection (*Rose v. Reynolds*, 23 & 24 Eliz. *Choice Cases*, 147, see the extract from the Register, 1 Swans. 446 (B), the Court assumed jurisdiction upon the principle that dower was barred in equity by acceptance of a benefit designed as a recompence, though not constituting a bar at law.

The application of the general rule to compel election, in the instance of devises to the testator's widow, between her claims as devisee and as dowress, underwent repeated discussion in the well-known case of *Lawrence v. Lawrence*; a summary of the proceedings, the record of which lies dispersed through many volumes, may form a convenient transition from these early authorities to the more familiar series of decisions in which the doctrine is embodied. *William Lawrence* being seised in fee of estates of the annual value of £550, devised a manor and other lands worth about £130 *per annum*, to his wife during her widowhood, and, on the determination of that estate, he devised the premises, and all his other lands to trustees on trusts specified; and directed that, after two years of a term of twenty-four years created by the will were expired, his wife should receive the rents of certain lands worth about £60 *per annum*, and, after five years, the rents of other lands worth about £90 *per annum*, during the remainder of the term, if she remained a widow; and bequeathing to her several specific and pecuniary legacies, appointed her executrix. The widow having recovered judgment in a writ of dower (*Lawrence v. Dodwell*, Lord Raym. 438; *Lutw.* 734), the remainder-man exhibited a bill to be relieved against that judgment, and to have the trusts of the will performed. In November 1699, Lord Somers, being of opinion that the devise was intended in satisfaction of dower, and that a collateral satisfaction might be a bar in equity, decreed that the widow must waive either the dower or the devise. (*Lawrence v. Lawrence*, 2 Vern. 365; 2 Freem. 234.) In July 1701, Lord Keeper Wright reversed that decree, declaring that nothing in the will denoted an intention to bar dower; and that if "any such thing did appear by the will, the same would be only a bar at law, and not in that Court," and the matter had been already determined at law. (3 Bro. P. C. ed. Toml. 484; 2 Freem. 235.) In December 1715, Lord Cowper (on a bill filed by a subsequent remainder-man, whose title had accrued in the interval), declared that the point of dower being a point of right, and so doubtful in its nature, as that the Court had been of different opinions therein, he would not vary the late determination, having remained so long unquestioned. (3 Bro. P. C. ed. Toml. 485.) In May 1717, the House of Lords affirmed Lord Cowper's decree, and dismissed the bill so far as concerned the question of dower. (3 Bro. P. C. ed. Toml. 483.)

On this case Sir Thomas Clarke has said, "The general rule which has obtained since *Noys v. Mordaunt*, is clear, that where a man does by will more than he has strictly a right to do, and gives a bounty to the person to whose prejudice that is done, the person prejudiced by one part shall not insist upon his right, and at the same time upon the bounty by the will. The same thing was attempted in Lord Somers's time, but did not prevail; as appears from *Lawrence v. Lawrence*," 2 Ves. Sen. 618. It seems, however, that the final decision in *Lawrence v. Lawrence* negatives not the existence of the general rule of election, but its application to the particular case, as not affording evidence of the testator's intention, that his widow should accept the devise in satisfaction of dower. That general rule was conclusively established by *Noys v. Mordaunt*, February 1706, 2 Vern. 581; *Gillb. Rep. in Eq.* 2 (described by Lord Hardwicke, 2 Ves. Sen. 14; 3 Bro. P. C. ed. Toml. 178, as the first case on the subject, a description of which the correctness has been justly questioned



by Lord Eldon, 6 Dowe, 179). The following are the principal cases (some in strictness, cases of express condition, or of satisfaction) in which the doctrine of election has been administered or discussed by courts of equity. *Boughton v. Boughton*, 2 Ves. Sen. 12. *Kiston v. Kiston*, Pre. in Cha. 351. *Streafild v. Streafild*, Ca. Temp. Talb. 176. *Forrester v. Cotton*, Amb. 388; 1 Eden, 532, a decision contradicted by later authorities. *Jenkins v. Jenkins*, Bell's Supplement, 250. *Anon. Gilb. Rep. in Eq.* 15. *Cowper v. Scott*, 3 P. W. 119. *Cookes v. Hellier*, 2 Ves. Sen. 234. *Morris v. Burroughs*, 1 Atk. 399. *Kirkham v. Smith*, 1 Ves. Sen. 258. *Chetwynd v. Fleetwood*, 1 Bro. P. C. ed. Toml. 300, stated 2 Schoales & Lefr. 266. *Unett v. Wilkes*, Amb. 430; 2 Eden, 187. *Highway v. Banner*, 1 Bro. C. C. 584. *Lewis v. King*, 2 Bro. C. C. 600. *Hoare v. Barnes*, 3 Bro. C. C. 316. *Stratton v. Best*, 1 Ves. Jun. 285. *Finch v. Finch*, 4 Bro. C. C. 38; 1 Ves. Jun. 534. *Bigland v. Huddleston*, 3 Bro. C. C. 285. *Blake v. Bunbury*, 4 Bro. C. C. 21; 1 Ves. Jun. 514. *Wilson v. Lord John Townshend*, 2 Ves. Jun. 693. *Whistler v. Webster*, 2 Ves. Jun. 367. *Wilson v. Mount*, 3 Ves. 191. *Blount v. Bestland*, 5 Ves. 515. *Rutter v. Maclean*, 4 Ves. 531. *Darlington v. Pulteney*, see the reference to this case, 2 Swans. 374. *Webb v. Lord Shaftesbury*, 7 Ves. 480. *Andrew v. Trinity Hall, Cambridge*, 9 Ves. 533. *Stewart v. Henry, Vern. & Scriv.* 49. *Moore v. Butler*, 2 Schoales & Lefr. 249. *Birmingham v. Kirwan*, 2 Schoales & Lefr. 444. *Welby v. Welby*, 2 Ves. & Beam. 187. *Green v. Green*, 2 Mer. 86. *Tibbits v. Tibbits*, 2 Mer. 96, n. *Lord Rancilffe v. Parkyns*, 6 Dow, 149. And see *Ayres v. Willis*, 1 Ves. Sen. 230. *Robinson v. Hardcastle*, 2 Bro. C. C. 344. *Crosbie v. Murray*, 1 Ves. Jun. 555. *Freke v. Lord Barrington*, 3 Bro. C. C. 274. *Rushout v. Rushout*, 6 Bro. P. C. ed. Toml. 89; 2 Schoales & Lefr. 267. *Sheddon v. Goodrich*, 8 Ves. 481. *Rich v. Cockell*, 9 Ves. 369. The remaining authorities (with the exception of decisions on the question what testamentary benefit is an equitable bar of dower, collected in *Sanzter v. Fison*), are cited in the notes to the present and the succeeding case.

The foundation of the equitable doctrine of election, is the intention, explicit or presumed, of the author of the instrument to which it is applied \* and such is the import of the expressions by which it is described as proceeding, sometimes on a tacit (*Ca. Temp. Talb.* 183; 15 Ves. 392), implied (2 Vern. 582; 10 Ves. 609, 616; 13 Ves. 220, 222; 3 Bro. P. C. ed. Toml. 177), or constructive (2 Ves. Sen. 14) condition (1 Eden, 536), sometimes on equity.† From this principle the whole doctrine, with its distinctions and exceptions, is deduced.

The intention of the author of the deed (for it is established, that the doctrine of election extends to deeds. *Llewellyn v. Mackworth*, 3 Barnard. 445. *Freke v. Lord Barrington*, 3 Bro. C. C. 274. *Bigland v. Huddleston*, 3 Bro. C. C. 285, n. *Chetwynd v. Fleetwood*, 1 Bro. P. C. ed. Toml. 300. *Moore v. Butler*, 2 Schoales & Lefr. 249. *Birmingham v. Kirwan*, 2 Schoales & Lefr. 266. *Green v. Green*, 2 Mer. 86), or will, to dispose of property which is not his, must be manifest, *Forrester v. Cotton*, Amb. 388; 1 Eden, 532. *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390. *Dashwood v. Peyton*, 18 Ves. 27; not conjectural, *Blake v. Bunbury*, 4 Bro. C. C. 21; 1 Ves. Jun. 514, and see *Read v. Crop*, 1 Bro. C. C. 492; ‡ and it is difficult to apply the doctrine of election, when the testator has some present interest in the estate disposed of, though not entirely his own, *Lord Rancilffe v. Parkyns*, 6 Dow, 185.

It has been decided (in contradiction to the doctrine of *Stratton v. Best*, 1 Ves. Jun. 285), that for the purpose of determining the question, what property the testator intended to devise by general words, matter *dehors* the will may be received as evidence, that he considered the property of others as his own. *Finch v. Finch*, 4 Bro. C. C. 38; 1 Ves. Jun. 534. *Darlington v. Pulteney*, *ubi supra*, p. 374. *Rutter v. Maclean*, 4 Ves. 531. *Pole v. Lord Somers*, 6 Ves. 309. *Druce v. Dennison*, 6 Ves. 385, and see *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; but it may be doubted, whether the authority of these decisions, the principle of which seems extremely questionable, will in future prevail. *Doe dem. Oxenden v. Chichester*, 4 Dow, 65; see p. 76, 89.

It seems, that mere recital of a supposed right in an individual named, will not amount to a gift of that right, or demonstration of an intention to give, so as to impose the obligation of election; *Dashwood v. Peyton*, 18 Ves. 27; see p. 41; but the expression of a condition with reference to one individual, is not sufficient proof that there was no intention to raise a case of election in favor of another. *Id.* p. 39.

If a debtor, by his will, reciting the amount of the debt, directs payment of the sum at which he erroneously computes it, and also bequeaths a legacy to his creditor, the creditor may both claim the legacy, and dispute the calculation, the error in computation not denoting an intention to pay less than the actual debt. *Clark v. Guise*, 2 Ves. Sen. 617.

"If a man entitled to an estate not well devised from him by will, by the same will has a legacy given to him, with a power in the will to a trustee for him during his minority; it is paid to the trustee; but if he loses that legacy by failure of that trustee, and receives no satisfaction for it; I will never carry the rule in *Noys v. Mordaunt* to that extent, as to put him to make his election, merely because that trustee received that legacy for him during his minority." *Lord Hardwicke*, 2 Ves. Sen. 603.

Although a part of the benefits proposed by the will fails, the remainder may constitute a case of election; as on a devise of realty and bequest of personalty to the testator's widow, in bar of her claims under a settlement, the devise being void, the widow must elect between those [404] claims and the bequest; *Newman v. Newman*, 1 Bro. C. C. 186; the testator not intending that any benefit under the will, should be enjoyed, unless all benefit under the settlement was relinquished. But a legatee declining one benefit charged with a burden, given to him by a will, is not bound to decline another benefit unconnected with a burden, given to him by the same will. *Andrews v. Trinity Hall*, 9 Ves. 534.

An absolute power in the testator, to dispose of the subject, and an intention to exercise that power, seem in general sufficient to raise a case of election; and therefore (notwithstanding the doubt intimated in *Rich v. Cockell*, 9 Ves. 379), a devise to the heir, although inoperative (the heir, whether disputing or admitting the will, taking by descent), compels him to elect between the estate devised, and claims adverse to the will; *Noys v. Mordaunt*, 2 Vern. 581; *Gilb. Rep. in Eq.* 2. *Anon. Gilb. Rep. in Eq.* 15. *Welby v. Welby*, 2 Ves. & Beam. 187. *Thellusson v. Woodford*, 13 Ves. 224. The estate descending to the heir under his election to claim against the will, descends subject to the implied condition.

In the instance of wills, and probably of deeds of donation, the effect of election to take in opposition to the instrument, is not absolute forfeiture of the benefit proposed, but an obligation to indemnify the disappointed claimants, see *Gretton v. Howard*, 1 Swans. 433, n. Whether the same doctrine prevails in cases of express contract (see 2 Mer. 95) is a question yet undecided, the decision of which must, it seems, depend on distinct principles.

Election to take under a deed or will, imposes an obligation (to the extent at least of the benefit taken, 2 Ves. Jun. 372) to give effect to the whole instrument, by the relinquishment of every inconsistent right. On this principle, in *Morris v. Burroughs*, 2 Atk. 627, some children of a freeman of London, electing to abide by the custom, and others by their father's will, *Lord Hardwicke* declared, that the customary shares of the latter passed by the will. The title of the children to the orphan's portion, being paramount to the will, the condition of their claim under it, was (by the ordinary rule), that their property, of which it assumed to dispose, should be subjected to its disposition.

The rule of not claiming by one part of an instrument in contradiction to another, has exceptions, *Lord Hard[405]-wicke*, 2 Ves. Sen. 33, and see *Vern. & Scriv.* 53; and the ground of exception seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election. "Several cases have been, and several more may be, in which a man by his will, shall give a child or other person, a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will: for the Court will not construe it as meant, in lieu of every thing else, when he has said a particular thing." *Lord Hardwicke*, *East v. Cook*, 2 Ves. Sen. 33. Upon that principle it was decided in *Bor v. Bor*, 3 Bro. P. C. ed. Toml. 167 (see *Vern. & Scriv.* 53, 54), that the testator having by express proviso, made a disposition in the event of his not possessing power to devise certain estates, no implied condition arose against the heir, disappointing the devisee, but complying with the proviso. So a legatee, who cannot obtain a benefit designed for him by the will, except by contradicting some part of it, will not be precluded by such contradiction, from claiming

other benefits under it. *Huggings v. Alexander*, cited 2 *Ves. Sen.* 31. The intention being equal in favor of each part of the testamentary disposition, no reason is afforded for controlling one, in order to accomplish the other. Under a will containing a bequest to the testator's widow, in satisfaction of all dower or thirds which she might claim out of his real or personal estate, or either of them, and a residuary bequest which failed, the widow, accepting the specific bequest, was not excluded from her distributive share of the undisposed residue. For if the Court could (which it cannot), on a question between the next of kin, advert to the will, it would find there no evidence of an intention to exclude the widow in their favor. *Pickering v. Lord Stamford*, 3 *Ves. Jun.* 332, 492.

But, although a particular benefit is given expressly in satisfaction of a particular claim, yet, if the assertion of that claim appears inconsistent with the intention of the testator, the claimant must relinquish all his rights under the will. *Graves v. Boyle*, 1 *Atk.* 509. *Jenkins v. Jenkins*, *Belt's Supplement*, p. 250.

A devise of freehold by a will not executed conformably to the statute of frauds, will not impose the obligation of election on the heir disputing its validity, and at the same time [406] claiming benefits under other clauses of the will. *Hearle v. Greenbank*, 3 *Atk.* 715; 1 *Ves. Sen.* 306, 307. *Carey v. Askew*, 8 *Ves.* 492, 496; 1 *Cox*, 241. *Goodrich v. Sheddon*, 8 *Ves.* 481. *Thellusson v. Woodford*, 13 *Ves.* 209. A devise by an infant, is equally ineffectual for this purpose. *Hearle v. Greenbank*, 3 *Atk.* 695; 1 *Ves. Sen.* 298; 13 *Ves.* 223. These instances seem not so much exceptions to the rule (though commonly so described), as cases not including the fact which the application of the rule assumes. They were decided on the principle, that the devise being void for all purposes, the Court cannot advert to it as evidence of the testator's intention; the will must be read as if that clause were expunged, and it then contains nothing to raise the question of election. Upon the same principle, the Court refused to read, for the purpose of compelling the husband to elect, a bequest of a diamond ring, in the will of a married woman, which the ecclesiastical court had adjudged to affect her separate estate only. *Rich v. Cockell*, 9 *Ves.* 381. But if the will affords valid evidence of the testator's intention, as by a condition annexed to a personal legacy to the heir, not to dispute the will, which not being duly executed, contained a devise to a stranger, it is settled (though the propriety of the distinction has been much questioned, by Lord *Kenyon*, 1 *Cox*, 244, by Lord *Eldon*, 8 *Ves.* 497, by Lord *Erskine*, *Sugd. on Powers*, 380, n., and by Sir *William Grant*, 2 *Ves. & Bea.* 130), that the heir must elect between the inheritance and the legacy. *Boughton v. Boughton*, 2 *Ves. Sen.* 12. He cannot take the legacy, without complying with the express condition. *Whistler v. Webster*, 2 *Ves. Jun.* 371. *Carey v. Askew*, 8 *Ves.* 492, 496; 1 *Cox*, 241. *Sheddon v. Goodrich*, 8 *Ves.* 481.

Before the recent statute 55 G. 3, c. 192, giving validity to wills of copyhold without surrender, it had been decided that a specific devise of unsundered copyhold (not a general residuary devise, *Judd v. Pratt*, 13 *Ves.* 168; 15 *Ves.* 390), compelled the heir, taking other benefits under the will, to elect; *Allen v. Poulton*, 1 *Ves. Sen.* 121. *Goodwyn v. Goodwyn*, 1 *Ves. Sen.* 226. *Ardesoife v. Bennet*, 2 *Dick.* 463. *Frank v. Standish*, 1 *Bro. C. C.* 588, n.; 15 *Ves.* 391, n. *Unet v. Wilkes*, *Amb.* 430; 2 *Eden*, 187. *Rumbold v. Rumbold*, 3 *Ves.* 65. *Petteward v. Prescott*, 7 *Ves.* 541, and see *Wilson v. Mount*, 3 *Ves.* 191; [407] the Court not holding itself precluded, from adverting to the devise (though otherwise ineffectual), as evidence of intention. In like manner, an heir entitled to benefits under a will directing conveyances of future purchases, on trusts specified, must give effect to that direction; *Thellusson v. Woodford*, 13 *Ves.* 209; 1 *Dow*, 249; and an heir of heritable property in *Scotland*, taking a personal legacy under the will of his ancestor domiciled in *England*, which contained a general devise, void by the law of *Scotland*, was compelled to elect. *Brodie v. Barry*, 2 *Ves. & Bea.* 127.

It has been decided, that the heir is not put to election by a devise under an erroneous supposition of title. *Cull v. Showell*, *Amb.* 727; 3 *Wooddeson*, *Lect. App.* 1. The decision in that case, may probably be vindicated on the ground of lapse of time; but the general principle, though apparently approved by Lord *Redesdale*, 2 *Schoales & Lefr.* 267, has been satisfactorily overruled, *Whistler v. Webster*, 2 *Ves. Sen.* 370, 371. *Thellusson v. Woodford*, 13 *Ves.* 221. *Welby v. Welby*, 2 *Ves. & Bea.* 199, and see *Walpole v. Lord Conway*, 3 *Barnard* 153; 2 *Ves. Jun.* 707, in consideration of the absence of proof, that the testator's intention would have been changed by a

knowledge of the true title, and the uncertainty introduced by conjectural inquiry on that subject.

Lord *Hardwicke* appears, on one occasion, to have entertained an opinion, that the doctrine of election is not applicable to interests in remainder after an estate tail, *Bor v. Bor*, 3 Bro. P. C. ed. Toml. 178, n. ; and the Court of Exchequer in *Ireland*, deliberately adopted that conclusion, *Stewart v. Henry, Vern. & Scriv.* 49, on the ground that "in cases of wills, things are to be taken as they stood at the testator's death"; and that if at that time the remainder-man had been directed to confirm the devise, as far as he could, by levying a fine, in order to bar his issue, the tenant in tail might the next moment, have barred all the remainder-men, and such a decree therefore, would have given no substantial benefit. The principle of this exception seems extremely questionable; the doctrine of election is applied to interests, in respect, not of their amount, but of their inconsistency with the testator's intention; and to assume their remoteness, or their value, as a criterion of the existence or the absence of that intention, would introduce that [408] uncertainty which on questions of property, is perhaps the worst defect of law. Accordingly, the doctrine of election has been declared to be applicable to "interests immediate, remote, contingent, of value, or not of value." 2 Ves. Jun. 697, and in *Graves v. Forman*, cit. 3 Ves. 67, Lord *Hardwicke* seems to have applied it to an estate for life in remainder after estates tail; and see *Highway v. Banner*, 1 Bro. C. C. 584.

The opinion of Lord *Northington*, that the rule of election, "must be confined to plain and simple devises of the inheritance, and cannot be extended to limitations." *Forrester v. Cotton*, Amb. 388; 1 *Eden*. 532, is not sanctioned by subsequent authorities.

It has been decided, that an appointment by will, under a power to appoint among children, being valid to a certain extent, and void for the remainder, a child to whom a part is well appointed, is not excluded from his proportion of the shares of which the appointment fails; the doctrine of election founded on compensation, not being applicable to a case in which the testator had given no free disposable property. *Bristow v. Warde*, 2 Ves. Jun. 336.

Nor is that doctrine applicable against creditors taking the benefit of a devise for payment of debts, and also enforcing their legal claim upon other funds disposed of by the will, *Kidney v. Coussmaker*, 12 Ves. 136 (an exception founded on the distinction between creditors, as claimants for a valuable consideration, and devisees and legatees as volunteers); nor against a creditor, who, in the character of heir, has disputed the validity of a devise for payment of debts, *Deg v. Deg*, 2 P. Wms. 418; nor in favour of a residuary legatee, "if a particular demand of any one taking a benefit under the will, subjects the personal estate to a debt," 3 Ves. 385; 2 Ves. Jun. 561; a claim to the residue supposing the previous satisfaction of debts.

A devisee claiming by the will, is not precluded from enjoying a derivative interest, to which he is entitled at law, under a legal estate taken in opposition to the will; thus, a husband may be tenant by the curtesy of an estate tail, held by his wife against a will, under which he accepted benefits, *Lady Cavan v. Pulteney*, 2 Ves. Jun. 544; 3 Ves. 384; the estate taken in opposition to the will, vesting with all its legal incidents. Nor will the election of the heir, a married woman, between real estates the subject of a void devise, [409] and a legacy to her separate use, affect the marital rights of the husband, deriving no benefit from the will. *Brodie v. Barry*, 2 Ves. & Bea. 127.

\* "There can never be a case of election, but upon a presumed intention of the testator," Lord Commissioner *Eyre*, 1 Ves. Jun. 557.

† 1 Ves. Sen. 306; 3 Bro. P. C. ed. Toml. 178; 2 Atk. 629; 3 Atk. 715. The term equity denotes the obligation affecting the conscience of the donee, to perform the intention of the donor, whose bounty he accepts, by fulfilling the condition of the gift; Lord *Rosslyn*, indeed, has on one occasion represented Lord Chief Justice *de Grey* to have referred the doctrine to a natural equity, as distinguished from an implied condition (4 Ves. 538); a distinction which, though apparently approved by a jurist of distinguished learning (*Hargrave*, Juridical Arguments, v. ii. p. 302, 303), is for this purpose merely nominal, the equity supposing the condition; but it is clear from Lord *Alvanley's* report of that judgment (3 Ves. 530), as well as from Lord *Rosslyn's* statement at a former time (2 Ves. Sen. 560), that Lord

Chief Justice *de Grey* meant to state the distinction, not between an implied condition and an equity, but between an express condition, and an equity arising from an implied condition.

† The following note of the judgment in that case, is extracted from Mr. *Cox's MSS.*

"I think these words are too loose to raise the construction contended for. If he had devised all his estates generally, there would have been no doubt; and I cannot think that his mentioning his estates in the four places by name, is sufficient to make me suppose that he meant to devise his wife's estates. As to *Thorley* there can be no pretence for it, since he had an estate there to answer the description; and I think, therefore, that the wife is not called upon to make any election."

GRETTON v. HAWARD. *Rolls. May 13, 1819.* (Note: This case, of recent date, is introduced here in consequence of its connection with the doctrine discussed in the preceding.)

[See *In re Vardon's Trusts*, 1884, 28 Ch. D. 130; *In re Lord Chesham*, 1886, 31 Ch. D. 475.]

By the will of *S.*, *A.* his widow took a life interest, and his six children the remainder in fee as tenants in common, in his real estates, of the annual value of £870; *A.*, under the erroneous expectation of acquiring an absolute power of disposition, having levied a fine of her husband's estates, devised a portion of them, worth about £135 *per annum*, to *G.* her grandson in fee; another portion of like amount (together with an estate of her own at *N.*, of the annual value of £115), for the benefit of the widow and children of *W.* her eldest son; and the residue, worth about £600 *per annum*, to her daughter *E.* in fee: *W.* being entitled, under the will of *S.*, as one of his children, to one-sixth, and as heir to three of his brothers who died without issue, to three-sixths, of his father's estates, devised all his real estate for the benefit of his widow and children, and died shortly before his mother *A.*: the widow and children of *W.* electing to take under the will of *S.*, and in opposition to that of *A.*, and by that election frustrating, to the extent of £455 *per annum*, the disposition of the latter in favour of *E.*, *E.* is intitled to the estate at *N.* in partial compensation.

By his will dated the 18th of June 1747, *Serle Edward Haward*, being seised of certain estates at *Charing Cross* and in *Saint Martin's*, subject to a mortgage in fee, devised and bequeathed all his real and personal estate to his wife *Ann Haward* (she first paying his just debts and funeral expenses) and after her decease, to the heirs of her body share and share alike, if more than one; and, in default of issue to be lawfully begotten by the testator, to be at her own disposal; and he appointed his wife sole executrix and residuary legatee.

The testator died in 1766, leaving *Ann Haward* his widow, and *Edward Haward*, *Ann Haward* (afterwards *Ann Gardner*), *Elizabeth*, *William*, *Francis*, and *James*, *Haward*, his six surviving children by her, of whom *Edward*, *Francis*, and *James* died intestate and without issue, leaving *William* their heir.

[410] *Ann Haward*, the testator's widow, entered into possession of his estates, and being advised that under his will she took an estate tail, and that, the remainder in fee being in herself, she might, by levying a fine, acquire the power of disposing of the estates devised to her, on the 8th of September 1807, executed a deed, covenanting to levy a fine (which was afterwards levied), and declaring, that it should enure to such uses as she should by deed or will appoint.

By her will dated the 7th of August 1809, *Ann Haward* devised three messuages (part of her husband's estates), as to one moiety, to her grandson *George Gardner* in fee, and as to the remaining moiety, to *B. Page*, *W. Watson*, and *R. L. Appleyard*, their heirs and assigns, in trust to sell and stand possessed of the purchase money, in trust for *Jane Haward*, the widow of the testatrix's late son *William Haward*, and for such of the children of *William Haward* living at the testatrix's decease, as being sons should attain twenty-one, or being daughters should attain that age or be married, equally to be divided between *Jane Haward* and such children; with remainder, in case of all dying before their shares vested, to *George Gardner*, his executors, &c.; and the residue of her late husband's estates she devised to her

daughter *Elizabeth Haward* in fee. The testatrix then devised to *Page, Watson, and Appleyard*, an estate at *Nine Elms* in the county of *Surry*, to which she was entitled in her own right, upon trust, till each of the children of her late son *William Haward*, living at her decease, should attain the age of twenty-one years or die under that age, to permit *Jane Haward* to enjoy it (if she should so long continue unmarried) to the intent that the produce might be applied by her towards the maintenance of herself and the child or children of *William Haward*, and upon farther trust, as soon as each [411] of the children of *William Haward*, living at the testatrix's decease, should attain the age of twenty-one years or die under that age, to sell the premises and stand possessed of the purchase money upon such trusts, for the benefit of *Jane Haward* and the children of *William Haward*, as before expressed concerning the money to arise from the sale of the moiety of the three messuages devised to them; but in case no child of *William Haward* should live to attain a vested interest, upon trust for *Elizabeth Haward*, her executors, &c. The testatrix devised and bequeathed to *Elizabeth Haward* the residue of her real and personal estate, and appointed her executrix.

*Ann Haward* died in *February* 1810, leaving *William Haward* the younger her grandson and heir (heir also of his father the late *W. Haward*, and of his grandfather the testator *Serle Edward Haward*), and the remaining children of the late *W. Haward* and *George Gardner*, her grandchildren, and *Elizabeth Haward* her only child.

*William Haward*, who died shortly before his mother *Ann Haward*, by his will, dated the 27th of *December* 1808, devised all his real estates to *Henry Gretton* and *Isaac Andrews* in fee, upon trust to sell and stand possessed of the purchase money, and also of his personal estate in trust, as to one-seventh, for his wife *Jane Haward*, her executors, &c., and as to the remaining six-sevenths, for all his children, living at his decease or born in due time afterwards, in equal shares, with benefit of survivorship between them, in case any should die under the age of twenty-one years, with remainder, in case of the death of all such children, for *Jane Haward*, her executors, &c. He appointed his wife, and *Gretton* and *Andrews*, executrix and executors, and de-[412]-clared that the provision made for her, was intended in full satisfaction of her dower or thirds.

*William Haward* died in *May* 1809, leaving *W. Haward* the younger his eldest son and heir, and *Jane Haward* his widow, and five younger children.

In 1811, the trustees named in the will of *W. Haward*, and his widow and younger children, instituted the present suit against *Elizabeth Haward* the surviving daughter of *Serle Edward Haward*, *George Gardner* one of his grandsons, *William* the eldest son and heir of *William Haward* deceased, the trustees named in the will of *Ann Haward*, and the mortgagees; insisting that under the will of *Serle Edward Haward*, his widow *Ann Haward* took only an estate for life, and that *William Haward*, as his heir, was entitled to the reversion in the devised estates, subject to the life interests of the widow and of the other children, or if the children took estates in fee simple, then, that *W. Haward* was entitled to one-sixth of the devised estates in his own right, and to three-sixths as heir of the three children of *Serle Edward Haward* who died without issue.

The bill prayed that the will of *William Haward* might be established, and the trusts carried into execution; that the will of *Serle Edward Haward* might be established, and the interests taken thereunder by the late *Ann Haward* and *William Haward* declared; and that such part of the premises as passed to *William Haward* under the will of *Serle Edward Haward*, or as his heir, or as the heir of his other children deceased, might be sold, and one-seventh of the produce paid to *Jane Haward*, and the remaining six-sevenths to the trustees named in the will of *William Haward*, in trust for his children.

[413] At the hearing of the cause on the 5th of *July* 1813, the *Master of the Rolls* directed a case for the opinion of the Judges of the Court of Common Pleas, who certified, that under the will of *Serle Edward Haward*, his widow *Ann Haward* took an estate for life only in the devised premises; and each of her six children a fee simple in remainder expectant upon the mother's life estate, in one undivided sixth-part of the premises, as tenant in common with the other five children. (6 *Taunt.* 94.)

By the decree on the 29th of *July* 1816, the rights of the parties were declared

conformably to this certificate (1 *Mer.* 448); and it was farther declared, that *William Haward*, at the time of making his will, and of his death, was as one of the six children, of *Serle Edward Haward*, seised of the reversion of one-sixth part of his estates, and of the reversion of three other sixth-parts thereof, as the only surviving brother and heir of *Edward, Francis, and James, Haward*; that *Elizabeth Haward* was, as one of such six children, seised in her own right of one other sixth-part, and *George Gardner*, as the only child and heir of *Ann Gardner* (formerly *Ann Haward*) deceased, of the remaining sixth-part; the decree also declared, that the children of *William Haward* must elect whether they would take under or against the will of *Ann Haward*; and *James Haward*, and *Edward Haward* being infants, it was referred to the Master to inquire whether it would be for their benefit to take under or against the will.(1)

[414] Under this decree, the adult children of *William Haward*, having elected to take against the will of [415] *Ann Haward*, and the Master having reported that the like election would be for the benefit of the infant; a [416] petition was presented by *Elizabeth Haward*, stating, in addition to the preceding facts, that the estates of *Serle Edward Haward* were let at rents forming a total of £870 *per annum*, of which the portion devised by *Ann Haward* [417] to the petitioner, amounted to £600, the remainder being by her devised in moieties (of £135 each), one to *George Gardner*, the other, for the benefit of *Jane Haward* and her children by *William Haward*, to whom the testatrix had also devised her own estate at *Nine Elms*, of the annual value of £115, and who therefore, under her disposition, would take to the amount of £250 only; that by the decree, the petitioner and *George Gardner*, take each, one-sixth of *Serle Edward Haward's* estates, amounting to £145 *per annum*, and *Jane Haward* and her children take the remaining four-sixths parts, amounting to £580 *per annum*, by which distribution, *Gardner* derives a benefit of £10 *per annum*, and *Jane Haward* and her children (independently on the *Nine Elms* estate intended for them), of £445 *per annum*, while the petitioner sustains a loss of £455 *per annum*. The petition prayed, that the petitioner might be declared entitled to the estate at *Nine Elms*, devised by *Ann Haward*, for the benefit of *Jane Haward* and her children, by way of compensation, as far as it would extend for the loss sustained by the petitioner of the estates devised to her by *Ann Haward*, which *Jane Haward* and her children have elected to take against the will of *Ann Haward*; and that in taking the accounts directed by the decree, of the rents of *Serle Edward Haward's* estates, the Master might allow to the petitioner a proper sum, in compensation for the rent of the estate at *Nine Elms*, from the death of *Ann Haward*, till the petitioner should be let into possession, to be paid from the share of *Serle Edward Haward's* estates, to which *Jane Haward* and her children should be found entitled.

May 13, 1819. The petition having, on the last petition day, been ordered to stand over for argument, was this day argued.

[418] Mr. *Horne* and Mr. *Shadwell* for the petition. No case is to be found in all circumstances precisely similar to the present, but the petition proceeds on the general principle, that where one devisee, by electing to take against the will, frustrates the testator's intention in favor of another, the benefit designed for the former shall be applied in satisfaction of the latter. *Streatfield v. Streatfield* (Ca. Temp. Talb. 176). The petitioner being, by the election of the widow and children of *William Haward* to assert their prior rights under the will of the grandfather, against the will of *Ann Haward*, excluded from the estate devised to her by the testatrix, is entitled to be indemnified *pro tanto* from the *Nine Elms* estate destined for them. The plaintiffs, seeking the aid of a court of equity, must submit to its rules, and cannot compel an inequitable distribution. The situation of the heir is, for this purpose, not distinguishable from that of the other children of *William Haward*. In the case cited, the Court applied the doctrine against the heir claiming adversely, though in that character, by descent; here the heir appears in the character of devisee, electing to take under the will of his grandfather; the rule, therefore, that no one shall claim at once under and against a will, is personally applicable to him.

Mr. *Wray*, for *William Haward*, the heir of his father, of *Ann Haward*, and of *Serle Edward Haward*. I admit that where the ancestor devises to his heir an estate of which he has power to dispose of, and to a third person another estate settled on the heir, and the heir asserts his rights under the settlement, he shall not

retain the estate given to him by the will. Here the estate which the petitioner claims was devised for the benefit, not of the heir alone, but of the widow and all the [419] children of his father ; and it is by the joint election of those persons, not the single election of the heir, that the intention of the testatrix in favour of the petitioner is frustrated. The doctrine of compensation has been applied in bequests of personalty, or devises disappointed by the election of the heir, but it has never been extended against the heir in the instance of devises disappointed by the election of others. The devisees electing to claim against the will, the estate designed for them becomes, in the event, undisposed of, and belongs therefore to the heir ; upon what principle can the Court take from him, for the benefit of the petitioner, the shares of that estate which those devisees have by their election abandoned ? Admitting that his own share is within the doctrine supposed, no case has decided that he is not entitled to retain the shares which, by reason of the election of others, devolve to him as undisposed of. The devise on trust cannot affect the question ; the estate in the trustees is neutral, and the point must be determined as if the legal estate had descended to the heir.

Another question is, whether the Court will interfere in the instance of partial disappointment ? A course which would involve great difficulties of calculation. The analogous practice under the statute of distribution (the practice of bringing into hotchpot sums advanced during the life of the intestate), has never been extended to instances of partial intestacy, where by a will affecting only a portion of the property, benefits are given to some of the children ; the Court being unable to ascertain whether either the particular intention of the party, or the equity of the case, would be accomplished by such an arrangement, and declining to encounter the intricacy of calculation.

[420] A third peculiarity of this case, and a distinct objection to this petition, is, that the petitioner herself, in effect, takes against the will of her mother ; her interest in the estates of *Serle Edward Howard*, devolves on her as his devisee ; a character inconsistent with that in which she claims compensation.

Mr. G. Wilson, for the Plaintiffs, insisted, that if the petitioner was entitled to the estate at *Nine Elms*, allowance must be made for sums expended by the Plaintiffs in its improvement.

The *Master of the Rolls* [Sir Thomas Plumer]. The object in directing this petition to stand over for argument was to discuss, not the general doctrine of election, but the peculiarities of the case, and the question, on which few authorities occur, what disposition is to be made of the estate relinquished by a party who elects to take against the will ? The principle of election is clear, not merely as an abstract theory, but as pursued to practical consequences. When a party elects to abide by the will, the practical consequence is, that he must relinquish his own estate, of which the will purports to dispose ; and the Court has in some instances directed him to execute a conveyance, in conformity to the intention of the testator, not leaving the estate to pass by the will, which would give to the devisee only an imperfect title. The doctrine is so stated by Lord Commissioner Eyre, in *Blake v. Bunbury* (1 *Ves. Jun.* 523) (concurring with many other cases), and there the plaintiffs, electing to claim " under the will, was decreed to convey the rent charge to the uses of the will " (1 *Ves. Jun.* 527). The Court imposes an implied condition, that if the party accepts the estate, which the testator had power to give, he shall convey his own, over which the testator had no power, to the individual to whom it [421] is actually, but ineffectually, devised. If he refuses to abide by that condition, and preferring his own, rejects the estate offered to him on the terms under which, if at all, he must take it, renouncing the will, it is a practical consequence that he is not permitted to retain, but must relinquish, the benefits which it purports to confer on him. So far is clear ; not as an abstract proposition, but as a practical contrivance. In most instances, the party has elected to abide by the will, and then no difficulty occurs. This case presents further peculiarities, in addition to the circumstance of election to take against the will. If, however, a clear rule is established, no theoretical objection can be suffered to interfere with it ; if no rule exists, the Court must on principle consider what is to be done in a new case. Being reluctant to innovate, more especially in a question of real property, I was desirous to ascertain whether it had not been settled by decision, that, in the event of election to reject the will, the estate relinquished



by that election, shall be taken from the heir at law, and given to the disappointed devisee.

*Noys v. Mordaunt*, determined in 1706, is said to be the first case on the subject of election; and a great authority, Chief Baron *Eyre* (4 Bro. C. C. 24; 1 Ves. Jun. 523), has described this practice of putting devisees to election, however reasonable, as a strong operation of a court of equity. I cannot say that I am at all satisfied that the mere circumstance of peculiarity in this case, that the heir at law is one of the individuals who have made election, ought to distinguish it. Though a party must be taken to have elected, still if a new right arises, not adverted to at the time, as no one is ever compelled to elect till the whole subject matter has been ascertained, and he knows all [422] his rights on each side, the Court would, according to its habit, indulge him with farther opportunity to be informed of his interests. It is to be considered also, that the heir is bound to elect, and has made election, not in the character of heir, but between two instruments in neither of which is that character concerned; he is required to declare whether he will abide by the will of *Serle Edward*, or by the will of *Ann*; of these he prefers the former, but that choice has no connection with his claim as heir. When the heir asserts his paramount title, no court is authorised *a priori* to impose any condition on him. Insisting on his right before the will was made, and declining to accept any benefit under it, what authority has this Court to annex a qualification? To deprive him of a title prior to any will? I think, therefore, that neither of these points is conclusive; but the fair way of considering the question, and the true test, is this; supposing the heir not interested in either instrument, nor having made any election, to advance a claim to this *hæreditas jacens*, alleging that the estate not being accepted by the person for whom the testator destined it, is in effect given to no one, and therefore (as a devise lapsed by the death of the devisee in the life of the testator) devolves to him in his character of heir; supposing him thus neither affected by any antecedent acts, nor interested in the property under an instrument varied by the wills of his father or grandmother, how would the Court deal with his claim? On general principles, it might be said, that the estate not being in the event effectually given, the devisee (who cannot be permitted to enjoy a double benefit, both the property devised to him, and property the title to which is inconsistent with the will), must indeed relinquish it, but that what is then to be done with it, is a quite different question. The doubt is, does it pass to the heir, as, in the actual event, un-[423]-disposed of, the will being frustrated; or come into the hands of the Court, under an authority to apply it for the benefit of the person who has been disappointed? If that authority has been constantly exercised, however disputable in its nature, it cannot now be impeached.

Few cases are to be found on the subject, but it must be acknowledged that the language of the great judges by whom it has been discussed, proceeds to the extent of ascribing to the Court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and dispose of it in favour of those whom he has disappointed; not merely taking it from one, but, such is the uniform doctrine, bestowing it on the other. A doctrine not confined to instances in which the heir is put to election, and which may be said to bring him within the operation of the general principle, but prevailing as an universal rule of equity, by which the Court interferes to supply the defect arising from the circumstance of a double devise, and the election of the party to renounce the estate effectually devised; and instead of permitting that estate to fall into the channel of descent, or to devolve in any other way, lays hold of it, to use the expression of the authorities, for the purpose of making satisfaction to the disappointed devisee; a very singular office; for in ordinary cases, where a legatee or devisee is disappointed, the Court cannot give relief; but here it interposes to assist the party whose claim is frustrated by election. Such is the language of Lord Chief Justice *de Grey*, cited with approbation by Lord *Loughborough*: "the equity of this Court is to sequester the devised estate *quousque* till satisfaction is made to the disappointed devisee." (*Lady Cavan v. Pulleney*, 2 Ves. Jun. 560). I conceive it to be the universal doctrine that the Court possesses [424] power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course; out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands. In the case to which I have referred, Lord *Lough-*

*borough* uses the expression, that the Court "lays hold of what is devised, and makes compensation out of that to the disappointed party."

A distinction has been attempted between real and personal property: I cannot see a principle on which the Court could think itself at liberty to sequester and distribute personalty, in the event not given to the individual intended, that would not apply equally to realty; the object being to direct the devolution of the property in a course prescribed by equity. Undoubtedly in the instance of personalty, satisfaction has been repeatedly given. In a case not reported (the name of one of the parties I recollect was *Brodie*) the property being divided into eleven parts, the Court followed it, for the purpose of satisfaction; and in several cases, anticipating either contingency, the decree has provided for the event of election to take against the will, by a direction for making compensation out of the estate. It would be too much now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir at law without any will to guide it; for to this purpose there is no will; the will destined to the devisee, not this estate but another: he takes by the act of the Court (an act truly described as a strong operation); not by descent, not by devise, but by decree; a creature of equity.

If this doctrine were now advanced for the first time, some objections might seem to occur to it. The dis-[425]-appointment of the devisee not arising from any wrong done to him, or any right withheld from him, but resting in the loss of a gift, from a want of title in the testator to dispose of what is given, how does it afford any claim to compensation in a court of justice? The testator might have anticipated and provided for this event, and have, in such case, substituted one estate for the other; and, perhaps, if he were now living, this is what he might wish to do; but not having expressed any such intention in his will, how can the Court supply the omission, and make a new will for him, giving one estate not devised, in lieu of the estate which was? In what way too is this to be effectuated, so as to invest this disappointed devisee with a clear and indefeasible title in the estate thus given him by the Court? Did the estate pass under the devise or did it not? If in consequence of the election and the noncompliance with the implied condition, the devisee is precluded from taking the estate, and no other disposition of it is made by the will, must it not devolve on the heir at law as being in event undisposed of; and if so, what equity is there against the heir, supposing him no party to the election, to restrain him from recovering in ejectment; or if not restrained, how is any defence to be made against his claim under the devise, which the devisee is precluded, by his election, from availing himself of, as well in law, according to Lord *Redesdale*, (2) as in equity? How too [426] is the devisee ever to obtain the legal estate, or to perfect his title without a conveyance from the heir at [427] law? And if there be no equity against him, how is a court of equity to compel him to part with his inherit-[428]-ance, favoured as that title in general is both in law and equity?

[429] If the other alternative is taken, the only way of avoiding the apparent contradiction of considering the [430] estate to pass by the will for one purpose, and not to pass for another, is to separate the legal estate from the [431] beneficial, and to allot the former only to the devisee, and reserve the latter for the disposition of the Court; but where is the ground for that separation; the will, if it is to operate at all, having given both the legal and the equitable interest to the same person, and laid no ground in the intent of the deviser for any distinction in their destination?

The devisee's election to abide by his own estate may properly operate to preclude his taking the devised estate; but how can it make him take in a different character, and convert him into a trustee for another, to whom the testator has not expressed any intention to give it? The disappointed devisee in respect to the estate devised to another has no title whatever to that estate, either under or *dehors* the will; What equity then has he to it?

These are some of the difficulties which might have been urged by way of objection to this part of the doctrine of election, had it been now open to discussion; in the present case, however, some of these difficulties are ob-[432]-viated, and the doctrine in its full extent has been too long considered as settled to make it safe to disturb it.

The question then is, will the circumstances in which *Elizabeth Haward* is placed, prevent the application of this doctrine? Taking a benefit by the election, not of

herself but of another, her situation is certainly in some degree peculiar. Under the election of the widow and children of *William Haward*, to abide by the will of his father *Serle Edward Haward*, the estates of the latter becoming divisible, the petitioner takes one-sixth; the question is, whether having by the election of other parties, acquired a right not intended for her by her mother, she can now insist on satisfaction for the disappointment of the devise contained in her mother's will, while she enjoys a benefit which has come to her against that will? That question is certainly new; no case has occurred in which an individual in part satisfied, deriving from one source a partial, has been declared entitled to additional, compensation. It has been ingeniously argued, that as the doctrine of bringing into hotchpot antecedent portions, is not applicable to a case of partial intestacy, the doctrine of compensation cannot be applied to partial disappointment; but that analogy will not, in my opinion, justify a departure from the ordinary rule. If the petitioner is the only individual disappointed, being deprived of an estate of £600 a-year destined to her, and taking an estate of £145 a-year only, and if the estate at *Nine Elms* is now in the hands of the Court, has not the established practice determined that it is to be applied in satisfaction of her as a disappointed devisee? To the extent of the difference between £145 and £600, she sustains that character. Difficulties in the calculation of quantity may be removed by a reference to the Master; *plus* or *minus* cannot vary the rule; here is disappointment; and I [433] think that the circumstances of novelty cannot so entrench on the entirety of the principle, as to authorise me in refusing compensation.(3)

[434] The only remaining question is, on what terms must compensation be made? From what time is the estate [435] at *Nine Elms* to be given up to the petitioner? The election is retrospective; reverting to the time of the [436] will, the parties electing reject all that comes under it; consequently they have in the interval enjoyed the [437] property of another; to retain the past rents and profits which they have received with no other title than that [438] conferred by the will, would be to claim under it; renouncing the will, they admit that they have been in [439] possession of an estate without title. There must be a retrospective account of rents and profits, and an ac-[440]-count of sums expended for melioration of the estate, which must be reimbursed.

[441] His Honour doth order that the said Master's said report, bearing date the 20th day of *May* 1818, be con-[442]-firmed, and His Honor doth declare that the petitioner *Elizabeth Haward* is entitled to the estate of the testatrix *Ann Haward*, widow, in the pleadings named, situate at *Nine Elms*, &c., in and by her will devised to or for the benefit of the Plaintiff, *Jane Haward*, widow, and her children, as and by way of compensation to the said *Elizabeth Haward*, as far as the same will extend, for the loss sustained by her of the estates and benefits devised to and intended for her, in and by the will of her mother the said *Ann Haward*, widow, which the said *Jane Haward*, and her children have elected to take (under the decision of this Court) against the said will; and it is ordered that the said *Elizabeth Haward* be [443] forthwith let into possession of the said estate at *Nine Elms* aforesaid, and into the receipt of the rents and profits thereof accordingly; and it ordered that the said Master, in taking the accounts of the rents and profits of the testator *Serle Edward Haward's* estates, which are directed by the decree made in this cause, fix and allow to the said *Elizabeth Haward*, as between her and the said Plaintiff, *Jane Haward* and her children, such sum as the said Master shall think proper, by way of compensation, in the nature of occupation rent for the said estate at *Nine Elms*, from the death of the said testatrix, *Ann Haward*, widow, until the said *Elizabeth Haward* shall be so let into the possession thereof as hereinbe-[444]-fore directed; and it is ordered that the said Master do take an account of all sums of money which he shall find to have been laid out and expended by the said Plaintiff and her children, in repairs and improvements of the said estate and premises situate at *Nine Elms* aforesaid, since the decease of the said *Ann Haward*, during the time they have been in possession thereof, and it is ordered that the said Master do deduct the same from what he shall certify to be due from the said Plain-[445]-tiffs by way of such occupation-rent as aforesaid; and it is ordered that the Plaintiffs and the Defendant, *William Haward*, do pay unto the said *Elizabeth Haward* what the said Master shall so certify to be due to her in respect of such occupation-rent as aforesaid, after such deduction as aforesaid.

—Reg. Lib. A. 1818, fol. 1173–1175.

(1) Some variety of practice appears to have prevailed, in the event of disability (by minority or coverture) of the person bound to elect. On a devise to a younger son, by a will not duly attested, containing a contingent legacy to the heir, with express condition of forfeiture if she controverted the will, the heir being an infant, Lord *Hardwicke* held "that she could not judge for herself, nor could the Master judge for her, it being on several contingencies, so that, until she came of age, no election could be made" and he directed the devisee (being restrained from committing waste) to receive the rents of the devised estates, subject to farther order. *Boughton v. Boughton*, 2 *Ves. Sen.* 12.\* According to *Vernon's* report, a like course was pursued in *Thomas v. Gyles*, 2 *Vern. Sen.* 232, but from the Register it appears, that in that case, the rights of the parties were founded, not so much in the doctrine of election, as in express contract between the testatrix and the ancestor of the infant heir. In *Bor v. Bor*, 3 *Bro. P. C. ed. Toml.* 173, final election by the heir was suspended during minority, with provisional election by his guardian in the interval; the Lord Chancellor of Ireland having decreed, that the infant should have six months after he attained the age of twenty-one years to elect, and should, in the mean time, receive the rents of the devised or descended estates at the election of his guardian, without prejudice, and subject to the order of the Court. In *Chetwynd v. Fleetwood*, 1 *Bro. P. C. ed. Toml.* 300; 2 *Schoales & Lefr.* 266, an infant heir being under an obligation to elect, either to provide for the payment of a sum which his ancestor had covenanted to pay, or to convey estates which, in consideration of that payment, had been settled on him, Lord *Talbot*, C., directed an inquiry which would be most beneficial to the infant, and on the Master's report decreed payment of the sum; and his decree was affirmed by the House of Lords. A like practice seems to have been adopted in *Goodwyn v. Goodwyn*, 1 *Ves. Sen.* 228; but in *Streatfield v. Streatfield*, *Ca. Temp. Talb.* 176, the same judge postponed election, on the ground of the inability of the heir to elect during minority (see the decree, 1 *Swans.* 447 (C)); and in *Hervey v. Desbouverie*, *Ca. Temp. Talb.* 130, reserved the election of an infant daughter of a freeman of London to take by the will or the custom, until twenty-one or marriage.

In *Rushout v. Rushout*, 6 *Bro. C. P. ed. Toml.* 89, an infant being bound to elect between different sums (one payable at eighteen or marriage, and the other at twenty-one or marriage), charged on distinct funds, Lord *Cowper*, C., decreed that she should make her election at the age of eighteen; she accordingly at that age (by a written instrument) elected to take the latter sum, and the decree was affirmed by the House of Lords. Lord *Redesdale* has stated, that, in this case, "it was considered that the Court was bound to see what was for the benefit of the infant, and make election for her, for otherwise other persons might be injured for want of that election," 2 *Schoales & Lefr.* 267. It seems difficult to reconcile this statement with the printed report, according to which the infant was ordered to elect, and actually elected, and the election was suspended during five years, the decree to elect having been pronounced in 1716, and the election made in 1721. In *Bigland v. Huddleston*, 3 *Bro. C. C.* 285, n., the Master was directed to inquire whether it would be for the benefit of the infant heir to take under or against the settlement.

In the instance of disability by coverture, Lord *Hardwicke* held, that a married daughter of a freeman of the city of London could not declare her election to take her share of her father's personal estate, under his will or by the custom, without appearing either in Court, or, if resident abroad, before persons named as commissioners; *Parsons v. Dunne*, 2 *Ves. Sen.* 60, *Belt's Supplement*, 276; and a case was on that occasion cited, in which the husband and wife attending in court and differing in election, "Verney, Master of the Rolls, referred it to a Master, to see what was most for her benefit." 2 *Ves.* 61. See 2 *Ves. Jun.* 560; 4 *Ves.* 626.

In *Ardesoife v. Bennet*, 2 *Dick.* 463, the receipt during five years, by a married woman, of interest on a legacy bequeathed to her separate use, and manifestly more valuable than the estate to which she had an alternative title, was held to constitute an election conclusive on her heir.

In *Pulteney v. Darlington*, Mrs. *Pulteney* was ordered, within a limited time, to signify her election to take under the will of Sir *William Pulteney*, or under the will of General *Pulteney* by signing the Registrar's book by her clerk in court; and the time having expired, the Master was directed to inquire which claim was preferable, and election was made in conformity to his report. 7 *Bro. P. C. ed. Toml.* 546, 547; 3 *Ves.* 385; 2 *Ves. Jun.* 560.

Lord Rosslyn, in *Wilson v. Lord John Townshend*, 2 *Ves. Jun.* 693, alluded to various orders in the instance of *femmes couvertes* bound to elect, directing an inquiry by the Master, which fund would be most beneficial; but the comparative value of the funds appearing there on the pleadings, he decided the question, and dismissed the bill without a reference. In *Vane v. Lord Dungannon*, Lady Charlotte Kerr, a *femme coverte*, was directed to make her election before the Master within six months. 2 *Schoales & Lefr.* 133.

Lord Eldon seems incidentally to admit the practice of directing an inquiry by the Master as established in the instance of coverture, *Davis v. Page*, 9 *Ves.* 350; and it is understood as established in the instance of minority also (see 1 *Swans.* 413, & 2 *Fonbl. Treat. on Equity*, 326, n.), though possibly it would not be unreasonable, in the latter instance at least, considering that preference may be determined by circumstances independent of pecuniary value, to distinguish between cases where the interests of third persons require an immediate, and where they admit a suspended, election.

(2) "The rule of election, I take to be a rule of law, as well as of equity; and the principal reason why courts of equity are more frequently called upon to consider the subject (particularly as to wills) than courts of law, I apprehend is, that at law, in consequence of the forms of proceeding, the party cannot be put to elect; for in order to enable a Court of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner, as to be deemed concluded by what he has done; that is, to have elected. This frequently throws the jurisdiction into equity, which can compel the party to make an election, and not leave it uncertain under what title he may take take." 2 *Schoales & Lefr.* 450.

Lord Rosslyn, also is reported to have said, "The principle of these cases" (cases of election) "is very clear. The application is more frequent here; but it is recognized in courts of law every day. You cannot act, you cannot come forth to a court of justice, claiming in repugnant rights." 2 *Ves. Jun.* 696. Lord Mansfield, in a judgment the authority of which, on every point, has been strongly questioned, *Sugden on Powers*, 498, *et seq.* professed the same opinion. 4 *T. R.* 743, n. See *Goodtitle v. Bailey*, *Cowp.* 597.

That no court will enforce rights which it recognises as repugnant, may be admitted probably for an universal proposition; but courts which differ in the rights which they recognise, necessarily differ in the recognition of repugnancy. In no instance it is believed (with the exception of the anomalous cases last cited), has a court of law adverted to a clause by which a testator assumes to dispose of the property of his devisee, in favour of a third person, for the purpose of declaring the right of the devisee, to the benefit offered by the will, repugnant to his right to retain the property of which that clause purports to dispose. It is obvious that such a clause, proceeding from one who is not the owner, cannot transfer the legal interest in the property; being distinct and unconnected, without words or necessary implication of reference, it cannot qualify the prior clause of devise as a condition; nor can it operate by estoppel, against the devisee, no party to the will, and whose title to his own estate, is not derived from the testator: failing, therefore, to effect, it serves only to denote, the purpose of its author; and becomes the peculiar subject of the jurisdiction of a court of equity, which, in administering the rights of its suitors, by enforcing the obligations affecting their conscience, executes the intention in which those obligations originate.

The instances in which courts of law have applied the maxim *allegans contraria non est audiendus*, are instances of *inconsistent titles*, whether to the same subject (as a contemporaneous estate for life and in tail, in the same land; see *Jenkins*, *cent.* 1, case 27, or the claim of a tenant under and against his landlord, mentioned by Lord Rosslyn, 2 *Ves. Jun.* 696), or to different subjects (as dower at once in the land taken, and in the land given in exchange; see the case cited, 3 *Leon.* 271; *Perk. s.* 319), the assertion of one title being incomplete, without a negation of the other. It is a maxim, not of morality, but of logic; and compels election between claims, in respect, not of the injustice, but of the technical impracticability, of their contemporaneous assertion.

In courts of law, the suitor is permitted to assert rights, which, so far as the intention of the parties constitutes repugnancy, are confessedly repugnant. "If a man make a feoffment in fee of lands or tenements, either before or after marriage, to the use of

the husband for life, and after, to the use of A. for life, and then to the use of the wife for life, *in satisfaction of her dower*, this is no jointure, within the statute, &c., and albeit in that case, A. should die, living the husband, and after the death of the husband, the wife, entrench, yet this is no part of her dower, *but she shall have her dower also*. *Co. Litt.* 36 b, and see 4 *Co.* 2 b, *Wilmot's Opinions*, p. 188, 9 *Mod.* 152. So, if A. disseises B., tenant for life in fee, of the manor of Dale, and afterwards gives the manor of Sale to B. and his heirs, in full satisfaction of all his rights and actions which he has in or for the manor of Dale, which B. accepts, yet B. may enter into the manor of Dale, or recover it in any real action. 4 *Co.* 1 b.

No legal principle is better established, than that on which these decisions proceed, namely, that a freehold right shall not be barred by collateral satisfaction, *Co. Litt.* 3 b, *Doctrina Plac.* 17. The like assertion of rights morally repugnant, has been sanctioned in many of the cases in which the courts have over-ruled a plea of accord and satisfaction. See *Peyton's case*, 9 *Co.* 77; *Grymes v. Blofield*, *Cro. El.* 541; *Co. Litt.* 212. The Plaintiff being permitted, on technical grounds, to enforce a claim for which he had received a compensation.

A devise or bequest of that which is not the property of the testator, is void at law. *Bransby v. Grantham*, *Plowd.* 525, 526; *Litt. s.* 287; *Co. Litt.* 185 b; *Perk. s.* 526; *Godolph. Orph. Leg. part* 3, c. 6, s. 5; *Swinb. on Wills, part* 3, s. 3, n. 8, s. 5, *prope fin.* s. 6, n. 17; *Dr. & Student, l.* 2, c. 25, p. 126. "If a man bequeath to one, another man's horse, in the law of the realm, the legacy is void to all intents, and he to whom the legacy is made, shall neither have the horse, nor the value of the horse." *Id. l.* 2, c. 55, p. 300, and see 3 *Co.* 29 a. To suppose that more favor would be shown to a clause in a deed, purporting to pass the property of a stranger, would be to contradict the established principle of construction. Being void, therefore, to all intents, such clause, whether in a deed or in a will, is inoperative at law, either for transferring the subject, or for qualifying a previous valid gift. To convert it into a condition, according to the equitable practice, by incorporation with a distinct clause, to which in terms it contains no reference, would be inconsistent with the rule, that conditions imposed by the particular intention of the individual (as distinguished from conditions founded in the nature of the relation or contract between the parties, and by us denominated conditions in law) must, conformably to the feudal principle, *Craig. Jus. Feud. l.* 2, *diag.* 5, s. 4, be expressed. *Co. Litt.* 201 a.

Many decisions may be found on the question what words annexed to the clause of gift, for the purpose of connecting it with a distinct clause, constitute a condition; *ea intentione, ad effectum*, sufficient in a will (*Co. Litt.* 236 b), are not sufficient in a deed (*Co. Litt.* 204 a); but in no case, it is believed, has a court of law referred a condition from words applicable only to another subject, and void in their obvious sense, as purporting to pass an estate, not the property of the author of the clause.

The general principle of the law, on the subject of repugnant rights, is illustrated by the decisions on the concurrent claims to jointure and to dower.

The Statute of Uses (27 *H.* 8, c. 10), having transferred the legal estate to the *cestui que use*, all women then married, would have become dowable of lands held to the use of their husbands, retaining their title to lands settled on them in jointure. To prevent this injustice, it is by that statute (s. 6), declared, that a woman having an estate in jointure with her husband (five species of which are enumerated), shall not be entitled to dower; and a subsequent clause (s. 9), reserves to the wife, a right to refuse a jointure assured during marriage. See *Wilmot's Opinions*, p. 184, *et seq.* It has been decided, that the species of estates enumerated, are proposed only as examples, and the courts have in construction extended the operation of the statute, to other instances, within its principle, though not within its words. *Vernon's case*, 4 *Co.* 1.

By the effect of this statute, therefore, no widow can claim both jointure and dower; jointure before marriage, is a peremptory bar of dower; jointure after marriage, she has an option to renounce.

Lord Redesdale, in support of the proposition, that election is a principle of law (2 *Schoales & Lefr.* 451), has referred to 3 *Leonard*, 273, That report (which is cited in 1 *Eq. Ca. Ab. Dower B.*) contains only the argument of *Egerton*, Solicitor-general; but the case (*Buller v. Baker*) is fully reported in 3 *Co.* 25; *Poph.* 87; 1 *And.* 348; and the decision proceeded on the construction of the statute. The passage to which Lord Redesdale refers (3 *Leon.* 272, not 273), is no more than a dictum of *Egerton*.

in his argument. It is true, however, that the demandant in a writ of dower, might be barred by plea of entry and acceptance of lands settled in jointure after marriage (*Doctrina Plac.* p. 149, see the form of pleading, *Co. Entr.* 172 a), but it is also true, that that plea is founded on the act of H. 8. The act having declared jointure a bar to dower, but reserved to the widow the option of refusing a jointure made after marriage, the question in that case was, "whether the widow had accepted or refused the jointure?" If she had not refused under the 9th, she was barred of dower by the 6th, section. The acceptance of the jointure constituting the case there specified, the widow was barred, not by her agreement, but by the statute, *Dyer* 317 a; and it is abundantly clear, that acceptance alone, without the operation of the statute, would not have formed a bar. *Vernon's case*, 4 Co. 1. *Duchess of Somerset's case*, *Dyer*. 97 b.

In *Gosling v. Warburton* (*Cro. El.* 128, reported under various names, 1 *Leon.* 136, *Owen*, 154), also cited by Lord *Redesdale*, and also referred to in *Eq. Ca. Ab.*, *ubi supra*, a rent charge was devised, expressly "in recompence of dower"; and the decision establishes only, that such a benefit so devised, is a jointure within the extended construction of the statute, and cannot be claimed after a recovery of dower.

The series of decisions under this statute (the only instances in which the doctrine of election has been applied at law, in a manner analogous to its application in equity), being founded expressly on the provisions of the statute, in contrast to the rules of the common law, constitute, it is conceived, a conclusive proof that the doctrine of election is equitable only; and one of the earliest instances (*Lacy v. Anderson*, *ante*, p. 398, n.) in which that equitable doctrine was enforced, is the case of a copyhold estate, devised and accepted, in satisfaction of dower, which not being within either the strict, or the extended, import of the statute, a jointure, would not have constituted a bar at law; and the aid of equity was requisite, to prevent the disappointment of the testator's express intention.

Accordingly, many authorities occur, in which the doctrine of election is described as exclusively equitable. In the report of *Noys v. Mordaunt*, by Chief Baron *Gilbert*, it is distinctly stated, that, "although the three daughters shall at law take their proportion of the entailed lands, as co-heirs in tail, yet the eldest daughter in equity shall have an equivalent out of the fee-simple lands." *Rep. in Eq.* 3. Lord *Hardwicke* repeatedly refers to that case, which he considered the first of the kind, as founded on equity (1 *Ves. Sen.* 306; 3 *Bro. P. C. ed. Toml.* 178, 179) a benevolent equity (3 *Atk.* 715), and describes the right to compel election as derived from an equity of the Court of Chancery (2 *Atk.* 629). That description is in substance adopted by Lord *Eldon* (6 *Dove* 179). Lord Chief Justice *de Grey* has accurately distinguished between the mode of indirectly disposing of the property of a stranger, by express condition at law, or by implied condition in equity, 3 *Ves.* 530. And Lord Commissioner *Eyre* describes the practice of putting devisees to election, as a strong operation of a court of equity. 4 *Bro. C. C.* 24; 1 *Ves. Jun.* 523.

(3) The effect of election to take against the deed or will, has been the subject of much doubt; and though no contradiction, it is believed, exists in the decisions on that point, it seems not very easy to reconcile all the dicta. The principal question is, whether such election induces absolute forfeiture, or only imposes an obligation to indemnify the claimants whom it disappoints? Whether a devisee, asserting his right to property of which the will assumes to dispose, must relinquish the whole of the benefits designed for him, or so much only as is requisite to compensate, by an equivalent, the provision which he frustrates?

Such of the dicta as appear authorities for the doctrine of forfeiture, consist, with one exception, of general expressions only, not of direct opinions on the question. Thus it has been said, that a party cannot take under and against a will; that he must abide *in toto* by the will, or by his inconsistent title; that no one taking under a will can contravene it; that he must part with his own estate, or not take the bounty; *Cowper v. Scott*, 3 *P. W.* 119. *Cookes v. Hellier*, 1 *Ves. Sen.* 235. *Morris v. Burroughs*, 1 *Atk.* 404. *Pugh v. Smith*, 2 *Atk.* 43. *Wilson v. Mount*, 3 *Ves.* 194. *Wilson v. Lord John Townshend*, 2 *Ves. Jun.* 697. *Broome v. Monck*, 10 *Ves.* 609; expressions which (considering that a party electing to take against a will on the terms of compensation, takes the surplus after compensation, under it), in strictness authorise the doctrine of forfeiture: but it may be reasonably doubted.

whether in these dicta the Court adverted to that complex case in which alone the question arises.† Their real import seems to be no more than the general proposition on which the doctrine of election rests; that a party, claiming under one clause in a will to his advantage, shall not treat as a nullity another clause at his expense, where the two clauses are, in the intention of the testator, parts of one scheme of disposition; shall not assert at once the whole of his claims under the will, and the whole of his claims against it; a meaning less equivocally expressed by Lord *Talbot* in *Hervey v. Desbouverie*; "it would be unreasonable to admit a latitude of taking by the will, as far as that makes for the party, and likewise by the custom, as far as that will go, and waive the other part of the will which makes against him." *Ca. Temp. Talb.* 136. In none of these cases did the precise question of forfeiture or compensation arise; it does not appear, that the fund relinquished was more than sufficient to compensate the disappointed claimants; there is no suggestion of the existence of a surplus; in which event only the effect of compensation would differ from the effect of forfeiture.

The words of Lord *Camden*, in *Villareal v. Lord Galway*, 1 Bro. C. C. 292, and of Lord *Erskine*, in *Thellusson v. Woodford*, 13 Ves. 220, 221 (see 2 Mer. 93), incline, certainly, to the doctrine of forfeiture; but in those cases, as in the former, the question was not distinctly presented to the Court. The judgment of Lord *Eldon*, in *Green v. Green*, 2 Mer. 86, has, however, been generally understood as sanctioning that doctrine; and it cannot be denied, that some expressions in the printed report intimate such an inclination of opinion, and form by far the strongest authority on that side of the question; but it must be recollected, 1. That those expressions amount neither to a decision, nor to a positive opinion. 2. That the case stated by the Court for the purpose of raising the question, was a case of express contract, as distinguished from an implied condition imposed by the form of a will, and that no dissent was intimated from the authorities cited, sanctioning, in the latter instance, the doctrine of compensation. 3. That the very ungracious character of the claim advanced by the Defendant, presented a strong inducement to the Court to struggle against him, and not to decide in his favour till satisfied that no other decision could be reconciled with its judicial duty. 4. That on a subsequent, as well as on a former, occasion, Lord *Eldon* has distinctly, in the instance of wills at least, sanctioned the doctrine of compensation. That doctrine seems conclusively established by the following series of dicta and decisions.

In *Webster v. Mitford* (June 1708), the testator directed the sum of £4000 to be invested in the purchase of lands, one moiety of the rents of which was to be paid to his widow, and the other moiety to *E. W.* and *J. R.* during their lives, with remainder, after the determination of those estates, to *M. H.* and *W. W.* and an express proviso that, if his widow insisted on her marriage-agreement, the bequest to her should be void, and in such case the moiety originally devised to her was limited to *E. W.* and *J. R.*, and after their death, to descend as the other moiety: the widow electing to take a moiety of her husband's personal estate, to which she was entitled under her marriage-settlement, and that demand having caused a deficiency in the funds for payment of legacies, the Court directed, that such part of the profits of the sum of £4000 as by the will was intended for the widow, should be applied during her life towards supplying the deficiency. In this case the widow's election, by the express words of the will, operated a forfeiture, yet the Court assumed jurisdiction to qualify the effect of that forfeiture; and, instead of permitting it, by determining her interest, to accelerate the enjoyment of the estates in remainder, sequestered her interest, for compensation to those whom her election disappointed; and assumed that jurisdiction, according to the only printed note of the judgment, on general principles of equity. "The wife's waiving the devise, and being let in upon the personal estate, wrought a deficiency in the legacy. Lord *Chancellor* thought it the highest equity, that *B.*, who had by the waiver gained the possession of an estate, of which he would have had but a reversion if the wife had accepted the devise, should contribute what he was benefited by the waiver towards raising a fund for payment of the legacies; and His Lordship thought £4000 in reversion worth but £3000 in possession, and decreed that, according to this estimate, the value of the lands, being settled by the Master, should be charged, if the legacies required it." 2 *Eq. Ca. Ab.* 363, marg. This decision, therefore, established the principle, that the fund forfeited, though under an express proviso,



by election to take against the will, should be sequestered for compensation to those whom that election disappointed. A statement of the case (which in other respects, particularly in its analogy to *Lewis v. Madocks*, 8 Ves. 150; 17 Ves. 48; 19 Ves. 66; and *Prebble v. Boghurst*, 1 Swans. 309, appears not unimportant) extracted from the register, is subjoined, 1 Swans. 449 (D).

In *Streatfield v. Streatfield*, 1735, *Ca. Temp. Talb.* 176, the testator having devised to his daughters an estate of which, under a settlement in pursuance of articles before marriage, he was, in the consideration of a Court of Equity, tenant for life only, and to his grandson, the infant tenant in tail under the articles, other estates of which he was seised in fee; Lord Talbot, C., decreed, that the heir, on attaining majority, should make his election between the articles and the will, and that if he elected to take under the former, a sufficient part of the rents of the lands devised to him accruing during his life, should be invested in the purchase of freehold estates, of which so much as should be of equal value with the lands comprised in the settlement and devised to the daughters, should be conveyed to them in fee. See the declaratory and mandatory parts of the decree from the register, 1 Swans. 447 (C).

This decision is a distinct authority for the doctrine of compensation, applied by means of pecuniary appreciation to specific devisees. The surplus value, after compensation to the disappointed devisees, was not forfeited, but devolved to the infant heir, in the character of devisee; the Court interfering with his title under the will, so far only as was necessary to indemnify those whom his election disappointed.

In *Bor v. Bor*, 1756, 3 Bro. P. C. ed. Toml. 167, the decree pronounced by the House of Lords declared, that the express proviso in the will, prevented the implied condition by which the appellant, electing to take against the will, would have been compelled to convey to the devisee whom he disappointed, so much of the lands devised as should be equal in value to those of which he was deprived by the election (p. 177, *Lords' Journals*, v. 28, p. 456). The argument of Lord Hardwicke, indeed, on which this decree was founded, states the rule thus: that if the elder son defeats the will in any part, he shall not at the same time take any benefit under it (3 Bro. P. C. p. 178, n.); expressions in strictness inconsistent with the doctrine of compensation, though probably employed in a general sense, and without reference to the distinction in question; but in instances of contradiction between the judgment and the decree, the rules of interpretation evidently require that credit should be given to the decree, as the latest and the most authentic evidence of the meaning of the Court.

In *Ardesoife v. Bennet*, 1772, 2 Dick. 463, the heir, to whom the testator had bequeathed a legacy of £5000, disputing the validity of a devise of copyhold, and the devisee claiming to be satisfied out of that legacy, the value of the copyhold estate, in case the devise was void, Sir Thomas Sewell declared the administrator of the heir entitled to the legacy, subject to any satisfaction which he might be liable to make to the devisee respecting the copyhold premises: and by consent £1600 were transferred to the Accountant-general "to make good to the devisee what she might be deemed entitled to, in case she should lose the benefit of the devise." It was afterwards declared, that the heir had elected to take the legacy, and that the devisee was entitled in equity. Whether that case involved the question of election may be doubted, for the devise seems valid (see the cases collected by Mr. Cox, 3 P. W. 360); but the Court proceeded on their assumption, and the provisional order clearly adopted the principle of compensation; a portion of the legacy bequeathed to the heir being appropriated to indemnify the disappointed devisee, his administrator was declared entitled to the residue.

In *Lewis v. King*, 1789, 2 Bro. C. C. 600, Lord Thurlow is represented to have said, the testator "has disposed of the estate of another person, giving that person other property; then the party taking that property disposed of, must give up that which was given in exchange for it, to reimburse the devisee for his disappointment. Every thing the Kings take should be brought into Court as a security for the purposes of the will," p. 603. Expressions descriptive not of absolute forfeiture, but of sequestration for the purposes of the will, and to the extent of compensation only, and not including therefore the surplus after compensation; and such seems to have been the doctrine of Lord Alvanley. *Freke v. Lord Barrington*, 3 Bro.

*C. C.* 284, 286. *Whistler v. Webster*, 2 *Ves. Jun.* 372, and *Ward v. Baugh*, 4 *Ves.* 627.†

In *Pulteney v. Darlington* the doctrine of compensation is explicitly propounded by Lord Chief Justice *de Grey*, § and recognised by Lord *Rosslyn*. (2 *Ves. Jun.* 566.) The decree indeed declared, that *Frances Pulteney*, in case she should elect to take an estate tail under the will of Sir *William Pulteney*, would not be entitled to any estate under the will of General *Harry Pulteney* (7 *Bro. P. C.* ed. *Toml.* 546); expressions which may be understood as implying forfeiture; and to that apparent contradiction between the explicit doctrine of the judgment and the implied principle of the decree, the observation of Lord *Eldon* on that case seems directed. (2 *Mer.* 94.) It is clear, however, that the decree was not framed on the principle of forfeiture. Mrs. *Pulteney* having long delayed her election, a reference to the Master was directed to inquire, whether it would be more beneficial for her to take under the will of Sir *William Pulteney*, or of General *Harry Pulteney*; the Master's report that it would be more beneficial to take under the former, must have been founded on pecuniary appreciation, and on the conclusion that the benefits conferred by that will were more valuable than those relinquished; in which case, no surplus existing after compensation, the question of forfeiture could not arise. By a subsequent arrangement, the benefits given to her by Sir *William Pulteney's* will were estimated at £61,000, and that sum she secured in trust for the uses of the will of General *Harry Pulteney*, by a charge upon the estates of Sir *William Pulteney* (3 *Ves.* 385); an arrangement founded on the principle of compensation.

The expressions of Chief Justice *Eyre*, in *Blake v. Bunbury* (1 *Ves. Jun.* 521), 1792, explicitly recognise that principle, and have been repeated with approbation by Lord *Eldon* (6 *Dow.* 187); and, on this foundation, the decree in that case rests. (1 *Ves. Jun.* 527.)

In *Vane v. Lord Dungannon* (2 *Schoal. & Lefr.* 118), Lord *Redesdale* decided, that, under a will implying in the testator an erroneous supposition of the interests of some of his devisees in a distinct fund, settled by a different instrument, devisees asserting their actual, in preference to their supposed, rights in that fund, must renounce all benefit of the will. It seems doubtful, whether the Court designed forfeiture or compensation as the effect of election to take against the will; the decree directs that the benefits intended for the recusant devisee should be accumulated for the benefit of the disappointed claimants, in proportion to their interests in the fund claimed (p. 134), without limitation of amount, or provision for a surplus; the judgment imports (p. 130), that the devisee must relinquish what the will gave in order to compensate the loss sustained by the other daughter. The distinction between forfeiture and compensation seems not to have been, nor did the circumstances of the case require that it should be, an object of attention. The interest taken under the settlement being pecuniary only, if the benefits offered by the will were more valuable (in which event alone the question could arise), it cannot reasonably be supposed that the devisee would elect to take against the will.

Lord *Eldon's* elaborate judgment in *Lord Ranclyffe v. Parkyns*, 1818, 6 *Dow.* 149, containing one of the latest dicta on the question, explicitly adopts the doctrine of compensation. "If I choose to devise my real estate to the Noble Marquess opposite, and in the same will I dispose of an estate which is not mine but his, a court of equity will say, that he shall take no benefit from that will, unless he makes good the whole of the will: and the Noble Marquess would not take therefore unless he allows the whole of the will to be effectual, *i.e.* suffers his own to be disposed of according to the will, or makes compensation for || as much as he takes of mine," p. 179. This passage is in conformity with the previous dictum of the same distinguished judge, that "where a case of election is raised, it does not give a right to retain the thing itself; though it may give a right to compensation out of something else." *Dashwood v. Peyton*, 18 *Ves.* 49. (Note: The judgment of Lord *Eldon*, in *Ker v. Wauchope*, 1819 (1 *Bligh*, 1), published while these notes were in their progress through the press, contains dicta to the same effect. See p. 25, 26.)

The doctrine of compensation has been thus stated, with characteristic precision, by Sir *William Grant*. "That an heir, to whom an estate is devised in fee, may be put to an election, although, by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord *Cowper's* decision in the case in *Gilbert* (*Anon. Gilb. Ca. in Eq.* 15); for if the will is in other respects

so framed as to raise a case of election, then, not only is the estate given to the heir under an implied condition, that he shall confirm the whole of the will, but in contemplation of equity the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit correspondent to that, of which they are deprived by such noncompliance. So, that the devise is read, as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him, as shall be equal in value to the estates intended for them." *Welby v. Welby*, 2 Ves. & Bea. 190, 191.

This deduction of authorities appears (in the instance at least of election under wills and deeds of donation) to establish two propositions; 1. That, in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints: 2. That the surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right.

Assuming that the doctrine of election is equitable only, (2) the infliction of forfeiture on a devisee electing to take against the will, beyond the extent of compensation to those whom his election disappoints, would be inconsistent with the principle on which the doctrine rests. By the assumption, the devise of the testator's property has vested the legal estate in the devisee; but a court of equity (in the contemplation of which his conscience is affected by the implied condition) interfering to control his legal right for the purpose of executing the intention of the testator, is justified in its interference so far only as that purpose requires. In the common case of election to take against a will containing a devise of the property of the testator to his heir, and a second devise of the property of the heir to a stranger, the express intention of the testator, that the heir should enjoy the subject of the first devise, and the stranger, the subject of the second, is defeated by the refusal of the heir to convey the latter; and a court of equity therefore restrains him in the enjoyment of the first, till the condition, under which, in the contemplation of that Court, it was conferred on him, is satisfied. The intention of the testator, having become impracticable in the prescribed form, is executed by approximation, or in the technical phrase, *cy pres*. The devise to the stranger, rendered void as a gift of the specific subject, is effectuated as a gift of value, and effectuated at the expense of the heir by whose interference its strict purport has been defeated. By this arrangement, the intention of the testator in favour of the stranger, though defeated in form, is, in substance, accomplished; his intention, in favour of the heir, equally express, remains to be considered.

If the value of the estate retained by the heir exceeds the value of the estate designed for him, his own act is his indemnity; the benefit which he enjoys transcends the intention of the testator; but if the value of the estate of which the Court deprives him, exceeds the value of the estate of which he deprives the devisee, what disposition is to be made of the surplus? Considered as a gift of value (and on that principle the equitable arrangement is founded), the devise to the stranger entitles him to an equal amount, but is no authority for bestowing on him more; and the undisputed intention of the testator being that the subjects of both devises should be enjoyed by the heir and the devisee, what is not transferred to the devisee must remain with the heir.

A court of equity, which assumes jurisdiction to mitigate the rigor of legal conditions, and substitute for a formal a substantial performance, would act with little consistency in enforcing, by the technical doctrine of forfeiture, to the eventual disappointment of the testator's intention, a condition, not expressed in the will, but supplied by the construction of the Court, for the single purpose of executing that presumed intention.

In the instance of pecuniary claims, the question can scarcely arise, since, in a choice between two sums of money, no probable motive exists for electing the smaller; but supposing that case, as a gift to a stranger of the benefit of a settlement under which the heir of the testator was entitled to £1000, and a bequest of £5000 to the heir, and election by him to take under the settlement; by the deduction of £1000 from the bequest, in satisfaction of the disappointed legatee, and by payment to the heir of the remaining £4000, together with the sum due under

the settlement, the intention of the testator would be executed in substance, though not in form; the heir would take £5000, and the legatee £1000: by any other arrangement that intention, which must inevitably be violated in form, would be substantially defeated.

The case of specific gifts may, indeed, involve some difficulty of appreciation, by the existence of local attachments, which admit neither accurate estimation nor adequate compensation; but it is on the principle of appreciation that the Court interferes, to transfer to one party, that which is expressly, and at law effectually, given to another; and the difficulty has been repeatedly encountered. (In *Webster v. Mitford*, *Streatfield v. Streatfield*, *Ardesoife v. Bennet*, *Pulteney v. Darlington*; and see *Bor v. Bor*, *Gretton v. Haward*.) Should any case present impediments of this nature practically insurmountable, the doctrine of compensation might become, in that instance, inapplicable, but would not for that reason cease to be the general rule of the Court.

By the doctrine of compensation, and the process of sequestration for executing it (though justly described as a strong operation), the intention of the testator is, so far as circumstances admit, effected; by the doctrine of forfeiture that intention would be defeated.

\* The propriety of this order has been questioned, not without plausibility, *Belt's Supplement*, p. 248; possibly it proceeded on the notion that the disposition of the will should not be disturbed except by actual election to take against it, and that any inconvenience consequent on the suspense of election, ought to affect the individual by whose disability it was occasioned. See 2 *Ves. Jun.* 697.

† The distinction appears to have escaped the attention of the learned and acute author of the *Systematical View of the Laws of England*; after stating, that "a devisee must either acquiesce in the will, or renounce any benefit thereby," he subjoins the substance of the decree in *Streatfield v. Streatfield*, without observing the important qualification there introduced. 3 *Woodd. Lect.* 491.

‡ In *Macnamara v. Jones*, 1785, the testator's daughter claiming a sum of £10,000 under a marriage-settlement, and also benefits under the will, which contained a direction that the annuities, &c., thereby given should be in satisfaction of all demands which the several takers had on the testator's estate, the decree declared that the daughter must elect to take under the will, or to insist on her other claims, "in which case, all which she might claim under the said will, and which she hath received or might hereafter receive by virtue thereof, must be accounted for, and applied to make good to the other residuary devisees the expense of satisfying the said claims." 1 *Bro. C. C. ed. Belt*, 482. This declaration seems, at the first view, an authority for the doctrine of sequestration for the purpose of compensation, but upon examination of the statement of the case, it may be doubted whether it assumes more than the common principle of election; the will disposing of the whole of the testator's property to the residuary devisees, the extinction of the claims under the settlement, by the effect of that principle operated in their favour.

§ 1 *Swans.* 423. A full report of Lord Chief Justice *de Grey's* judgment, on the question of election is an important desideratum. The obscurity of this very complex case has been much augmented by the imperfection of the reports. The will of Sir *William Pulteney*, upon which the question arose, is not stated by Mr. *Brown* (*P. C. v.* 7, p. 530, ed. *Toml.*) an omission which renders his report unintelligible. The will may be found in 2 *Ves. Jun.* 544.

|| The term "for" seems not perfectly correct, unless understood as synonymous with the phrase "to the extent of."—Compensation is made for that which the devisee retains of his own contrary to the design of the will, but (if necessary) to the extent of that which he derives from the testator. The former is the subject for which compensation is given, the latter the fund from which it is taken.

#### (A) *Lacy v. Anderson.*

Whereas the said Plaintiffs exhibited their bill into this court, against the Defendants, for stay of their proceeding in a writ of dower, for that, as the Plaintiffs suppose, the said *Margaret*, one of the Defendants, had certain copyhold lands to her devised, in recompence of her dower, which she, after the death of her former husband, of whose lands she seeks to be endowed, accepted, and entered into, and has enjoyed

above the space of twenty years; for as much as this Court was this present day informed by Mr. of counsel on the Plaintiffs' behalf, that the Defendants had demurred to the said bill, for that the Plaintiffs confess her to be dowerable by law; and that the said copyhold lands, so to her the said *Margaret* devised, can be no bar of dower; and for [446] that also it seemed to this Court, that the said *Margaret* is not in conscience to have both her dower and the said copyhold lands also, which she had only in recompence of dower; it is therefore ordered, that if the said Defendants shall not, by *Friday* next, show unto this Court some sufficient cause to the contrary, then a subpoena is awarded against them, to make perfect and direct answer to the said Plaintiffs' bill of complaint.—Reg. Lib. A. 1581, fol. 381.

14 *June* 1583. The Defendants were permitted to proceed to judgment in the trial at law, with stay of execution, and a subpoena was awarded to the Plaintiffs, commanding them to show cause why the Defendants should not have execution.—Reg. Lib. A. 1582, fol. 569.

The register of 1584 and 1585 has been searched, without discovering any further entry in this cause.

(B) *Edward Rose, Plaintiff; Edward Reynolds and Rose his Wife, Defendants.*

For as much as this Court was this present day informed on the said Plaintiff's behalf, by Mr. being of his counsel, that the said Defendants have now of late brought a writ of dower at the common law against the Plaintiff, whereby the said *Rose* seeks to be endowed of the lands and tenements of *Edward Rose*, her late husband, deceased, albeit she heretofore had a lease for certain years, yet enduring, assured unto her by her said late husband, in recompence of her dower, which she agreed to accept, and has also enjoyed accordingly from the death of her said late husband, being about twelve years since; and albeit a decree was made in this case, the 6th day of *February*, in the ninth year of her majesty's reign, that the said Defendants should not (in respect the same lease was proved to be assured as aforesaid) claim or challenge any dower, neither against one *Palmer* and others, who were Plaintiffs in the said decree, and had purchased certain of the lands whereof the Defendant sought to be endowed, neither of any of the lands or tenements whereof the said late husband of the said Defendant, *Rose*, was seised [447] during the coverture, it is therefore ordered, that a subpoena be awarded against the Defendants, returnable *immediate*, to show cause wherefore they should not be enjoined as well from any demand of dower against the Plaintiff (being heir to the said late husband of the said *Rose*) as they were against the said purchasers who were Plaintiffs in the said decree; if it be true that there was such an agreement, that the said lease should be accepted, and was assured in recompence of the said *Rose* as aforesaid.—Reg. Lib. A. 1580, fol. 204.

Injunction granted to stay the action at law, the Defendants not having appear to the subpoena.—Reg. Lib. A. 1580, fol. 252.(1)

(1) The interference of the Court in this instance was, perhaps, founded rather in express contract, than in the general doctrine of election. So, "27 *Car. 2*, in *Gladstone v. Ripley*, Lord *Nottingham* held, first, that a jointure of a copyhold is no bar of dower at common law; secondly, that an agreement precedent to marriage to accept it as such, makes it a bar in equity; and therefore he staid the suit at law." Lord *Northington*, 2 *Eden*, 59, 60.

(C) *Streatfield v. Streatfield.*

"His Lordship doth declare, that the will of the said testator, *Thomas Streatfield*, is well proved, and that the Plaintiff, *Thomas Streatfield*, is entitled in equity, to an estate tail in possession, in the houses and lands mentioned in the settlement of the 5th of *April* 1698; but in regard the said testator, the Plaintiff's grandfather, has taken upon himself to devise the said houses and lands by his will, and the said Plaintiff is an infant, and therefore cannot declare his consent to submit to the said will; His Lordship doth order that the said Plaintiff, within six months after he comes of age, do signify to this Court whether he consents to waive his equitable right to the said houses and lands, under the said articles of the 31st of *May* 1677, and the said settlement of the 5th day of *April* 1698; and in case the said Plaintiff [448] shall signify such his consent, then the several estates devised by the said will, are to be held and enjoyed by the respective

devisees, according to the limitations in the said will ; but in case the said Plaintiff, *T. S.* shall neglect or refuse to signify such his consent, within the time before mentioned, then it is ordered and decreed, that the possession of the houses and the lands comprised in the said settlement of the 5th of *April* 1698, be then delivered to him, and that all proper parties, as *Mr. S.* one of the Masters, &c., shall direct, do join in conveying the same to him, and the heirs of the body of his father begotten on the body of his mother, and that he and they be quieted in the enjoyment thereof from thenceforth, until such conveyance shall be made ; and in that case, it is ordered that the said Master do see a sufficient part of the rents and profits of the other estates devised by the will of the said *T. S.*, the Plaintiff's grandfather, to the Defendants, *Henry S.*, *Thomas S.*, and *William S.*, in trust for the Plaintiff *T. S.* for his life, which have arisen or shall grow due during the life of the said Plaintiff *T. S.* (but without prejudice to what shall be allowed for the said Plaintiff's maintenance during the minority), be invested in the purchase of freehold houses or lands of inheritance in fee simple, and so much of them as shall be of equal value to such of the houses and lands devised to the Defendants, *Margaret S.* and *Martha Polhill*, in possession, as are comprised in the said settlement of the 5th of *April* 1698, are to be conveyed to the said Defendants, *M. S.* and *M. P.* and their heirs, as tenants in common, and the residue thereof are to be conveyed to the like uses, and upon the like trust, as the lands devised to the Defendants, *H. S.*, *T. S.*, and *W. S.*, are limited by the said will." An account was ordered of the rents and profits received by the Defendant *H. S.*, out of the lands devised to him and *T. S.* and *W. S.* with the usual directions ; an allowance, to be settled by the Master, for the maintenance of the Plaintiff *T. S.*, to be paid out of the rents of the estates devised to *H. S.*, *T. S.*, and *W. S.*, and the surplus to be invested in government or real securities. " And in case the said Plaintiff *T. S.* shall signify his consent as aforesaid within the time before mentioned, then it is ordered that the surplus of such rents and profits, over and above what shall be allowed for his maintenance, and the produce thereof be paid and delivered to him ; but in [449] case the said Plaintiff shall neglect or refuse to consent, then the same are to be applied according to the directions before given ; and in case there shall be any residue, the same is likewise to be paid to him." Reg. Lib. B. 1735, fol. 205.

- (D) Elizabeth Webster Widow, Jane Richardson Widow, and Others, *Plaintiffs* ; Margaret Mitford and Others, *Defendants*.

Upon the hearing, &c., the substance of the Plaintiffs' bill appeared to be, that *Michael Mitford*, late brother of the Plaintiffs, *E. Webster* and *J. Richardson*, and the Defendant, *Margaret Mitford's* late husband, did, in *February* 1706, make his will in writing, and reciting, that upon his marriage with the Defendant, *Margaret*, he did make some articles or agreement for securing £1200 which he had in portion with her, or leaving her some other consideration in lieu thereof, therefore, in full performance of the said articles of agreement, he did devise unto the said Defendant, *Margaret*, his wife, the lease of his house at *Clapham*, and all his estate and interest in the said house, and all his plate, rings, linen, bedding, and other household goods whatsoever, and also £100 *per annum* issuing out of the Exchequer, which he purchased for the said Defendant, *Margaret's*, life, upon the act of parliament for tonnage, with the order and tally ; and devised unto his executors (*George Mertins*, *Thomas Nisbett*, and *William Mitford*, whom he also appointed trustees) the sum of £4000, upon trust that his said executors should, with all convenient speed after his decease, purchase lands of inheritance in fee-simple of the yearly value of £200, or thereabout, in some Northern county, within sixty miles of *Newcastle-upon-Tyne*, where he was born, to be settled in such manner as might best answer his will ; and that the interest and proceeds of the said £4000, until such purchase made, should be paid to such persons, and in such manner, as the rents and profits of the lands, when purchased, were devised and were made payable, and did devise one moiety of the rents and profits of the lands so to be purchased, unto the Defendant, *Margaret*, his wife, for her life, subject, nevertheless, to the proviso in the will, and hereafter men-[450]-tioned, and the other moiety to the Plaintiffs, *E. Webster* and *J. Richardson*, his two sisters for life, equally to be divided between them, and to be by them held and enjoyed severally as tenants in common, without benefit of survivorship, and from the determination of the said several estates, and as the same should severally drop by the deaths of the said parties, such part immediately to

descend and come to the Plaintiffs, *Mary Harrison* and *Winifred Webster*, his two nieces, to be equally received and enjoyed between them ; but in case the Plaintiff, *Mary Harrison*, should marry any person, who by his family should be a gentleman of the name of *Mitford* or *Midford*, by birth, then all and singular the said premises so to be purchased as aforesaid, should, after the respective deaths of the defendant, *Margaret*, and of the Plaintiffs, *Elizabeth* and *Jane*, descend and come to and be enjoyed by the said *Mary*, and such husband, for and during their natural lives and the life of the longer liver of them, and from and after their decease, to the first son of the body of the said *Mary* by such husband, which first son he desired might be christened by the name of *Michael*, and to the heirs male of the body of such first son, and, for default of such issue, to the second and every other son and sons of the body of the said *Mary* by such husband, and the heirs male of the body of such sons successively in tail male, provided that if the said Plaintiff, *Mary*, should not by her first marriage intermarry with one of the name and family aforesaid, or in case she should, and such husband should happen to die without such issue male as aforesaid, then the said premises so to be purchased as aforesaid, should descend and come to the Plaintiff, *Winifred*, upon the same terms ; and in case neither of his said nieces should, by their first marriage, intermarry with one of the name and family aforesaid, or if they should both happen to die without such issue male as aforesaid, then the said premises so to be purchased, should descend and come to his cousin, the Plaintiff, *Michael Mitford*, for life, and to the first, second, and every other son and sons of the said Plaintiff, *Michael Mitford*, and the heirs male of the body of such sons successively in tail male, and for want of such issue, to his own right heirs for ever ; and the testator, by his said will, declared, that the said bequests, thereby given to his wife, should be in full recompence of what she might or could claim by virtue of the said articles or agreement, or [451] otherwise, howsoever ; and that if she refused to accept the same, then all and every the devises and bequests aforesaid should become absolutely void as to his said wife, and in such case, he devised the moiety of the rents and profits of the premises to be purchased and devised as aforesaid, to his wife, to the Plaintiffs, *E. Webster* and *J. Richardson*, in such manner as the other moiety is devised to them, and after their deaths to descend and go in such manner as the said other moiety is limited ; and as to the other legacies devised to his wife (in case the same became void as aforesaid) the same to go to the Plaintiffs, his two sisters and two nieces equally among them, and gave to his said two sisters and the survivor of them the £25 *per annum* which he purchased in their names and for their lives upon the act of parliament for tonnage, with the tally and order for the same, and £50 a-piece to buy them mourning, and to the Plaintiff, *Mary Harrison*, £600, and to the Plaintiff, *Winifred Webster*, £400, to be paid at their respective ages of twenty-one years or marriage, which should first happen ; and, if either of them, should die before marriage, her legacy to go to the survivor ; and if either of them should marry without the consent of her mother, if living, to forfeit and lose one-half of her legacy, which was to go and be paid to her sister ; and that the said several sums should be put out at interest, upon good security to be approved by the executors, until the same should become payable, and the interest thereof, in the mean time to be applied for their maintenance ; and after several other legacies given to other persons in the bill named, he gave all the rest and residue of his real and personal estate, unto his said wife, two sisters, and two nieces, equally among them, share and share alike, and to the minister and churchwardens of the parish where he should die, £50, to be laid out in such manner and for such uses as in the will is particularly directed ; and in August 1707, the said *Michael Mitford* died without issue ; the Defendants, *Mertins* and *Nisbett* two of the executors, proved his will, and took upon them the execution thereof ; that in September 1694, the said testator paid into the Exchequer, as a contribution, the sum of £208, 6s. 8d., upon an act of parliament then lately passed, for granting several rates and duties for tonnage of ships and vessels, for which said sum of £208, 6s. 8d. the said testator had a tally and order out of the Exchequer, to entitle him to receive the annual sum of [452] £25 during the lives of the Plaintiffs, *E. Webster* and *J. Richardson*, his two sisters, and the life of the longer liver of them, who were nominees for him in the said order ; and the said testator, designing the benefit of the said annuity for them after his decease, did, by deed poll, under his hand and seal, dated the 30th of May 1695,

declare and agree, that the said annuity should be to the use and benefit of himself for life, and after his decease, to the use and benefit of his mother, *Mary Mitford*, and the Plaintiff, *E. Webster*, equally and after the death of his said mother, then to the use and benefit of his said two sisters, *E. Webster* and *J. Richardson*, equally between them; that the said *Mary Mitford*, the mother, died in the life-time of the testator, and the said testator being also dead, the Plaintiffs, *E. Webster* and *J. Richardson*, are advised that they are entitled to the said £25 annuity in their own right, by virtue of the said deed-poll; that the Defendants, the executors, having possessed themselves of the said testator's personal estate, and of the said tally and order, the Plaintiffs expected that they would have applied the same according to the testator's will; but the Defendants, by contrivance together, pretend that the said will cannot be performed, in regard by an agreement made by the testator on his marriage with the Defendant, *Margaret*, he did agree to leave her one full moiety of his estate, and that the said will cannot bind the said Defendant, *Margaret*, or exclude her from the benefit of the said marriage agreement, whereas if any such agreement was made, the same was voluntary, and subsequent to the testator's marriage, and unfairly obtained; and, therefore, that the Defendants, the executors, may deliver to the Plaintiffs, *E. Webster* and *J. Richardson*, the aforesaid tally and order, and to have a discovery, and an account of the said testator's personal estate, and that the same may be applied according to the directions of the said will, and to be delivered in the premises, is the scope of the Plaintiff's bill. Whereupon it was insisted, by the Defendant's counsel, that the Defendant, *Margaret Mitford*, by her answer says, she believes that the said *Michael Mitford*, her late husband, was, at the time of his death, possessed of a plentiful personal estate, and that before his death, he made his will in writing, to the effect in the bill set forth, but insists that the said will ought not in anywise to affect this Defendant, for that before her inter-[453]-marriage with the said testator, viz. in or about the 6th of December 1686, the testator did enter into an agreement by deed-poll, whereby, in consideration of the intended marriage with this Defendant, and of her marriage portion, he did covenant and agree with this Defendant, and with *P. W.* and *J. O.*, that he the said *Michael Mitford* should and would, in and by his last will and testament, or by good and sufficient assurances, and conveyances in the law, or otherwise, before his death (if this Defendant should him survive), give, grant, convey, assure, and leave, for the use of the Defendant, the one full and clear moiety or half part, of all his estate, in lands, houses, hereditaments, goods, chattels, money, and estate whatsoever, as he the said *Michael Mitford*, or any other person or persons whatsoever, for him or to his use, should stand or be seised or possessed by any ways or means whatsoever, and that in such ample and beneficial manner, as that this Defendant, her heirs, executors, administrators, or assigns, at all times after the death of the said *Michael Mitford*, should and might quietly hold and enjoy and dispose of the same as her and their own proper estate, without any let or molestation whatsoever; and saith, that the said deed-poll, or marriage agreement, was precedent to the said marriage, and in consideration of a marriage portion, and to the intent, as is expressed, in and by the said marriage settlement; and therefore she hopes she shall not be compelled to accept the provision made her by the will, or be excluded from the benefit of the said marriage agreement; and saith, that she is willing to come to a fair account with the Plaintiffs, touching her late husband's personal estate, and is willing that the same shall be applied according to his will; deducting first a moiety, according to the said marriage agreement; and that the said will should be performed as to the other moiety as far as may be, and the Plaintiffs have the benefit thereof. And the Defendants, *Mertins* and *Nisbett*, by their answer do say, that they believe that the said *Michael Mitford* did make his will as in the bill is set forth, and appoint these Defendants, and the Defendant, *William Mitford*, executors thereof, and that the said Defendant, *William Mitford*, the other executor, being at the time of the testator's death in the North of England, at a great distance from London, these Defendants did therefore prove the said will without him, and did possess [454] themselves of such part of the testator's personal estate as they could come by, and they have defrayed the charges of the testator's funeral, and paid several debts owing by the said testator; and say, that in a schedule annexed to their answer, they have set forth a true account of the goods, chattels, and personal estate of the said testator, which has



any way come to their hands, as also an account of what debts they have paid, and what debts are still owing by the testator, and likewise an account of the funeral charges; and that among the debts owing they have inserted a bond entered into by the testator to her majesty, of £2000 penalty, conditioned for Mr. C. C., faithfully demeaning himself in his employment of commissioner of prizes at *Leghorn*; and these Defendants do insist to retain so much of the testator's assets in their hands, as shall be sufficient to answer that demand, in case the crown shall have occasion to resort to them for the same, or otherwise, that these Defendants may be effectually indemnified against the said demand, as also against another bond of £300 penalty to M. C., and say that they were willing to have performed the said will, as far as was in their power; but the Defendant, *Margaret Mitford*, has produced and does insist on her marriage agreement in her answer before set forth, whereby she claims a moiety of the said testator's estate, wherefore these Defendants crave the direction and judgment of this Court touching the construction of the said will, and the application of the said testator's personal estate; and these Defendants believe, that the said testator did pay into the Exchequer, as a contribution, £208, 6s. 8d., upon security of the act of parliament in the bill mentioned, and that he had an order and tally for receiving £25 per annum during the lives of the Plaintiffs, *E. Webster* and *J. Richardson*, as nominees for the testator, which said tally and order are in these Defendants' custody, and that the said testator did execute such deed-poll, concerning the said annuity as in the bill is set forth, and that therefore these Defendants submit to the judgment of this Court, whether the Plaintiffs, *E. Webster* and *J. Richardson*, are become entitled in their own right to the said annuity, or whether the same is to be esteemed part of the said testator's estate. And the Defendant, *William Mitford*, by his answer says, that being named one of the executors of the said *Michael Mitford's* will, he [455] has proved the said will, and intends to act as an executor so far as to see the said will performed, according to the directions and true meaning thereof, and pursuant to the trust reposed in him, for the benefit of all parties concerned therein, but says that he has not hitherto, at any time possessed himself of any part of the said testator's personal estate, or of any of the rents or profits of the real estate, or any way inter-meddled therewith, otherwise than by proving the will as aforesaid, and that he is ready to do as this Court shall direct, being indemnified by the decree of this Court. Whereupon, and upon reading the will of the said testator, *Michael Mitford*, the agreement or deed-poll made by the said testator before his marriage with the Defendant, *Margaret Mitford*, dated the 6th of *December* 1686, and the deed executed by the said testator concerning the annuity of £25 per annum issuing out of the Exchequer, as also the proofs taken in this cause, and hearing what was alleged by the counsel for all the said parties, this Court declared, that inasmuch as the Defendant, *Margaret Mitford*, has renounced all benefit by the testator's will, and does insist upon the agreement or articles made by the said testator, before and in consideration of his marriage with her, the said Defendant, *Margaret Mitford*, ought to have one full moiety of the said testator's estate, after his debts and funeral charges, and the £50 to the parish of *Clapham* hereafter mentioned, paid according to the said agreement, and doth therefore order and decree, that it be referred to *Samuel Kerb*, esq., to take an account of the estate whereof the said testator, *Michael Mitford*, died seised or possessed, and that the Defendants, the executors do severally account before the said Master for what thereof has in any way come to their respective hands or possession, or to the hands or possession of any other person or persons, to or for their or either of their use, or in trust for them, to their knowledge, by their procurement or with their privity; in the taking of which account, the said Master is to make to the said executors all just allowances; and the said Defendants the executors, and also the Defendant, *Margaret Mitford*, the widow, are to be examined upon interrogatories before the said Master, for the better discovery thereof, and of other the personal estate of the said testator; in the taking of which account, the said Master is [456] to make unto the said other Defendant all just allowances; and the said Defendant, *William Mitford*, one of the said executors, is to have notice from time to time, to the end that he may attend the Master upon the said account, if he shall think fit, and this Court now declared that the two annuities of £100 and £25 per annum, issuing out of the exchequer, are to be looked upon and taken as part of the said testator's personal

estate, and are to be brought into the account thereof ; and the said Master is to examine and certify what the said testator's debts and funeral charges, with the legacy to *Clapham* parish, do amount unto, and to make a deduction thereof, and what the said testator's whole estate (after a deduction of the said debts, and legacies and funeral charges) shall amount unto, it is ordered and decreed, that the Defendant, *Margaret Mitford* shall receive and enjoy one full moiety thereof according to the said marriage agreement ; and in case the said Defendant, *Margaret Mitford*, should desire to have any part of the said personal estate, which was specifically devised to her by the will, she is to have the same at the appraised value in part of her said moiety ; and as to the other moiety, it is ordered and decreed, that £4000 thereof, or so much as the other moiety shall amount to of such £4000, be laid out by the Defendants, the executors, and trustees in the purchase of lands, to be settled according to the uses and limitations in the will in all respects, which purchase is to be approved of by the said Master ; and the said executors are hereby indemnified in the making thereof, except as to that part of the said £4000 to be laid out by the said will, which by the said will was to be enjoyed by the Defendant, *Margaret Mitford*, for her life ; and in case the moiety of the said testator's estate (which the said testator had power to dispose of by will) shall not be sufficient to answer and make good the said £4000, then the several legatees in the will, whose legacies are above £10, are to defalcate in proportion out of their respective legacies to make up the said £4000, but there is to be no defalcation out of any legacy of the value of £10 or under already paid, or hereafter to be paid ; and as to such part of the profits and benefit of the said £4000 which by the said will was intended for the Defendant, *Margaret Mitford*, during her life, it is ordered and decreed, that the same do go and be applied during the said Defendant, *Margaret Mitford's* life, towards making good to the several legatees what shall be so defalked out of their legacies for the making up the said £4000 ; and as to the £2000 bond entered into by the testator to the crown upon the account and as security for *C. C.* in the pleadings named, it is ordered and decreed, that the Defendant, *Margaret Mitford*, do give security to be approved by the said Master to indemnify the defendants, the executors, as to the moiety of the said bond or demand ; and that the Plaintiffs, *E. Webster, J. Richardson, Mary Harrison, and Winifred Webster* do give security also to be approved of by the said Master, to indemnify the said Defendants, the executors, as to the other moiety thereof ; the said securities are to be also against any dormant debts of the said testator ; and it is hereby referred to the said Master to approve and take the security so to be given for the said parties ; and as to the £50 legacy given by the will to the parish where the testator died, it is ordered and decreed, that the same be paid out of the said testator's personal estate unto the minister and churchwardens of the parish of *Clapham*, to be by them laid out in the purchase of lands for the uses and purposes directed by the said will ; and it is further ordered, that the Master do tax all parties their costs of this suit which are to be paid to them respectively out of the estate in question, as also the costs of the said account ; and for what the executors shall act or do in pursuance of this decree they are hereby indemnified. 22d June 1708. Reg. Lib. B. 1707, fol. 352.

DIXON v. SMITH. March 19, [1818].

Under a sequestration, the landlord is entitled to be paid arrears of rent.

The Defendant, *Smith*, occupied a farm at *Holbeach* in *Lincolnshire*, as tenant to *Sir Joseph Banks* ; and one year's rent, amounting to £55, became due at *Lady-day* 1816. A sequestration having been issued at the suit of the Plaintiff, the sequestrators, on the 10th of *July* 1816, entered on the farm at *Holbeach*, and took possession of the farming stock and other [458] effects of *Smith*. On the same day, and a few hours after the sequestration was so executed on the Defendant's effects, the agent of *Sir Joseph Banks* caused a distress to be made on the farm, for the arrears of rent (amounting, after a reduction of £5, 10s. for the landlord's property-tax, to £49, 10s.) and a notice in writing, addressed to *Smith* (who was then a prisoner in the fleet) to be affixed on one of the gates of the farm, signifying that such distress had been made ; and also delivered to the solicitors for the Plaintiff a notice of the rent due. The sequestrators refusing to pay the rent, proceeded to sell the crops

and other effects, and the agistment of all the pasture of the farm until *Lady-day* 1817; and paid into court the money arising from the sale.

A motion was now made in behalf of Sir Joseph Banks, that out of the money so produced and standing in the name of the Accountant-General, the sum of £104, 10s. might be paid to him, for two years' rent, due at *Lady-day* 1817, or that he might be at liberty to come in before the Master to be examined *pro interesse suo*, in the sequestered money and premises.

Mr. *Heald* in support of the motion. Before the removal of the goods under a sequestration, the landlord by the equity of the statute of *Anne* (8 *Ann.* c. 14), is intitled to be paid all arrears, not exceeding one years' rent. His legal remedy by distress he cannot enforce against sequestrators, more than against a receiver.

Mr. *Wetherel*, for the Plaintiff, and Mr. *Owen*, for the Defendant, against the motion.

[459] It has never yet been decided that, under a sequestration, the landlord is intitled to a year's rent in priority; in other words, that a sequestration is an execution within the statute. On any question of right in property sequestered, the only safe course is an examination of the party before the Master, *pro interesse suo*.

The Lord Chancellor [*Eldon*]. In a clear case, the Court will not send parties into the Master's office, merely that they may return with their rights as plain as when they went. The facts are not disputed; and a question of law is more fitly discussed here than before the Master. The order must be made.

"His Lordship doth order that it be referred to Mr. *Cox*, one, &c., to tax the said Sir Joseph Banks the costs of this application; and it is ordered, that out of the sum of £1000 cash, remaining in the bank on the credit of this cause, such costs, when taken, be paid to Mr. *D. M.*, his solicitor, and thereout also it is ordered, that the sum of £104, 10s. be paid to the Right Honorable Sir Joseph Banks, Bart., for two years' rent of the farm and lands in the pleadings mentioned, due at *Lady-day* 1817; and for the purpose aforesaid, the said Accountant-general is to draw on the bank, &c." Reg. Lib. A. 1817, fol. 936.

[460] JACKSON v. SEDGWICK. April 16, 25, 1818.

[S. C. 1 Wils. Ch. 297.]

Stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner, of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits, during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business to which the stipulations cannot be applied without injustice; and an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners, for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained.

By articles of partnership, dated the 29th of May 1809, between Richard Cookes (since deceased) George Lord Jackson, and John Milthorpe Maude, after reciting that Cookes and Jackson had, for several years, carried on the trade of ship-agents, ship-brokers, and insurance-brokers, as partners, and that it had been agreed that their partnership should be dissolved, and that Cookes, Jackson, and Maude, should enter into partnership, in that business for the term of seven years, to be computed from the 1st of July then last, and that their capital should be £10,000, £6,000 to be brought in by Cookes, and £2000 by each of the other parties; and further reciting, that the shares of certain ships, the property of Cookes and Jackson had been valued at different sums, amounting to £1140, which was to be considered as so much capital brought into the trade by them, in part of their proportions, and to bear interest from the 1st of July then last; the parties covenanted, that they would be co-partners in the business of ship-agents, ship-brokers, and insurance-brokers, and in all things incident thereto, and in all such other business as they should agree upon, for the term of seven years, to be computed from the 1st of July then last; that the capital of the partnership should consist of £10,000, which should remain therein during its continuance, unless Cookes should happen to die before its expiration, in which case £4000 were to be repaid to [461] his executors or administrators, in the

manner thereafter provided ; and that, as *Cookes* had brought in and would continue in the co-partnership, during the continuance thereof, or so long as he should be living, £4000, being part of the £6000 above mentioned, over and above the proportions which *Jackson* and *Maude* had brought in, the joint stock, profits, and effects, should be liable to the re-payment thereof ; and in case the same should be deficient, the other parties should make good a proportion thereof out of their private property. The articles then provided, that all losses which should arise by reason of bad debts, fire, or other accidents in carrying on the trade, and all expenses of the co-partnership, should be defrayed as follows ; £50 annually by *Cookes*, out of his separate estate, and the residue out of the profits of the trade, or by the parties, in the proportions of three-eighths by *Cookes*, three-eighths by *Jackson*, and two-eighths by *Maude*.

The articles further provided that the parties should, on the 31st *December*, in each year, or as soon after as possible, make up and pass an account in writing of all their dealings and transactions, and make a settlement or balance thereof, so that the true state of the same might appear, and of the profits of the trade, and how much was coming to each of the partners (the amount of each partner's share of the profits to be carried to his separate account in the partnership books, and there to be at his disposal, and to be drawn out of the trade when he pleased, each partner being intitled to recover interest upon the amount of his capital in the business, before any division of the profits) ; that the same should be written in three several books, each of which should be subscribed by all the parties ; and that such accounts, so passed and subscribed, should not be opened or called in question, but should be binding on all parties, their [462] executors and administrators, unless some special error, to the amount of £30 or upwards, should appear plainly to have escaped their notice, and should be discovered within three years from the making up such accounts ; and in case either of the parties should refuse to attend to take such accounts, and sign the same, for the space of ten days after being required, it should be lawful for the other or others of them to proceed to take such account, and to sign the same, and to call to his or their assistance such other ship-agent, or ship-broker, or policy or insurance-broker, as he or they might choose ; and such accounts, if taken and signed by the other party or parties, within thirty days next after the expiration of such ten days, should be final and binding, and not be opened or unravelled by the partner or partners making default, but be considered conclusive against him or them, provided a copy of such account be delivered to, or left with him or them within thirty days, accompanied with an affidavit, that to the best of the knowledge and belief of the party or parties so signing such accounts, they were just and true accounts between the parties.

The articles next provided, that no benefit of survivorship should be taken by any of the parties in case of death ; and that if *Cookes* or *Jackson* should die during the continuance of the partnership, their executors and administrators should be entitled to an allowance from the survivors, or from *Maude* alone in case of both their deaths, during the remainder of the partnership term of seven years, of the annual sum of £400 ; such allowance being secured in manner therein directed, with respect to the share of the partners or partner dying during the partnership of the joint stock or profits ; and *Maude*, his executors or administrators were intitled in a like event, to an annual sum of £300. The articles proceeded to [463] provide, that in case any of the parties should die within the partnership term, his executors or administrators should be entitled to receive from the survivors an allowance in lieu of all profits, from the day of the then last actual rest, to the day of such decease, in proportion to the amount of the profits which the party dying should have received, or been intitled to receive, out of the profits of the trade from the commencement of the partnership to the then last rest, in case two full years should not have elapsed from the commencement of the co-partnership ; but in case two years should have elapsed prior to such last rest, then in proportion to the profits accruing in respect of such two years immediately preceding such last rest ; and that such allowance should be paid within six months to the respective executors or administrators of *Cookes* and *Jackson*, or such of them as should die within the term aforesaid, and should also be secured in the manner therein directed, with respect to the share of a partner dying during the co-partnership in the joint effects.

After a provision for diminishing the annual allowance to the representatives of a deceased partner, in proportion to the deficiency of his capital, the articles

declared, that upon the death of any of the parties during the partnership, his share in the joint stock, profits, and effects, up to the 31st *December* immediately preceding his decease, or the value thereof, should be paid or secured to his executors or administrators in manner following: viz. as to £2000, part thereof, one-third part, with interest at 5 *per cent. per annum* (to be computed from the expiration of the co-partnership term of seven years), at the end of six months, one other third part with interest, at the end of twelve months, and the remaining third part, with interest, at the end of eighteen months, ensuing the expiration of the [464] co-partnership term; and the surviving party or parties should be intitled to retain the same in the business until such respective terms, upon giving the security thereafter mentioned; and as to all such sums of money, estate, and effects, as should belong to such deceased partner, above the said £2000, and particularly as to £4000 which *Cookes* had brought in more than *Jackson* and *Maude*, the same respectively should be paid to the executors or administrators of such deceased partner or partners in manner following: viz. one-third part thereof, with interest, from the day of his death, at the expiration of six months; one-third with interest at the expiration of twelve months; and the remaining one-third with interest, at the expiration of eighteen months, from his decease; and the same should be secured to be paid in the same manner as the £2000 and interest, and the annual allowance.

It was finally provided, that on the decease of any of the partners during the partnership, the last rest or balance of account signed by the deceased partner, and the survivor or survivors, should be referred to, and what should then appear to have been the amount of the capital of such deceased partner at such last rest, should be considered as his capital, and should not, under any pretence whatever, be disputed, or called in question; and that in case any of the partners should die during the partnership, and upon or after such decease, his representatives should become intitled under the previous provisions, to the payment of his share of the capital stock and profits, and to the payment of such annual allowance as aforesaid, then for securing the payment of so much money as the full value or share of such deceased partner would amount to, in such capital, stock, and profits, at the time therein mentioned for payment thereof, with interest, [465] and also for securing payment of the annual sum therein agreed to be allowed to the executors or administrators of the party so dying, the surviving partner or partners should, within one month after his decease, with one other sufficient surety, become bound to his executors or administrators, in one or more bonds with double penalty, conditioned for payment, to such executors or administrators, of such monies or interest and allowances at the time therein mentioned; and should also become bound to such executors or administrators in one or more bonds of sufficient penalty for indemnifying them from all debts and duties which, at the time of such decease, were jointly owing by the partners, on account of the partnership, and from all actions, suits, and expenses for or about the same, which debts and duties the surviving partners agreed to pay and satisfy in convenient time; and that the executors or administrators of the party so dying, upon the sealing and delivery of such bond, should release to the surviving partner or partners all right and interest in all the estate and effects (other than such debts as were next thereafter mentioned) and profits of the partnership which, at his death, were due and belonged to the parties on account of the said business; and that in case any of the parties should die during the partnership, all such bad and desperate debts owing to or on account of the business, as should not have been accounted a good estate, and as such included in the yearly account or accounts to be made up and stated as aforesaid (if any such account should have been stated), should, with all convenient speed, be divided between the surviving partners, and the executors or administrators of the deceased, in proportion to their respective shares in the profits of the business, and thereupon the surviving partners, and the executors and administrators of the deceased, should give to each other and his and their executors and administrators, full [466] power to sue for and recover their respective shares of such bad debts.

The partnership commenced on the 1st of *July* 1808, and continued till the death of *Cookes* on the 10th of *January* 1815. At that time the books of the partnership were in arrear; no accounts had ever been signed by the partners, or considered as closed; sketches or drafts of the general dealings of the partnership, and of the profit or loss, had been made for the years from 1808 to 1812, but not until after the

expiration of twelve or eighteen months beyond the close of the year to which they respectively refer ; but no account, or sketch, or draft of an account, had been made for the years 1813 and 1814.

Previously to the 31st of *December* 1814, the partners had engaged in various adventures by shipment of goods and otherwise, which, at the death of *Cookes*, were depending, and the result of profit or loss unascertained. In some instances a loss was then probable, and had since occurred.

On the 27th of *July* 1815, *Jackson* and *Maude*, together with *E. M.*, as their surety, executed to the executors of *Cookes*, a bond in the penalty of £10,000, reciting that *Jackson* and *Maude* had paid to the executors the proportion of the annual sum of £400 in the articles stipulated to be paid in case of the death of *Cookes*, and also the sum of £1333, 6s. 8d. being one-third of £4000 with interest from his death, pursuant to the articles, but that no other payment had then been made to them ; that the partnership term of seven years expired on the 1st *July* then instant, and that the accounts of the partnership were not made up and passed upon or after the 31st *December*, in each year, as agreed by the articles, [467] so that the true state of the same, and of the profits of the trade, and how much was coming to the representatives of *Cookes* did not, at the time, appear ; but that it had been agreed that, in pursuance of the articles of co-partnership, *Jackson* and *Maude*, with *E. M.*, as their security, should execute the bond ; with condition to be void, if *Jackson* and *Maude* should pay to the executors the several sums of money at the several times thereafter mentioned ; viz. £666, 13s. 4d., being one-third of the £2000, with interest at 5 per cent. per annum to be computed from the 1st *July* then instant, on the 1st of *January* 1816 ; £666, 13s. 4d. with like interest, on the 1st *July* 1816 ; and £666, 13s. 4d. with like interest, on the 1st of *January* 1817 ; £1333, 6s. 8d., another third part of the sum of £4000, with interest at the same rate, from the 10th of *January* then last, on the 10th of *January* 1816 ; and the further sum of £1333, 6s. 8d. with like interest, on the 10th of *July* 1816 ; and also if *Jackson* and *Maude* should pay to the executors at the times and in the manner stipulated in the articles, and with interest as therein mentioned, all such sums of money as should belong to and be the share of *Cookes*, above the sums of £2000 and £4000, in the joint stock and effects, and the profits of the trade or otherwise howsoever, by virtue of the stipulations in the articles, and not exceeding, together with the sum of £1333, 6s. 8d. before mentioned, the sum of £10,000 (to which last-mentioned sum the bond was limited for the purpose of ascertaining the stamp duty thereon) ; and in case upon settling the accounts of the partnership, it should be found that the representatives of *Cookes* were not intitled to receive so much money as the whole of the sums of £2000 and £4000, a proportionable abatement should be made from the last of the payments therein conditioned to be made.

[468] The surviving partners paid to the executors of *Cookes*, on account of this bond, sums amounting to about £3400, and the executors having since commenced an action on the bond, the bill was filed by the surviving partners and their co-obligor in the bond, insisting, that the balance of profit and loss on the co-partnership concern, up to the 31st of *December* 1814, ought to be ascertained by consulting the result of all engagements in which the firm was then embarked, and for which it was responsible ; that the losses sustained in consequence of such engagements should be brought into the account between them and the executors ; and that after the just deduction, in respect of such losses, *Cookes*' share in the business did not exceed £3000, being less than the sum already paid by the Plaintiffs on account of the bond.

The bill, charging that unless the accounts were taken the Plaintiffs could not prove at the trial that the bond had been satisfied, prayed, an account of the partnership transactions ; that the share of *Cookes*, at his death, might be ascertained ; an account of all sums paid by the Plaintiffs in respect of his share ; that the Defendants might repay what should appear to have been over-paid to them, and might deliver the bond, upon being paid what, if any thing, remained due ; and, in the mean time, be restrained from proceeding at law.

The Defendants, by their answer, submitted that according to the true construction of the articles, the accounts of the co-partnership transactions should be settled on or down to the 31st *December* 1814, as the transactions stood on that day, and that such accounts, when so adjusted, should be conclusive on all parties, unless an

accidental error to the amount of £30 and up-[469]-wards should be discovered therein, and that no subsequent transactions, whether of profit or loss, or any subsequent losses or profits of the then depending adventures, should be brought into the account either to the debit or credit of *Cookes*, or of any partner who died before the expiration of the term; and that they ought not to be charged with any part of the loss occasioned by the bankruptcy of persons indebted to the partnership at the death of *Cookes*, and then believed to be solvent.

*April 16.* On this day the Plaintiffs moved for an injunction to restrain the Defendants from proceeding in the action on the bond.

*Mr. Hart, Mr. Bell, and Mr. Collinson* in support of the motion.

*Sir Samuel Romilly, and Mr. Roupel*, against the motion.

The *Lord Chancellor* [Eldon]. The articles of partnership seem to refer only to the trade of ship-agents and brokers; and it is difficult to apply them to trade of another description. The question will be whether the proceeding *de anno in annum* without settling the accounts, and the engaging in business not contemplated by the articles, are not evidence of the intention of the parties to waive the agreement? Partnership accounts may be taken in various ways; the distinction is, that in the absence of a special agreement, the accounts must be taken in the usual way; but where a special agreement has been made, it must be abided by, provided that the parties have acted on it; if not, I always understood that the articles are read in this [470] court as not containing the clauses on which the parties have not acted. There would be no difficulty in applying the articles to the particular business with reference to which they were framed, but if the parties engaged in business in which their application would work injustice, as in importation or exportation, where the returns could not be ascertained at the period limited, then, I say, that these articles, though they contain a general reference to other business, are not such as would have been prepared with relation to that specific business; and that engaging in that business affords a reason for not performing the stipulations. Considering the difficulty of now making up the account, after an interval of four or five years, I cannot, at present, think the executors of the deceased partner entitled to insist on the articles. I will read them; but unless I intimate a change of opinion, the motion must be granted.

*April 25.* On this day the *Lord Chancellor* [Eldon] declared, that after reading the articles of partnership, and the bond, he retained the opinion which he formerly expressed, and granted the injunction.

The order restrained the Defendants from all farther proceedings in the action against the Plaintiffs, "until the bearing of this cause, and the farther order of this Court." Reg. Lib. A. 1817, fol. 1387.

[471] WILSON v. GREENWOOD. *April 16, 18, July 17, 1818.*

[S. C. 1 Wils. Ch. 223. Applied, *Collins v. Barker*, [1893] 1 Ch. 582.]

Articles of partnership having provided, that on dissolution by death, notice, or misconduct, of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared (after a recital that such was their intention in the articles), that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bankrupt within a few months after the execution of the latter deed, his assignees are not bound by it. Whether a provision in articles of partnership, that on the bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts. *Quære.*

*John Greenwood, Jonas Whitaker, and William Ellis*, having agreed to become partners in the business of cotton spinners, by indenture dated the 20th of *October* 1812, covenanted that the partnership should continue for four years from the 30th of *June* preceding (determinable by death, misconduct, or notice); but if not dissolved by the death of any of the partners, or for such misconduct as therein after-mentioned, or if none of the partners should give twelve months' notice in writing,

of his intention to terminate it at the expiration of that period, the partnership should not then cease, but should continue until one of the partners should give twelve months previous notice in writing, of his intention to dissolve it; and thereupon, at the expiration of such twelve months, the partnership should cease, as to the partner giving such notice.

The articles of partnership farther provided, that immediately after the determination of the partnership, either by the death of any of the partners, or by notice, or for misconduct as thereafter mentioned, a final account should be made and settled of the co-partnership, and the property belonging thereto, and all the debts then owing by or on account thereof; and the excess of capital which any partner, or the executors or administrators of any partner, might then have in the partnership, above the share of the other partners, or [472] their executors, should be discharged out of the partnership effects; and all the effects (including the real estate) of the co-partnership, should be valued by three indifferent persons, one to be named by each of the partners, or by the executors or administrators of a deceased partner; and in case any of the partners should refuse to join in such nomination, the three referees should be named by the other or others of the partners interested in the valuation; and the determination of the referees (who were empowered to employ, at the expense of the co-partnership estate, competent persons to estimate the value of the respective properties), should be conclusive as to the value; and upon such valuation being perfected, the surviving or continuing partner or partners, should have the option of purchasing the share of the partner so dying or withdrawing, at the price ascertained by such valuation, and should be allowed two months from the date of the valuation, for making such election; and in case of any difference in judgment between the referees, they, or any two of them, should appoint an umpire, whose judgment should be conclusive; and the determination of the referees, or any two of them, should bind the several partners, their respective executors and administrators, to complete the sale and purchase of the share of every partner so dying or withdrawing, by making and accepting a release and assignment thereof, at the price so ascertained; but such partners or partner, continuing to carry on the trade, and becoming the purchasers or purchaser of the share of the partner dying or withdrawing, should be allowed the term of seven years for the payment of the price or purchase-money thereof, by equal yearly instalments, with interest for the purchase-money, or the unpaid part thereof, from the determination of the partnership until payment of the instalments respectively; and the purchase-money and interest should be [473] effectually secured by a mortgage of the share so sold, and such bond or further assurance, as by such retiring partner, or the executors of such deceased partner, should be reasonably required; and in such bond or other assurance, should be inserted a proviso, whereby, if default should be made in payment of any of the instalments for the space of one month, the whole of the purchase-money should become an immediate debt; and if the partners so continuing to carry on the trade, should refuse or neglect for two months from the date of the valuation, to declare their intention of becoming the purchasers of the share of the partner so dying or withdrawing, at such valuation, the parties would, within two months after such refusal or neglect, join in a sale of the entirety of the effects of the partnership, by public auction; and it was declared, that the parties were joint and equal partners, as well in the mills and other effects, as in all profits of the trade, and that they would bear equally all losses.

It was further declared, that if any of the partners should become bankrupt or insolvent, the partnership, with respect to such partner, should be immediately void; and that upon the ceasing of the partnership, a final account in writing should be taken and entered in the co-partnership books, of the property belonging to or employed in the trade, and also of all debts and engagements due from or entered into by the partnership; and true copies of such accounts should be delivered to each of the parties, or their respective heirs, executors, or administrators, the same, and the copies thereof, to be signed by all the partners, testifying their settling and approving thereof; and that thereupon the co-partnership estate and effects should be sold and converted into money; and after payment of the debts and engagements of the partnership, the residue should be [474] equally divided between the parties, according to their shares in the co-partnership; but if the monies arising from such sale should not be sufficient to satisfy the debts and engagements, the partners should sustain such deficiency equally.



The partnership continued till the 9th of *November* 1816, when a joint commission of bankruptcy was issued against *Ellis*, and certain persons with whom he was connected in a business distinct from that in which *Greenwood* and *Whitaker* were interested.

The bill filed by the assignees of *Ellis* against *Greenwood* and *Whitaker*, prayed a declaration, that the partnership under the articles of *October* 1812, was determined by the bankruptcy of *Ellis*, and that the Plaintiffs, as his assignees, were entitled to have all the partnership property, as well real as personal, sold; and an account of the particulars of which, at the date of the commission, it consisted, and of the subsequent application or disposition thereof by the Defendant; that the outstanding debts might be collected, and all the partnership accounts liquidated; that the clear surplus of the partnership property, and the proceeds thereof, and of the profits of the concern to the issuing of the commission, might be ascertained, and the share due to the bankrupt's estate paid to the Plaintiffs; and that if it should appear that the Defendants had, since the issuing of the commission, carried on the trade, or used the partnership property for their own benefit, they might be compelled to account to the Plaintiffs for a moiety of such profits, or interest on the amount of the bankrupt's share from the date of the commission at the option of the Plaintiffs; and a receiver or manager of the partnership property.

[475] *April* 16. On this day the Plaintiffs moved, on affidavit before answer, for a receiver and manager.

The affidavit, in opposition to the motion, stated, and that by indenture, dated the 3d of *July* 1816, between *Greenwood*, *Whitaker*, and *Ellis*, after reciting the articles of co-partnership, and that the parties conceived they had not thereby (although their original intention was so to do), in the case of bankruptcy or insolvency of any one of the parties, or in those cases followed by notice amounting to a dissolution of the co-partnership, sufficiently provided for the circumstance of any two solvent partners, or any two partners desirous to continue as between themselves the co-partnership, carrying on the same on the terms and conditions annexed to the two cases of a partner dying or withdrawing voluntarily from the co-partnership; and that the parties, being desirous to place every case of a dissolution of the partnership, which should apply to or arise upon the going out, voluntarily or involuntarily, of any one of the partners, on the same footing, should the same happen by death, under a notice of withdrawing, from bankruptcy, insolvency, or for any other reason mentioned in the articles of partnership as causes of dissolution, had agreed to execute the present instrument to give effect to their intention, and for carrying into effect their agreement and meaning; the parties covenanted with each other, that in all cases of a partial dissolution of the co-partnership, wherein one only of the parties should withdraw from the co-partnership concern, or cease to have any interest therein, whether the same should happen with or without his consent in any manner, the same order and method, and none other, should be adopted and pursued, for ascertaining his interest and property in the partnership effects, as is marked out in the original articles of partnership, in the two cases of a partner [476] dying, or withdrawing under his own notice for that purpose; and the same period of time, to wit, seven years from the time of such dissolution, by seven equal yearly instalments bearing interest, should be allowed to the continuing partner, for the liquidation of the retiring partner's share and interest in the partnership property, as it might then happen to be, any thing in the recited articles to the contrary notwithstanding; and the parties, in all other respects not thereby altered, ratified and confirmed all the clauses, provisoes, and agreements, contained in the original articles of co-partnership.

The affidavit also stated, that the agreement of *July* 1816, was executed without any fraudulent intention; and that in *November* 1817, the Defendants, by a written notice, required the Plaintiffs to join in a settlement of accounts and valuation, according to the provisions of the articles of partnership, the Defendants waiving the benefit of the clause entitling them to a delay of seven years for the payment of the bankrupt's share, and offering payment on the settlement of the accounts; and *Ellis* deposed, that at the time of the execution of the agreement of *July* 1816, he had not committed, or contemplated the commission of, an act of bankruptcy, nor entertained any doubt of his own solvency, or of the solvency of any partnership in which he was engaged.

The affidavit of one of the assignees of *Ellis*, in support of the motion, stated his

belief that the agreement of *July* 1816, was executed when *Ellis* was insolvent, and in contemplation of bankruptcy; and that *Ellis*, in his final examination, did not disclose that deed.

[477] Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Horne*, in support of the motion. The provision by the second deed of *July* 1816, for the event of bankruptcy is void, and the partnership being dissolved by the bankruptcy of *Ellis*, his assignees are entitled to a sale of the partnership effects, and in the mean time to the appointment of a receiver. The stipulation for transferring the share of the bankrupt to his solvent partners, at a price fixed by valuation, and payable in the course of seven years, is contrary to the policy of the bankrupt laws. No man can effectually contract for a disposition of his property, in an event which deprives him of all disposing power. An absolute owner may undoubtedly annex to a gift terms at his discretion; he may direct, as in *Domett v. Bedford* (3 Ves. 149. See the case at law, 6 T. R. 684), that the enjoyment shall continue during the solvency, and cease on the bankruptcy of his donee; but has it ever been decided that he could by contract control the disposition of his property in the event of his own bankruptcy? On the contrary, in questions arising on marriage settlements, providing that a benefit secured to the husband shall cease on his bankruptcy, a distinction has constantly prevailed; and validity is given to that provision to the extent only of the property of the wife: In the matter of *Meaghan* (1 School. & Lefr. 179).

The particular circumstances of the case render it unnecessary to decide the general question. The deed of *July* 1816, proceeding on a misrepresentation of the original articles, was evidently framed in expectation of the approaching bankruptcy, and with the design of withdrawing the property of *Ellis* from the claims of his creditors, under the operation of the bankrupt laws. [478] The articles expressly provide, that on the bankruptcy of a partner, his share shall be sold; the subsequent deed extending to the case of bankruptcy, the provision made for the death or retirement of a solvent partner, instead of executing, contradicts, the original intention of the parties, and is an expedient to prevent the legal consequences of an event which they anticipated. That fraudulent contrivance cannot be rendered valid, by the waiver of the stipulation allowing seven years for the payment of the estimated price. It is not competent to a party to abandon one term of an agreement as unreasonable, and insist on the execution of the rest.

Mr. *Hart* and Mr. *Shadwell* against the motion. The present application seeks, without any allegation of misconduct, to withdraw from the management of the solvent partners the whole affairs of the partnership, their own shares, as well as the share of the bankrupt. The claim of the Defendants involves not the question, whether a trader can be permitted to protect, for a course of years, his interest from the operation of the bankrupt laws; they offer to pay to the assignees the amount of *Ellis's* share, as soon as it is ascertained by valuation. The second deed declares the intention of the parties, insufficiently and erroneously expressed in the first. In what respect is the policy of law contravened by that stipulation? On bankruptcy, the property of the bankrupt devolves unquestionably to his assignees, but devolves subject to the anterior contracts which he has imposed on it. A trader may so involve his estate, as to exclude his assignees from the immediate enjoyment. For a present debt, he may accept securities payable at remote periods; he may embark in protracted and ruinous speculations; may he not, if engaged in adventures, the abrupt termination of which would be fatal to himself and his partners, [479] provide for the continued investment of his property, till the accomplishment of the period required by the nature of the undertaking? In the actual event, the effect of such restrictions may be prejudicial to the creditors of an individual partner, though beneficial to the partnership; but that prejudice is accidental only, and in other events, the interests which now suffer, would have been protected by the arrangement. It is indisputable, that mere postponement of distribution cannot be represented as a fraud on the bankrupt laws; such a principle would be inconsistent with commerce. In many undertakings, no man could reasonably embark, except under a confidence that the capital invested could not be withdrawn within a definite period: joint adventurers, engaging to work a mine, may justly stipulate that no part of the funds shall be recalled till a time specified; that the bankruptcy of one shall not reduce the solvent partners to the alternative of suspending the adventure, or advancing additional sums from their own funds. The actual engage-

ment, in this instance, is not, perhaps, the most beneficial for the creditors of *Ellis* ; but it is evidently less prejudicial than some which he might have contracted, and by which they would have been bound.

If this clause is void against his assignees on bankruptcy, by parity of reason, on *Ellis's* death insolvent, it must have been void against his executors. The creditors of a testator cannot be objects of less favour, than the assignees of a bankrupt. But it is clear that the contract would have bound all claiming under his will, or under the statute of distribution ; is its validity, then, to depend on an extrinsic circumstance, the solvency or insolvency of his estate ? Under the commission, *Ellis* may be intitled to a surplus after satisfaction of his debts ; would he, or his assignees repre-[480]-senting him, be intitled to demand his capital in contravention of this agreement ?

But the general question is not raised on this application ; after the acquiescence of the assignees, permitting the solvent partners to continue the trade since the bankruptcy of *Ellis* in November 1816, the Court will not grant the summary relief prayed. The motion proceeds on the principle of preventing irreparable injury in the nature of waste ; and delay is a fatal objection.

Sir *Samuel Romilly*, in reply. If the solvent partners admit that they carry on the business for our benefit, as well as their own, the necessity for this motion becomes less urgent ; but while the question is, whether they are not intitled to retain the whole property, the Court must grant a receiver. The provisions of this deed are designed for the express purpose of defeating the bankrupt laws ; cases of future payment arising from contract, without reference to bankruptcy, have no analogy to a stipulation for repayment of capital by instalments, provided specifically for that event. The second deed is evidently framed in contemplation of the individual bankruptcy which ensued.

The *Lord Chancellor* [Eldon]. When a partnership expires, whether by the death of the parties, or by effluxion of time, without special provision as to the disposition of the property, in all these cases, to which I may add the bankruptcy of a partner, the partnership is considered, in one sense, as determined, but in a sense also as continued, that is, continued till all the affairs are settled (1 *Swans*. 507. *Crawshay v. Maule*) ; and as, [481] in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver ; so in the course of winding up the affairs after the determination of the partnership, the Court, if necessary, interposes on the same principle.

In this case, the first question is, Whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it has provided for the dissolution by other means, that provision would be good ? I will not say that it would not ; but I have heard nothing to convince me that it would.(1) From the original deed, it is clear that the intention of the parties was not, as the Defendants insist, to apply the special provision to the event of dissolution by bankruptcy. After providing for other cases, it expressly declares, that in case of bankruptcy, the concerns are to be wound up in the same way as if no special provision was made. On this agreement, the parties proceed, [482] till the execution of another deed, which, in one sense, may be justly said to be made in contemplation of bankruptcy, because it is applicable to the event of bankruptcy alone ; but I have no doubt, from the face of it, that it was made, in a strict sense, in contemplation of bankruptcy ; for it contains a recital which cannot be believed by any one who looks at the original deed, that the parties to that deed intended the same provision in cases of bankruptcy and insolvency, as in the case of dissolution from other causes. I go farther ; the inefficacy of the terms of the agreement as applied to bankruptcy, affords another proof that that application was not designed. In the event of dissolution by misconduct, the parties were to name a valuer, and the property was to be divided ; if the partnership was dissolved by the death of a partner, what was to be done ? His executors or administrators were to name a valuer. The deed then contemplating bankruptcy and insolvency, the provision for insolvency is sufficient, because, while not yet become a bankrupt, the insolvent retains all capacities of acting ; but if he becomes bankrupt, it is impossible to contend that, under this clause, he is to name the persons who are to value the interests of his assignees ; and no such

authority is given to his assignees, for the word "assigns" is not to be found in the deed.

I have no doubt, therefore, whether, on general principle, or on the construction of the deeds, that the law of this case is, that the partnership was dissolved by bankruptcy; and the property must be divided as in the ordinary event of dissolution without special provision. The consequence is, that the assignees of the bankrupt partner are become, *quoad* his interest, tenants in common with the solvent partner; and the Court must then apply the principle on which it proceeds in [483] all cases, where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the concern, or in winding it up, when it becomes necessary to sell the property, with all the advantages relative to good will, &c.

With these observations, I shall, for the present, leave the case, considering it one in which some arrangement among the parties is evidently recommended by the interest of all.

July 17. The motion being again mentioned, Mr. Hart, objected that, in the absence of imputation of misconduct, or suspicion of insolvency, the appointment of a receiver was not a measure of necessity for the sale of partnership property.

Sir Samuel Romilly insisted, that a division of the stock (to which, on the dissolution of the partnership by the bankruptcy, the assignees were entitled), having become impracticable by the continuance of the trade during two years, and the consequent change of stock, a sale was necessary, and would be best conducted by a receiver, the Plaintiffs not objecting to the appointment of the Defendant, Greenwood.

The Lord Chancellor [Eldon]. The property must be sold. Greenwood may be appointed receiver; and let the master consider the best mode of sale.

"His Lordship doth declare, that the co-partnership property and effects in the pleadings in this cause mentioned, ought to be sold, and doth order that the [484] same be sold to the best purchaser or purchasers that can be got for the same, to be allowed of by Mr. Courtenay, one, &c.; and it is ordered, that it be referred to the said Master to approve of a proper mode of selling the same; and it is ordered that the money to arise by such sale be paid into the Bank, with the privity of the Accountant-General of this Court, to be there placed to the credit of this cause, subject to the further order of this Court; and in the mean time, and until such sale be had, it is ordered, that the Defendant, John Greenwood, be appointed receiver and manager of the said co-partnership property and effects, and take and have the superintendence and carrying on the said co-partnership trade, and get in the outstanding debts and effects belonging to the said co-partnership, and be allowed all his just and reasonable costs, charges, and expenses, in and about the same, but without any salary for his trouble; but the said Defendant is first to give security to be allowed of by the said Master, and to be taken before a master extraordinary in the country, if there shall be occasion, duly to manage the said co-partnership trade, and to be answerable for what he shall so receive in respect thereof, and pay the same as this Court has hereby directed, or shall hereafter direct; and it is ordered, that the said Master do take an account of the co-partnership dealings and transactions; and in taking such accounts, it is ordered that the said Master do inquire and distinguish what capital each of the partners had in the trade at the time of the bankruptcy, and which of the co-partnership debts have been since paid, and by whom, and out of what fund, without prejudice to any question between the parties, and with liberty for either party to apply specially as to the same; and the said Master is to be at liberty to make one or more separate report or reports as to any of the said inquiries, at the request of either party; and it is [485] ordered, that the Plaintiffs, and the Defendant, Jonas Whitaker, do deliver over to the said Defendant, John Greenwood, all the stock, goods, effects, books, and accounts belonging to the said co-partnership; and the said Defendant, John Greenwood, is to be at liberty to bring actions, with the approbation of the said Master, as there shall be occasion, for the recovery of such of the debts as are now due, or shall hereafter become due, in the names of the parties, or any of them, and the persons in whose names such actions shall be brought are to be indemnified against the costs and damages thereof, out of the stock, goods, and effects of the said co-partnership; and it is ordered, that the said Master do settle the said indemnity; and it is ordered, that the said

Defendant, *John Greenwood*, do pay the balances reported due from him into the Bank, with the privity of the *Accountant-General*, to be there placed to the credit of this cause, subject to the further order of this Court ; " with the usual directions for taking the account, and liberty to apply. Reg. Lib. B. 1817, fol. 1729.

(1) The following are some of the principal authorities applicable to this point : *Lockyer v. Savage*, 2 Str. 947. *Roe v. Galliers*, 2 T. R. 133. *Ex parte Hill*, *Cook's B. L.* 228 ; 1 Cox, 300. *Ex parte Bennet*, *Cooke's B. L.* 229. In the matter of *Murphy*, 1 *Schoal. & Lefr.* 44. *Ex parte Henecy*, *cit. ib.* In the matter of *Meaghan*, 1 *Schoal. & Lefr.* 179. *Dommelt v. Bedford*, 6 T. R. 684 ; 3 Ves. 149. *Ex parte Cooke*, 8 Ves. 353. *Ex parte Henton*, 14 Ves. 598. *Ex parte Oxley*, 1 *Ball & Beat.* 257. *Higinbotham v. Holme*, 19 Ves. 88. *Ex parte Vere*, 19 Ves. 93 ; 1 *Rose*, 281. *Ex parte Young*, 1 *Buck.* 179 ; 3 *Madd.* 124. *Ex parte Hodgson*, 19 Ves. 206. And see *Brandon v. Robinson*, 18 Ves. 429. The general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee, by a condition to take effect on bankruptcy ; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors ; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law.

HOOPER v. GOODWIN. *Rolls.* June 8, 11, [1818].

[S. C. 1 Wils. Ch. 212. See *Cochrane v. Moore*, 1890, 25 Q. B. D. 72.]

*R. G.* having died intestate, possessed of considerable personal property, and entitled, after the death of his wife, to the principal of certain bank stock, standing in the name of a trustee, his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the widow, executed to the trustee (transferring to the widow) a release of the bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour : the release of the stock is effectual in favour of the intestate's widow ; but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift ; and she, as administratrix, must account to the representatives of the brother, but without interest.

*Robert Goodwin* having died intestate, without issue, on the 12th of December 1808, his personal estate became divisible, one half to his widow, *Elizabeth* [486] *Goodwin*, one-fourth to his brother, *Henry Goodwin*, and the remaining fourth among his nephews and nieces, *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*. On the 20th of December 1808, *Henry Goodwin* addressed, to the widow and administratrix of the deceased, a letter, containing expressions of regret that his brother had not made a will ; and concluding with these words :—" I cannot think that the law will give the *Kingtons* any thing ; let that be how it may, my share I shall relinquish to you, and for your benefit only." *Henry Goodwin's* share of the intestate's personal estate, amounted to about £2700 ; consisting of £1192 in cash, and one-fourth part of £9073, 14s. 6d. 3 per cent. annuities, to the capital of which the intestate was entitled, under the will of *Henry Mugleworth*, subject to the life interest of his widow in the dividends.

By a release, dated the 1st of March 1809, between *Elizabeth Goodwin*, as the widow and administratrix of the intestate, of the first part, *Henry Goodwin*, *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*, as his only next of kin, living at his decease, of the second part, and *Francis Morgan*, as the surviving trustee under the will of *Henry Mugleworth*, of the third part, after reciting, that by that will, *Elizabeth Goodwin* was entitled to the dividends of £9073, 14s. 6d. stock, during her life, and that *Robert Goodwin* having made no will, the capital of the stock was, after her decease, to be paid to his representatives ; and that she, as his administratrix, had, with the consent of *Henry Goodwin*, *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*, as the next of kin of the intestate, requested *Morgan* immediately to transfer the said £9073, 14s. 6d. stock to her ;

which he consented to do, upon receiving such release and indemnity as therein was mentioned; and that he had accordingly, with the approbation of the next of kin exercised [487] a power of attorney, authorising a transfer of the stock to *Elizabeth Goodwin*; in consideration of the premises *Elizabeth Goodwin*, *Henry Goodwin*, *Thomas John*, and *Mary Ann Kingston*, and *Susannah Bayly*, according to their several rights and interests, released and discharged *Morgan*, his heirs, executors, &c., and also the heirs, executors, &c., of his deceased co-trustees, from the £473. 14s. 6d. stock, and all the interest, dividends, and profits, to the date of the indenture, and from all actions, &c., which they, or any of them had, or might have, against *Morgan*, his heirs, executors, &c., or the heirs, executors, &c., of his deceased co-trustees, by reason of the stock; and the parties of the first and second parts covenanted with *Morgan*, to indemnify him, his heirs, executors, &c., against all actions, suits, &c., by reason of the transfer to *Elizabeth Goodwin*.

For the purpose of securing to *Thomas John*, and *Mary Ann Kingston*, and *Susannah Bayly*, their shares of the stock, *Elizabeth Goodwin* executed to them a bond, in the penalty of £500 conditioned to be void, if her heirs, executors, &c., should, within three months after her decease, transfer to them their heirs, executors, &c., the sum of £2268. 8s. 7½d. 3 per cent. stock; but she was never required to make any such arrangement with *Henry Goodwin* for the payment of his share.

On the 14th of March 1809, the solicitor of the administratrix, in consequence of the letter of the 20th of December 1808, forwarded to *Henry Goodwin*, for his signature, a printed discharge, for his distributive share, in the form prescribed by statute (36 G. 3, c. 52; 44 G. 3, c. 93; 45 G. 3, c. 28), acknowledging the receipt of £2649, after deduction of the duty. On the 21st of the same month, *Henry Goodwin* sent this dis[488]charge to his solicitor, desiring his opinion on the propriety of acknowledging the receipt of money contrary to the fact; and was advised by him that a release, declaring the renunciation of his claim, and explaining his motives, would be more proper. In the beginning of June 1809, a niece of *Henry Goodwin*, by his direction, instructed his solicitor to prepare a deed of release, stating that he had promised to execute such an instrument in favour of the intestate's widow, for the purpose of relinquishing to her his share of the intestate's property. The solicitor accordingly prepared a deed poll, by which, after reciting that by the decease of his late brother, *Robert Goodwin*, intestate, he was intitled to one-fourth, or some other distributive share, of his personal property, and that he had no wish to advantage himself by any unintentional omission of his said brother, *Henry Goodwin* released *Elizabeth Goodwin*, and the estate of his said brother, from the payment of any sum of money, and from the transfer of any property or effects, which might have legally accrued to him by the aforesaid event, and assigned and transferred all such money and property to *Elizabeth Goodwin*, her executors, &c., as her and their goods and chattels. The draft of this instrument was sent to *Henry Goodwin*, and returned by him to his solicitor, with directions to have it copied on stamped paper for execution. Between the beginning of June and his death, *Henry Goodwin* frequently expressed an anxious desire to execute the release, and requested the attendance of his solicitor for that purpose, but the execution was prevented, sometimes by his own illness, sometimes by the absence of his apothecary, whom the solicitor had recommended as a proper person to attest it. The 24th of June 1809 being fixed for the execution, about eight or nine o'clock in the morning of the 23d. *Henry Goodwin* expressed a hope that he should be able to receive the parties on the next day, and sign [489] the release to Mrs. *Goodwin*, "for he very much wished it done"; but within an hour after using those expressions, he expired.

The bill was filed by the executors and executrix of *Henry Goodwin*, against the widow and administratrix of *Robert Goodwin*, claiming one-fourth of the personal estate of the intestate.

The defendant, by her answer, insisted, that the letter of the 20th December 1808, under the circumstances, amounted to an actual release and relinquishment of *Henry Goodwin's* share of the intestate's effects; and that, by reason of the property to which he was intitled being in the hands of the Defendant, and not of a third person, the letter was a sufficient authority for her retaining such share to her own use, without any formal release for that purpose.

Mr. Bell and Mr. Girdlestone, for the Plaintiffs. The question in this case is

merely legal. At law no action can be sustained for a legacy, or distributive share of an intestate's estate; this Court, therefore, assumes concurrent jurisdiction with the Ecclesiastical Court, in enforcing the legal rights of legatees and next of kin. The demand of the Plaintiffs is founded, not in equity, but in law, and can be resisted only by a strict legal defence. Of the general personal estate, whatever might be the intention of *Henry Goodwin*, no release was ever executed; and the claim of the Plaintiffs, therefore, is in force. *Cotteen v. Missing* (1 *Mald.* 176). The release of the stock was made, not to the Defendant, but to *Morgan*, and might be intended, not as a discharge to her, but as an indemnity to him. Taking the stock, as ad-[490]-ministratrix, she took it for the benefit of the next of kin, *Ripley v. Watworth* (7 *Ves.* 425); and the release might probably be occasioned by doubts, whether the trustee would be justified in transferring it to her without their concurrence.

Mr. *Hart* and Mr. *Wingfield* for the Defendant; insisted on the avowed intention of *Henry Goodwin*, and on the possession of the Defendant, which could not be disturbed, without the interposition of the Court.

The *Master of the Rolls* [Sir Thomas Plumer]. The bill is filed by the representatives of *Henry Goodwin*, claiming his share of the personal estate of *Robert Goodwin*, his brother. That they are intitled to an account against the administratrix, unless *Henry Goodwin* renounced his right, is not disputed; but it is insisted by the Defendant that his acts amount to a renunciation, and exclude the claim of his representatives. The principal evidence that *Henry Goodwin* relinquished all right to participation in his brother's property is his letter of the 20th of *December* 1808, containing an explicit declaration of his intent. He was affluent—his brother had died in narrow circumstances, leaving a widow to be provided for. By that letter he declares that he shall relinquish his share to her. He lived till the 23d of *June* 1809, when his death happening sooner than was expected, prevented the formal execution of his intention. It appears that he had taken measures for that purpose: a solicitor was employed, and an instrument of discharge drawn, which being objectionable in form, a release was prepared; the execution was first delayed by the absence of the persons proposed to attest it, and by the illness of *Henry Goodwin*, and finally [491] prevented by his death; but he constantly, and within an hour of that event, retained his intention, and expressed a wish to execute it. The question is, whether enough has been done, the intention itself being clear, to enable the Court, which would do its utmost for that purpose, to accomplish it? The demand is, undoubtedly, advanced after much delay, the bill not being filed till eight years from the death of the testator; but the executors have felt it their duty to call for this fund. With every inclination to assist the Defendant, I cannot satisfy myself that the case contains sufficient to constitute a complete gift of the general personal estate.

A gift at law, or in equity, supposes some act to pass the property: in donations *inter vivos* (not adverting, at present, to donations *mortis causa*), if the subject is capable of delivery, delivery; if a chose in action, a release, or equivalent instrument; in either case, a transfer of the property, is required.—An intention to give, is not a gift. Without investigating the authorities, it may be sufficient to refer to *Cotteen v. Missing* (1 *Madd.* 176. And see *Irons v. Smallpiece*, 2 *Barn. & Ald.* 551), which is not distinguishable from the present case, and where they are all collected. The evidence establishes only a clear intention to relinquish; the testator meant to do a further act, he was preparing to do it; it was not done; the Court cannot supply it. The gift is inchoate and imperfect; not such as can be pleaded at law, or opposed in equity as a bar to a bill for an account by a legatee against the personal representative.

The other part of the case rests on different ground. By the will of *Henry Mugleworth*, the dividends of the stock were given to the intestate and his wife for their [492] lives, and the capital, after the decease of the survivor, to his representatives; on the death of *Robert Goodwin*, his widow became intitled, in her own right, to the interest, and, as his administratrix, to the capital, of that stock, then standing in the name of *Morgan*, the trustee. It is admitted that she did not, as administratrix, take the capital for her own absolute benefit; it is contended only that *Henry Goodwin* released his proportion of the fund; and the question is, whether, as to this property, he has not, by the deed of *March* 1809, executed his

intent? That instrument, it is true, is a release, not to the Defendant, but to *Morgan*, the trustee; but the equitable interest, in his proportion of it, subject to the life-estate of the Defendant, was vested in *Henry Goodwin*; by his letter of *December* 1808, he had declared an intention to relinquish this, among the other property, which devolved to him from his brother; the question is, whether he did not execute the release for the purpose of effecting that intent? In terms it is a release to *Morgan*, provided he transfers to Mrs. *Goodwin*. It is not stated that she was to take as administratrix, or to be accountable to *Henry Goodwin*, or to any other person. It may be said, indeed, did the other parties concurring in that release, propose to convey all their interest to Mrs. *Goodwin*, and not to call on her for an account? Did they design to release her? Certainly not; they required from her a bond; expressing the effect of the release, without that precaution, to give to her the beneficial interest; but *Henry Goodwin* took no bond, and as to him, therefore, the deed stands as an absolute release of his interest in the property. The question is, whether his design being declared by letter, and followed by this deed, the Court may not hold that that instrument operates to transfer his equitable right? The decision of the *Lord Chancellor* in *ex parte* [493] *Dubost* (18 Ves. 140), affords a strong analogy in support of the Defendant's claim. Were the case doubtful, the Court would labour to accomplish the unquestionable wish of the testator; but I think that I may, without violence, hold that the release was executed for the purpose of effecting the intent expressed in the letter: that it is a sufficient execution of that intent, and an act which deprives his representatives of all right to call on the administratrix for an account of this stock. To that extent she must be protected.

Feb. 8, 1819. The parties not agreeing on the minutes of the decree, the case was again mentioned; the Plaintiffs insisting that the Defendant should be charged with interest on the sum of £1192, Os. 9½d. from the death of the intestate, as a trustee retaining the trust fund.

The *Master of the Rolls* [Sir Thomas Plumer]. On the former occasion nothing passed relative to interest, nor is it an object of the prayer of the bill. Beyond dispute, the testator intended to relinquish this fund in favour of the Defendant, and that intention has been frustrated only by the want of a formal execution of the deed prepared. With his permission, the fund remained in the hands of the Defendant during his life, and a long interval elapsed before his executors asserted their claim. This, therefore, is not a case of wrongful retainer, or refusal to account, but of general acquiescence by the parties intitled. I am clearly of opinion that the Defendant cannot be charged with interest.

[494] "His Honor doth declare, that the Plaintiffs, as the surviving executors and executrix of *Henry Goodwin*, deceased, the testator in the pleadings named, are intitled to one-fourth part or share of the personal estate and effects of *Robert Goodwin*, the intestate in the pleadings also named, possessed by the Defendant, and it being alleged and admitted by the Counsel on both sides, that such share amounts to the clear sum of £1192, Os. 9½d., and the Defendant, by her Counsel, admitting assets of the said *Robert Goodwin* for the payment thereof, His Honor doth order and decree, that the said sum of £1192, Os. 9½d. be paid by the said Defendant to the said Plaintiffs, or either of them, in full of such fourth part of the said intestate's effects, and to which the said plaintiffs became intitled in right of the said testator, *Henry Goodwin*; and His Honor doth declare, that the said Plaintiffs, as such executors and executrix, as aforesaid, are not intitled to any part or share of £9073, 14s. 6d. 3 per cent. Bank Annuities, in the pleadings mentioned, but that the share of the said *Henry Goodwin* therein was absolutely released by the said *Henry Goodwin* to the said Defendant, by the indenture of the 1st of *March* 1809, in the Defendant's answer stated; and His Honor doth also declare, that the said Defendant became intitled thereto as her own exclusive and absolute property, by virtue of the said indenture; and it is ordered, that the Plaintiffs be at liberty to retain their costs of this suit, as between solicitor and client, out of the said sum of £1192, Os. 9½d. as against the estate of the said testator, *Henry Goodwin*; and His Honor doth not think fit to give the Defendant her costs of this suit," &c. Reg. Lib. A. 1817, fol. 2194.



[495] Between WILLIAM CRAWSHAY, *Plaintiff*, and GEORGE MAULE, JOHN LLEWELLIN, and JOSEPH KAYE, *Defendants*. And between GEORGE MAULE, JOHN LLEWELLIN, and JOSEPH KAYE ; and BENJAMIN HALL, RICHARD CRAWSHAY HALL, HENRY GRANT HALL, CHARLES RANKIN HALL, and CHARLOTTE HALL, infants by the said GEORGE MAULE, JOHN LLEWELLIN, and JOSEPH KAYE, their next Friends, *Plaintiffs*, and WILLIAM CRAWSHAY, *Defendant*. June 9, 10, 27, July 11, 23, 31, [1818].

[S. C. 1 Wils. Ch. 181. See *Randall v. Randall*, 1835, 7 Sim. 284 ; *Darby v. Darby*, 1856, 3 Drew. 501. See also Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 20 and 22.]

*R. C.* being in possession of mines and iron-works, held under leases of unequal duration, by his will bequeathed £25,000 to *B.*, "as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works, so long as the lease endures," with a devise to *H.* and his wife of the residue of his estates, real and personal ; by a codicil the testator gave to *W. C.* three-eighths of the concern at the iron-works, "so the partnership will stand at my decease, *W. C.* three-eighths, *H.* three-eighths, *B.* two-eighths." After the testator's death, *W. C.*, *H.*, and *B.*, carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and re-sale. *B.* having then assigned his share to *C.*, the business was carried on in like manner by *C.* and *H.* till the death of the latter ; no agreement having ever been entered into for the duration of the partnership. 1. The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in *H.* to the exclusion of his wife. 2. The concern is not a mere joint interest in land, but a partnership in trade. 3. The purchase of a leasehold interest as part of a stock in trade, is not evidence of an agreement to contract a partnership commensurate with the duration of the lease. 4. The partnership is dissolved by the death of *H.* 5. In a suit instituted by *W. C.*, praying a sale of the partnership property, the Court, on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold, or carried on for the purpose of winding up the concern.

By articles of agreement dated the 31st of July 1794, between *Antony Bacon*, and *Richard Crawshay*, *Bacon* agreed to assign to *Crawshay* all his interest in certain lands, and mines of coal, and iron ore, situated at *Cyfarthfa* in the county of *Glamorgan* (of which he [496] was then in possession, under three leases for terms of 99 years each, commencing respectively in the years 1763, 1765, and 1768), subject, after the 29th of September 1815, to an annual rent of £5000 and a payment of 15s. a ton on all pig iron, annually made on the premises, beyond 6400 tons. *Richard Crawshay* accordingly took possession of the premises, and carried on iron works there : and in 1801, intending an extension of the works, and the erection of new furnaces, it was agreed between him and *Bacon*, that the payment of 15s. a ton beyond 6400 tons, should cease at 10,700 tons. Disputes having arisen on the subject of that agreement, in 1808, *Richard Crawshay* filed a bill to compel specific performance. The decree pronounced in March 1810 directed *Bacon* to execute to *Richard Crawshay* an underlease of the premises, for all the times which he, or the trustees under his marriage settlement, had therein, except the last day, subject to the yearly payments stipulated.

*Richard Crawshay* being seised and possessed of a considerable real and personal estate, including the iron works at *Cyfarthfa*, and the buildings and machinery thereon, and a leasehold wharf at *Cardiff*, used for shipping iron, by his will dated the 26th of September 1809, after giving among other legacies, £100,000 to his son *William Crawshay*, gave to *Joseph Bailey* £25,000 "to be transferred from my account on the ledger to his, intended as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures, with the principal and profits therefrom to be his own forever." He then gave to *Benjamin Hall* esq. and his wife, of *Abercarne*, and to their heirs for ever, all the residue of his estate, real and personal, and appointed Mr. *Hall* sole executor.

By a codicil, dated the 4th of *May* 1810, the testator gave to his son *William Crawshay*, "three-eighth [497] shares of my concerns at this iron work, and of the premises at *Cardiff*; so the partnership will stand at my demise, *William Crawshay* three-eighths, *Benjamin Hall* three-eighths, *Joseph Bailey* two-eighths."

The testator died on the 27th of *June* 1810; *Mr. Hall* proved his will, and *William Crawshay*, *Hall*, and *Bailey* took possession of the iron-works, and carried them on as co-partners in the shares bequeathed to them, under the firm of *Crawshay, Hall, and Bailey*, but without any articles of co-partnership. In *October* 1812, *William Crawshay* purchased the share of *Bailey* for £30,000, and from that time the works were conducted by *William Crawshay* and *Hall*, till the death of the latter, under the firm of *Crawshay and Hall*; no written articles of co-partnership were ever executed or prepared between them; but they verbally agreed that the future capital of the concern should be £160,000, which consisted of an imaginary or estimated value of the whole of the partnership property (£100,000 standing to the credit of *William Crawshay*, in respect of his five-eighth parts, and £60,000 to the credit of *Mr. Hall*, in respect of his three-eighth parts); and that the books should be balanced on the 31st of *March* in each year, and the annual profits drawn out by *William Crawshay* and *Hall*, in proportion to their shares.

No under-lease having been executed in the life of *Crawshay*, by indenture of the 21st of *May* 1814, *Bacon*, and his trustees, in obedience to the decree of 1810, assigned to *Hall*, his executors, &c., all the premises, for the residue of the respective terms, except the last day of each, subject to the annual rent of £5000 and the payment of 15s. a ton on all pig iron made yearly on the premises above 6400 tons, and not exceeding 10,700 tons; and by a deed dated the 1st of *June* 1814, [498] and indorsed on the assignment, *Hall* declared that he would stand possessed of the premises, as to three-eighth parts, in trust for himself, and as to five-eighth parts, in trust for *William Crawshay*; and *Hall* and *William Crawshay* entered into covenants for payment of their respective proportions of rent, and for mutual indemnity.

By indenture dated the 23d of *May* 1814, *Bacon*, in consideration of £32,500 paid three-eighths by *Hall* and five-eighths by *William Crawshay*, assigned to *Joseph Kaye*, his executors, &c., in trust for *Hall* and *Crawshay*, in the proportion of three-eighths to the former and five-eighths to the latter, the rent of 15s. per ton on iron, then due or to become due. By another indenture of the same date, *Bacon*, in consideration of £62,500 assigned to *Kaye*, in trust for *William Crawshay*, his reversionary interest in the premises, and the annual rent of £5000.

On the 1st of *June* 1814, *Bailey*, in execution of the agreement of *October* 1812, assigned to *William Crawshay* his share in the partnership property.

On the 31st of *July* 1817, *Mr. Hall* died, leaving four sons (the eldest of the age of fifteen years), and a daughter. By his will, dated the 8th of the same month, he devised to *George Maule*, *John Llewellyn*, and *Joseph Kaye*, all his freehold, copyhold, and leasehold estates (except trust and mortgage estates, and the estates in which he was interested as a partner with *William Crawshay* at *Cyfarthfa*), in trust, subject to the payment of debts and legacies in aid of his personal estate, for the benefit of his children. He then declared, that if he should have one or more son or sons living at his decease, or born in due time after, but no such son should then have attained the age of 21 years, it should be lawful for [499] his trustees, and the survivors and survivor of them, and the executors, &c., of such survivor, to carry on the iron-works, and other mercantile or trading concerns in which he should be concerned at his decease, if they should judge it for the benefit of the persons interested in his property under his will; and that if they should carry them on, then, during such time as his having such a son should be in suspense, it should be lawful for them to cause or permit any part of the stock in trade or effects which should be employed in or belong to the said works or concerns at his decease, to be employed in carrying on the same; and he exempted the stock in trade and effects so to be employed from the payment of his debts, to the extent and in the manner therein-after mentioned. The testator also declared, that if his son, who first or alone should attain the age of twenty-one years, should be desirous to have the iron-works and concerns or any of them continued, and should signify such desire to his trustees, by any writing under his hand, the amount of the stock and effects then employed therein should be valued, and his said son should pay (or secure in manner therein mentioned) to the trustees, the money at which such stock and effects should be

estimated. The testator then directed the application to be made by his trustees, of the profits of the iron works during the suspense of his having a son who should attain twenty-one years, and of the amount of the valuation to be paid or secured by his son as before mentioned ; and declared that if his iron works and other concerns should be so carried on, and his son, who first or alone should attain the age of twenty-one years, should decline to carry on the same, or to give such security for the stock and effects employed therein, or if while it should be in suspense whether he should have any such son, his trustees should deem it advisable to discontinue the said iron works and concerns, in either of such [500] cases, the iron works and concerns should be discontinued, and the stock and effects employed in the same should be sold and disposed of in such manner as his trustees should judge prudent and reasonable, and the money arising from the sale, and the gains and profits previously arising from the iron works and concerns, should be disposed of in the manner in which he had directed the gains and profits, and the money to be paid or secured by his son, in the event before mentioned, to be paid or applied, or as near thereto as circumstances would admit. The testator then appointed *Maule, Llewellyn, and Kaye*, executors of his will, and guardians and managers of the estate of his children, during their minorities, and he also appointed his executors and his wife guardians of the persons of his children ; and he authorised his trustees to employ any persons in the management of the iron work and concerns, at such salary, and to repose in them such trust or authority in conducting the trade, and in the management and disposal of the estate employed, or to be employed, and in the receipt of any debts to be contracted therein, as his trustees should in their discretion think fit.

On the 12th of August 1817, *William Crawshay* sent a written notice to the executors of *Hall*, that he considered the partnership absolutely dissolved by *Hall's* death, and would not consent to carry on the works in conjunction with his representatives.

The bill in the first cause, filed by *William Crawshay* against the executors of *Mr. Hall*, prayed, a declaration that the partnership between the Plaintiff and *Hall*, in the iron works, and all the trade and business thereof, became absolutely dissolved, or determined, by the death of *Mr. Hall*, or from that period ; an account of the [501] partnership dealings, from the foot of the last settlement thereof, previous to his death, and payment of the balance (after satisfaction of the partnership debts), between the Plaintiff and the executors of *Mr. Hall*, according to their respective interests ; a sale of all the partnership effects, and a division of the proceeds.

The Defendants, the executors of *Hall*, admitted that no written articles were ever entered into between *William Crawshay* and *Hall*, any such articles, as they believed, being considered unnecessary, inasmuch as the proportions to which the parties were entitled in the leasehold premises, and the leases, sufficiently ascertained their rights and interests as long as the leases endured. They denied that by the death of *Hall*, his interest in the premises and iron works determined or was in any respect affected, submitting that they were intitled to the premises and iron-works, as tenants in common with *William Crawshay*, for the residue of the terms of years for which they were holden, and to carry on iron-works for the benefit of the family of *Hall*, in the same manner as he carried on the same with *William Crawshay*, and according to the directions of his will, until one of his sons should attain the age of twenty-one years. They stated that the iron-works were absolutely necessary to the beneficial enjoyment of the leasehold premises ; and they insisted, that it appeared from his will and codicil to be the intention of *Richard Crawshay*, that his legatees should, for themselves and their representatives and families respectively, have an interest in the leasehold premises and iron-works, commensurate with the terms for which they were holden ; that the joint interest which *William Crawshay* and *Hall* had therein, was not an interest in an ordinary trading partnership, but an interest given by *Richard Crawshay* to them, for the benefit of themselves and their respective families, com-[502]-mensurate with the terms of years for which the leasehold premises were holden ; and that therefore no sale of the property ought to be directed by the Court in opposition to the bequest of *Richard Crawshay*, and to the will of *Hall*, whose family would in that event be deprived of the benefits intended and contemplated by him, to be derived from the leasehold premises and iron-works.

The bill in the second cause, filed by the executors and the children of Mr. *Hall* against *William Crawshay*, prayed a declaration that the executors were entitled to the leasehold premises and iron-works, for three-eighth parts thereof as tenants in common with *William Crawshay* (who was entitled to the other five-eighth parts), until one of the sons of *Hall* should attain the age of twenty-one years, and to carry on the iron-works with *William Crawshay*, for the benefit of the family of *Hall*, in the same manner as *Hall* carried on the same, and according to the directions of his will, until one of his sons should attain the age of twenty-one years, and that then such son, if he chose, would be entitled to the said leasehold premises and iron-works, for three-eighth parts thereof, as tenant in common with *William Crawshay*, for the remainder of the said terms of years, and to carry on the iron-works with *William Crawshay* accordingly. The bill also prayed, the consequential accounts and directions.

June 9. On this day a motion was made in behalf of *William Crawshay*, that it might be referred to the Master, to consider and approve a proper plan for the sale and disposal of the whole of the co-partnership iron-works, property, estate, and effects, including the good-will of the joint trade, and that the Master might proceed to a sale thereof immediately.

[503] Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Horne*, and Mr. *Rigby*, in support of the motion. The partnership subsisting without any agreement for its continuance during a certain term, was dissolved by the death of Mr. *Hall*. As long as the surviving partner carries on the trade with the original capital, the representatives of the deceased are, according to the doctrine of *Crawshay v. Collins* (15 Ves. 218. So *Featherstonhaugh v. Fenwick*, 17 Ves. 298), entitled to an account of the profits; but it is by no means clear that the surviving partner could render them responsible for a loss; an event of probable occurrence in a business, producing very uncertain returns; highly profitable in some years, and in others proportionately disadvantageous. Mr. *Crawshay*, therefore, insists on his right to a judicial declaration of the dissolution of the partnership. The object of the motion is not to obtain the effect of a hearing; the decree would direct an account as well as a sale. But were the order for a sale decretal, the Court would not, on that objection alone, compel the surviving partner to carry on the trade, during the interval which must elapse before a decree can be obtained, upon the terms of admitting the representatives of the deceased to a participation in the profits, without being entitled to obtain from them contribution for a loss. *Waters v. Taylor* (15 Ves. 10); *Forman v. Homfray* (2 Ves. & Beam. 329); *Featherstonhaugh v. Fenwick* (17 Ves. 298).

Sir *Arthur Piggott*, Mr. *Hart*, and Mr. *Winthrop*, against the motion. The order sought is decretal, and cannot be obtained on motion. The object of Mr. *Crawshay's* suit is, a judicial declaration of the dissolution of the partnership, and a sale. The Court will not, by this summary [504] proceeding supersede the established rules which protect its suitors and itself, from premature decision.

Were the order in its nature interlocutory, at least it cannot be obtained on this application. The motion though intitled in both causes, can be made only in the first, the object of the second being foreign; and to the first cause, neither the widow or the children of Mr. *Hall* are parties. Under the residuary clause in the late Mr. *Crawshay's* will, Mrs. *Hall* became intitled to the residue, including the iron-works and stock in trade, as joint-tenant with her husband; that interest was not divested by the codicil, and at the death of her husband, the whole devolved on her by survivorship; she is therefore a necessary party; and before the suits can proceed, the posthumous son of Mr. *Hall* born since their institution, must be brought before the Court.

Independently on these preliminary objections, the order cannot be obtained on the merits. First, this is a case, not of partnership in trade, but of joint interest in land; each party may apply for a partition, or sell his own share, but cannot compel a sale of the whole. The manufacture of the produce, was merely a mode of enjoyment of the land; not a trade. Next, the leases taken during long terms of years, for the purposes of the partnership, amount, in the absence of express agreement on that subject, to evidence of an intention to continue the partnership during the continuance of the leases. Lastly, it was the manifest intention of the late Mr. *Crawshay*, in the provisions of his will, that the duration of the partnership should be commensurate with the duration of the leases. The legacy of £25,000 to Mr. *Bailey*,

is given expressly as a capital for him to become a partner "so long as the lease endures."

[505] *The Lord Chancellor*. An important consideration is, whether this business is such as would subject the parties to become bankrupts. The distinction is obvious, and for this purpose material, between a partnership in trade, and a joint-interest in land. As between tenants in common, the Court does not dissolve the tenancy, but leaves each to sell his share; while in cases of partnership in trade, unless under particular circumstances of the trade, the rule is different.

June 10. *Sir Samuel Romilly* in reply. If, on the death of *Mr. Hall*, his interest in the trade devolved to his widow by survivorship, his executors have no interest, and the second suit is improperly instituted by them. But the objection is untenable. The codicil of the late *Mr. Crawshay* withdrawing the trade from the operation of the residuary clause in his will, disposes of three-eighths in favour of *Mr. Hall* alone, to the exclusion of his wife.

The objection that the children are not parties to the first suit is equally unfounded. They have no fixed interest. *Mr. Hall's* will contains only a contingent bequest in favour of a child who shall attain twenty-one. The motion, however, is made in both causes, and the persons interested under that will are therefore before the Court.

It is clear that the property consists not of a mere joint-interest in land, but of a partnership in trade. The business includes the manufacture of ore purchased from strangers, and is such as subjects the parties to the bankrupt laws. *Mr. Crawshay*, the testator, described it [506] as a trade. He gives, not an interest in leasehold property, but a share in a trade, of the capital of which, that leasehold property forms a part. The expression "so long as the lease endures," assigns no definite period. Among the several subsisting leases, to which is the Court to refer those words? The testator evidently employed them only to denote the intention of passing his whole interest in this stock in trade. It is absurd to impute to him the design of imposing on his legatees the obligation of receiving as partners, the representatives of such of them as died or became insolvent; a creditor for example taking out administration. On that construction, under the bankruptcy of one, his assignees being competent to sell his interest, might introduce the purchaser as a new partner, during the continuance of the leases.

The order sought is in strict conformity with practice. The Court, more especially where infants are concerned, takes immediate measures to terminate a trading, which is in effect conducted with the property of others.

*The Lord Chancellor* [Eldon]. The object of this motion is a sale of the partnership property; and in whatever terms expressed, the Court, if it directs a sale, will so direct it, that the property may be sold in the manner most beneficial for all parties interested. Where a suit is instituted for the dissolution of a partnership, and where it is clear on the bill and answer that all or some of the parties have a right to a dissolution, it is not contrary to the course of practice to direct a sale on motion. The two modes of proceeding for obtaining an immediate order for a sale, either to set down the cause for hearing on bill and answer, or to apply by motion, are the same in effect, though different in form. The reason of that [507] practice is, that if one partner has a right to consider the partnership as at an end, it may continue for the purpose of winding up the affairs; but being by death, or notice, or any other mode of determination, actually ended, no person in possession of the property can make any use of it inconsistent with that purpose. (1) If any person, therefore, conducts it otherwise, the Court will appoint a manager to wind up the concern (*Harding v. Glover*, 18 Ves. 281), and will direct inquiries in what manner it can be wound up most beneficially to those interested. The object of this motion, therefore, might be obtained, notwithstanding the objection of form; and the difficulty with regard to parties, might also be remedied by allowing the case to stand over for the bill to be amended; and the question is to be considered on the part of *Mr. Crawshay*, as if the infant children of *Mr. Hall* had applied for a declaration that the partnership is not dissolved.

[508] The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved, to this extent, that the Court will compel the

parties to act as partners, in a partnership existing only for the purpose of winding up the affairs. So death terminates a partnership,<sup>(2)</sup> and notice is no more than notice of the fact that death has terminated it. (See *Vulliamy v. Noble*, 3 Mer. 514.) Without doubt, in the absence of express, there may be an implied, contract, as to the duration of a partnership; but I must contradict all authority, if I say that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the Court holding, that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold, that if the partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade, are no more than stock in trade. I remember a case in the House of Lords about three years ago (the case of the *Carron Company*), in which the question was much discussed, whether, when partners purchase freehold estate for the purpose of trade, on dissolution that estate must not be considered as personalty, with regard to the representatives of a deceased partner? (1 *Swans*. 521.)

[509] The doctrine, that death or notice ends a partnership, has been called unreasonable. It is not necessary to examine that opinion, but much remains to be considered before it can be approved. If men will enter into a partnership, as into a marriage, for better and worse, they must abide by it; but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin; and considering what persons death might introduce into the partnership, unless it works a dissolution, there is strong reason for saying that such should be its effect. Is the surviving partner to receive into the partnership at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation or assignment from his representative? (3)

[510] If Mr. *Crawshay*, the testator and owner of this property, had thought proper, by his will, to declare that [511] his legatees should continue the partnership as long as the longest of the leases should endure, no person, [512] I agree, claiming under that will, could enjoy the benefits conferred by it, without submitting to the incon-[513]veniences which it imposed; but I find nothing to that effect in his will. It might have been plausibly, though [514] I think not effectually, contended, that *Bailey* and *Hall* were bound to continue partners as long as they lived; [515] but the words cannot be represented as imperative on any other person. The difficulty on the part of those [516] who insist that the partnership is to continue as long as the leases, is this, that they cannot insist that it is to [517] continue between the original partners and their representatives; for they have admitted, and must admit, [518] that each partner might assign his interest, and assign it to any number of individuals, in any number of shares; so that in truth the partnership, within two years after its formation, might not contain either an original partner, or a representative of any one of the original partners; but might consist entirely of a multitude of assignees.

In another view of this question it becomes important accurately to know the nature of the business. It seems difficult to establish that this is an interest in land, distinct from a partnership in trade; a mere interest in land, in which a partition could take place; for when persons, having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership in trade. Such is my present view; but both on the merits and on the objections of form, the case deserves further consideration.

June 27. The Lord Chancellor [Eldon]. It may be assumed, though the observation is not material to the purposes of this application, that the de-[519]-sire of Mr. *Crawshay*, the testator, was to keep the concern together. He gives the sum of £25,000 to Mr. *Bailey*, as a capital for him to become a partner with his executor, Mr. *Hall*; the rest of his interest in the trade, if he had not made a codicil, would have passed by the will to *Hall* and his wife; the effect of the will and codicil combined, is this; by the former, the testator being possessed of the entire concern, bequeathed

two-eighths to *Bailey*, the rest, including the three-eighths given by the codicil to *William Crawshaw*, would have devolved under the residuary clause to *Hall* and his wife; the codicil, continuing the gift of two-eighths to *Bailey*, disposes of three-eighths to *William Crawshaw*, and of the remaining three-eighths to *Hall*, in exclusion, as I understand, of his wife. Such being the state of the concern at the death of the testator, it appears that *Bailey* sold his share to *William Crawshaw*, and it has not been disputed in the course of the discussion, that everyone of the legatees was at liberty to sell his interest; the consequence is, that the individuals forming the partnership may be changed as often as the partners think proper. The question on these pleadings is, whether, supposing this the hearing of the cause, the Court could order the property to be sold; and whether the nature of the concern, and of the interest of the several parties in it is not such, that each being at liberty to sell his own share, they yet cannot, more particularly by interlocutory application, call on the Court for a sale of the whole? Mr. *Crawshaw*, having bought the interest of Mr. *Bailey*, carried on the business jointly with Mr. *Hall*, till the death of the latter. His will seems to me to devolve on his executors the discretion of continuing or discontinuing this concern, as they should think most for the benefit of his family; and he considers himself at liberty (for the will states as much) to introduce three executors as partners with Mr. *Crawshaw*, and various [520] branches of his family as *cestuis que trust* of those executors, as they must be, if the partnership is continued. It is impossible to contend that Mr. *Hall* may thus impose on Mr. *Crawshaw*, the necessity of continuing in partnership with his three executors, and their *cestuis que trust*, without admitting that on the same principle he might have imposed the obligation of receiving as partner, any person who might now sustain, or hereafter acquire, the character of executor or administrator to any of the trustees, or of their *cestuis que trust*, and that Mr. *Crawshaw* might have exercised a similar power. If this case is to be considered subject to the principles which govern partnerships in general, I cannot say that such was the situation of either party.

On the death of Mr. *Hall*, there being no articles of partnership, or agreement for its continuance, without any notice, and for every purpose, except that of winding up the concern, the partnership would cease, unless the surviving partner, and the representatives of the deceased, entered into some agreement for its continuance; and in the absence of articles, or stipulation to the contrary, *Crawshaw*, in the life of *Hall*, or *Hall*, in the life of *Crawshaw*, might, on the common principles of the contract, by notice, have terminated the partnership. It is contended, that the late Mr. *Crawshaw*, having formed this business, must have had an intention to keep it together, as one concern, though he distributed different interests in it among different members of his family; had he so said, without doubt, those who took his bounty, must have taken it on the terms which he imposed; but there is no such expression in his will or codicil, nor is the effect of those instruments more than to give an interest in aliquot shares and proportions in this concern. He has said, indeed, that *Bailey* should have an interest to the amount of £25,000, and should [521] be partner with his executor; but neither the terms nor the intent of the will impose on *Bailey*, or on his executor, an obligation to carry on the partnership, except as between themselves; and if *Bailey* thought proper to sell to *Crawshaw* his interest, a question might have arisen, as long as the executor was living, whether *Crawshaw*, purchasing the interest of *Bailey*, did not purchase subject to the obligation which, it is said, this will imposes on *Bailey*; but it seems to me impossible to contend, that when the executor was dead, either *Crawshaw* or *Bailey* were bound to carry on the trade with the executors of that executor; a proposition which cannot be maintained without asserting that they were bound to carry on the trade with the successive executors of that executor, to the expiration of the leases.

It has also been insisted that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure; but it is equally certain that there is no general rule, that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases. For ordinary purposes a lease is no more than stock in trade, and as part of the stock may be sold; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock; though, a question might

in that case arise on the death of a partner, whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality.(4) It is impossible therefore in [522] my opinion to hold, that there being many leases, some long, some of short duration, and others intermediate, the partnership is to subsist during the term of the leases, or of the longest lease. By the will of Mr. *Hall*, the question, whether his executors and trustees should continue in partnership, is left to their discretion; clear evidence of his opinion, that his interest might be separated from *Crawshay's*; if so, *Crawshay's* might be separated from his; and upon that construction of the will of the late Mr. *Crawshay*, the argument is, that he meant the whole concern to be kept together, but cared not who were to be the partners; an intention not to be imputed to him unless unequivocally expressed in the words of his will.

The question then resolves itself into this, what is the nature of this partnership property? The general doctrine with respect to a trading partnership is, that where there is no agreement for its continuance, any one of the partners may terminate it, and admitting the serious inconveniences which sometimes ensue, it becomes us to recollect the formidable evils which would attend the opposite doctrine; nor is it clear that a better rule could be suggested: but, whatever is its policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences; if they omit that precaution, Courts of Justice have no right to redeem them from the penalties of their imprudence. With respect to mere joint-interests in land, I apprehend the rule to be different: the parties then becoming tenants in common, each cannot call on his companions to concur [523] in a sale, but must sell his own interest. It is said that this is only the case of tenancy in common of a mine; if so, I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships; but a very difficult question may arise whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature, to be manufactured with their own. On such a case in bankruptcy, it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market as traders. On the evidence before me the case is left somewhat doubtful, though, I think, that the language of Mr. *Hall's* will, and of all the instruments, describes this as a trading concern; but under the circumstances it will not be wrong to have the nature of the business explained by affidavit. If this is a trading partnership the common principles must be applied.

Then comes the question, Can the Court, in such a case, direct a sale by interlocutory order on motion? I have considered that question much, and I think that the Court not only can, but in many instances does, order a sale on motion, in the instance of a trading partnership actually dissolved. Consider the inconveniences of a contrary proceeding. By the hypothesis, the Court has before it the case of a trading partnership clearly dissolved, and nothing remains, therefore, but to wind up the concern; we must then weigh the consequences of permitting the business of a partnership, [524] actually dissolved, to proceed until a decree for a sale; a decree which, in those circumstances, must necessarily be pronounced. An universal rule, that the trade, whether beneficial or not, should be carried on till the decree, would render the jurisdiction of the Court, in many cases, extremely mischievous; and on general principles, therefore, it is the practice, in the instance of a trading partnership clearly dissolved, at once to put an end to the trade, where that measure is required by the evident interest of the parties.

I shall reserve my final decision till I have seen the affidavit; and it may be worth consideration, whether you will not, in the mean time, bring before the Court, the posthumous child of Mr. *Hall*.

The affidavit of Mr. *Crawshay*, in explanation of the nature of the business, was to the following effect; that the iron-works at *Cyfarthfa* had, from the period of their first establishment by his father, been conducted as a trading concern; that the produce of the mines consisted of iron-stone, coal, and lime-stone: and



that, at the works, large quantities of iron (of various specified descriptions) had been, and were manufactured, sometimes from the materials obtained from the leasehold premises in question, and sometimes from pig-iron and finers' metal purchased in *London*, *Plymouth*, and *Bristol*; that from the establishment of the works, the proprietors had been in the habit of making very considerable purchases of iron-ore from *Lancashire*, pig-iron, and finers' metal, and of old wrought iron, naval and ordnance stores, for the purpose of manufacturing the same at the works into various sorts of iron, and re-selling them in that manufactured state; that such purchases (to a large amount), manufacture, and re-sale, had been made by [525] the successive firms of *Crawshay*, *Hall*, and *Bailey*, and *Crawshay* and *Hall*, during those respective partnerships; that the whole of such purchases were made with a view to profit, by manufacturing the same at the works, into bar and other iron for re-sale, and not merely for mixing the same with the iron the produce of the works, for the purpose of improving the iron of the works, or bringing the same better to market; and that from the first establishment of the works, the iron-stone, coal, and lime-stone produced from the mines on the works, had never been sold in their natural or raw state, except a small quantity of coal for the accommodation of the labourers.

*July 23.* The *Lord Chancellor* [Eldon]. This application, whether granted or refused, is one of the most important with which I have lately had to deal. The motion is made in two causes, to neither of which is the widow of Mr. *Hall* a party. The first bill prays a declaration that the partnership is dissolved; the object of the second is to compel its continuance, omitting to advert to a fact which, in any view of the case, seems clear, that *Crawshay* could not be constrained to remain a partner, but had the same right to dispose of his interest, which was exercised by Mr. *Hall* over his own. I am perfectly satisfied that the relief sought by that bill cannot be given, that is, that the executors of Mr. *Hall* cannot bind *Crawshay* to them; whether he can compel dissolution, is quite another question. Mr. *Hall* having, by his will, disposed of his own share, and attempted to introduce new partners, there is obviously no equity to constrain these parties to continue in partnership, unless it arises from express or implied contract, or from directions in the will under which they all claim. In that will I find no such direction. [526] It is calculated only to render *Bailey* a partner in the trade, but imposes no conditions on *Crawshay*. On that point, however, it may be sufficient to say, that had any such conditions been imposed, yet when the interests of *Bailey* and *Crawshay* became united in one person, and the executor was dead, having made such a will as appears in these pleadings, it would be impossible to maintain that an obligation existed among the parties, to continue in partnership during the remainder of the leases.

I am also of opinion that, if this is to be considered as a partnership in trade, the utmost that can be made from the purchase of leases of longer or shorter duration, is to propose that as a circumstance of evidence, from which may be inferred an implied contract that the partnership should last as long as those leases; but I find nothing here to authorise the conclusion that such was the intention. The purchase of a lease by a partnership, is no more than the purchase of an article of stock, which, when the partnership is dissolved, must be sold. I lay aside the affidavit as to the nature of the undertaking, because there is sufficient in the wills of *Crawshay* and of *Hall*, to call on the Plaintiffs in the second cause, to shew that this was not a trading partnership, if they meant to insist on that proposition. At present, I think that this was a trade.

The next question is, what is the consequence of Mrs. *Hall* not being a party? It is said that the effect of *Crawshay's* codicil is not such as to deprive Mrs. *Hall* of her interest under the will. That argument, if correct, might raise a question somewhat difficult; for considering the nature of the property, including freehold, leasehold, and personal chattels, and the power of Mr. *Hall* as her husband, over her interest in many parts [527] of that property, by reducing them into possession, unless we hold that the codicil deprived her of all the benefit, which the residuary clause in the will conferred, it would not be easy to know what is become of her interest. Mr. *Hall* has taken on himself by his will to dispose of this property, and has given to his wife a provision which would put her to election, if she retains any interest in it; and should she elect to take against the will, it requires consideration, that she is not a

party. The infant also is not before the Court ; and some difficulty may arise from acting in their absence. On the other hand, it is impossible to call on *Crawshay* to continue a partner with the executors of *Hall*, and to say that, whether they are considered as having the legal estate only, or as trustees for the family of *Hall*, *Crawshay* is obliged to unite himself with them as a trustee carrying on the trade for the benefit of their *cestuis que trust* ; or that he has not at this moment the same right which *Hall* by his will supposed his executors would have at his death, and his eldest son at twenty-one.

That brings it again to the question, whether this is a partnership in trade, or a tenancy in common in land ; and, if a partnership in trade, whether the ordinary rule of the Court is, on dissolution by the death of a partner, to wait till a decree before disposing of the partnership property, if the concern is of such a nature that it cannot be wound up at once ? I consider it clear, that the general rule is not to wait for a decree ; but, at least if the parties differ as to the mode of carrying on the trade, the Court will, without reference to the objection for want of parties, appoint a manager. Whether they will give notice of a motion for that purpose, which they shall be at liberty to do, or call on the Court for its opinion, and a reference to the Master to state the [528] best mode of winding up the concern, is what the parties will determine.

Mr. *Crawshay* says what I think is not unreasonable, that he will not carry on the trade five-eighths for himself, and three-eighths for the benefit of others. I desire to be understood as not deciding against ordering a sale, if Mrs. *Hall* and the infant were before the Court. If Mr. *Crawshay* will not carry on the trade, it is for the benefit of all parties interested, absent as well as present, that a manager should be appointed ; and is it [?] it is] clear that the Court possesses the power of making the order on motion, without waiting for a decree.

July 31. The Lord Chancellor [Eldon]. The first question that remains to be considered is, whether Mrs. *Hall* has any interest in this fund ? How does that stand in the opinion of other persons ? First, Mr. *Hall* disposed of the whole interest by his will ; and his executors have filed a bill on the supposition that she had no interest ; next, if the codicil had not the effect which I imagine, on the will, the nature of the property renders it extremely improbable that Mrs. *Hall* should retain any interest ; lastly, I think the codicil a revocation of the will so far as concerns the trade. The question follows, is it clear that the partnership was dissolved by the death of *Hall*, or am I to say that his executors, or any of them, are partners at this day in this concern ? After repeated consideration, I entertain no doubt, either that if this is to be regarded as a trading concern, the partnership was ended by his death or that it was a trading concern ; the consequence is, that being a trading concern, and the partnership being terminated by *Hall's* death, *Crawshay* would be justified in dealing with the property, since that event, as a person who is to wind up the concern. That introduces the question, whether I am to place a manager on the estate, or to leave *Crawshay* to deal with the property as surviving partner ? In that character he is at liberty to deal with it for the purpose of winding up the concern ; it is true that other parties are at liberty to deal with it in the same way, and in the event of differences between them, the Court can only appoint a manager to act under its direction. If application was made for a manager, it would be the duty of the Court, with regard to the infants, to consider whether that appointment is for their benefit, or whether there should be a reference to inquire the expediency of appointing a manager to wind up the business, or ordering a sale. The state of the market varies so much, that a sale, which might be beneficial at one moment and prejudicial at another, cannot be ordered without inquiry. I think that I shall not do wrong in directing a reference to the Master of the vacation to inquire whether it is for the advantage of all parties that this property should be sold, and, if so, on what terms ; without prejudice to any question.

“ His Lordship doth order, that it be referred to Mr. *Courtenay*, the Master of the vacation, to inquire and state to the Court, whether it will be for the benefit of all parties concerned in the works, that the same should be sold, and in what manner, as going works, or that they should be carried on for the purpose merely of winding up the concern ; and for the purpose of making such inquiries, the parties are to be examined upon interrogatories, if the Master should so think fit, and to produce all books, papers, and writings relating to the said works, the production of which the

said Master may think it proper to require; and it is ordered, that [530] the said Master do proceed *de die in diem*." 31st July 1818. Reg. Lib. A. 1817, fol. 1760.

By his report, dated 11th December 1818, the Master, after stating that it was admitted that it would be highly injurious to all parties interested, to stop the works, or to carry them on merely for the purpose of winding up the concern, or to put them up to sale otherwise than as going works, and that William Crawshay had offered to purchase the whole of Mr. Hall's share for £90,000, certified that it would be for the benefit of the infants, and of all other parties concerned in the works, that the whole of the shares and interests in the said leasehold and other estates, &c., vested in the executors of Mr. Hall, should be sold to Mr. Crawshay at that price. By an order of the Vice Chancellor, on the petition of Mr. Crawshay, the report was confirmed, and it was "ordered that the Defendants, G. Maule, J. Llewellyn, and J. Kaye, as executors of the said B. Hall, esq., the testator in the pleadings named, be at liberty to sell and dispose of, to the petitioner, by private contract, at the sum of £90,000, ascertained and apportioned as in the said report specified, all the estate, shares, right, and interest of them the said Defendants, as such executors as aforesaid, of and in the said iron-works, and the said late co-partnership of Crawshay and Hall, and in the leases, farms, lands, and buildings, wharf, machinery, &c." 24th December 1818. Reg. Lib. A. 1818, fol. 204.

(1) "There are various ways of dissolving a partnership: effluxion of time; the death of one partner; the bankruptcy of one, which operates like death; or a dry naked agreement that the partnership shall be dissolved. In no one of these cases can it be said, that to all intents and purposes the partnership is dissolved; for the connection still remains, until the affairs are wound up. The representatives of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor or the solvent partner; but still, in either of those cases, that community of interest remains that is necessary until the affairs are wound up." *Lord Eldon, C. Ex parte Williams*, 11 Ves. 5. And see *Peacock v. Peacock*, 16 Ves. 57. *Wood v. Braddick*, 1 Taunt. 104. *Wilson v. Greenwood*, 1 Swans. 480. Hæres socii, quamvis socius non est, tamen ea quæ per defunctum inchoata sunt, per hæredem explicari debent. *Dig. lib. 17, tit. 2, l. 40*. Si, vivo Titio, negotia ejus administrare cœpi, intermittere mortuo eo non debeo, nova tamen inchoare necesse mihi non est, vetera explicare ac conservare necessarium est: ut accidit cum alter ex sociis mortuus est; nam quæcunque prioris negotii explicandi causa geruntur, nihilum refert quo tempore consumuntur, sed quo tempore inchoarentur. *Dig. lib. 3, tit. 5, l. 21, s. 2*. [See 3 Swans. 627 (App.).]

(2) "Although the partnership is entered into for a term of years, it is previously dissolved by the death of either of the partners, unless there be express stipulations to the contrary." *Crawford v. Hamiltan*, 3 Madd. 251.

(3) The reasoning, on which the doctrines discussed in the text, rest (derived originally from the principle, that the contract of partnership is founded on a *delectus personæ*), has received a fuller illustration from the Civilians, than from any authorities in our domestic jurisprudence. According to the Roman law, a partnership was dissolved, by the death of either of the partners. "Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi eligit." *Inst. lib. 3, t. 26, s. 5*, and see to the same effect; *Dig. lib. 3, t. 2, l. 6, s. 6*; *lib. 17, t. 2, l. 4*; *l. 63, s. 10*. So rigidly was this doctrine enforced, that a stipulation, for admitting the heir of the deceased, into the partnership, was declared void. "Nemo potest societatem hæredi suo sic parare ut ipse hæres socius sit." *Dig. lib. 17, t. 2, l. 35*. "Idem (Papinianus) respondit societatem non posse ultra mortem porrigi; et ideo nec libertatem de supremis judiciis constringere quis poterit, vel cognatum ulteriorem proximioribus inferre." *Dig. lib. 17, t. 2, l. 52, s. 9*. Adeo morte socii solvitur societas, ut nec ab initio pacisci possimus, ut hæres succedat societati. *Dig. lib. 17, t. 2, l. 59*. Societas quemadmodum ad hæredes socii non transit, ita nec ad adrogatorem; ne alioquin invitus quis socius efficiatur ei cui non vult. *Dig. lib. 17, t. 2, l. 65, s. 11*. Nulla societas in æternum coitio est. *Dig. lib. 17, t. 2, l. 70*.

This restraint on the transactions of adults, without any purpose of public policy, is justly censured by *Pothier*. La raison de cette décision, étoit que la société étant un Droit qui est fondé sur l'amitié que les parties ont l'une pour l'autre, sur la confiance réciproque que l'une a dans la fidélité et les bonnes qualités de l'autre, il étoit contre

la nature de la societe, qu'elle put se contracter avec une personne incertaine et inconnue, et par consequent avec les heritiers des parties contractantes, qui lors du contrat, estoient des personnes incertaines, l'associe ne pouvant pas meme s'engager a se donner pour heritier une certaine personne. *L. 52, s. 9, d. tit.* Cette raison ne me paroît pas bien decisive, et je crois qu'elle a plus de subtilite que de solidite ; c'est pourquoi, je pense que dans notre droit, quoique regulierement la societe finisse par la mort de l'un des associes, et que son heritier ne lui succede pas aux droits de la societe pour l'avenir ; neanmoins la convention qu'il y succedera est valable : c'est l'avis de l'ancien Praticien Masner, des associations, 28 a, 33. (*Traite du contrat de societe, c. 8, s. 3, p. 139, 140.*)

The doctrine for which *Pothier* contends, though different from that of *Argou* (*Institution au droit Francois, livr. 3, ch. 32, p. 324*), and *Denisart* (voce societe, p. 539) who adopt the principle of the Digest, is established by the *Code Napoleon* (*Code civ. art. 1868*). The law of *England* imposes no restraint on the period of partnership, or the description of persons to whom, on the death of the original partners, the benefit of the contract is reserved, *Stuart v. Earl of Bute*, 3 Ves. 212 ; 11 Ves. 657 ; 1 Dow, 73. *Balmain v. Shore*, 9 Ves. 500 ; and see *Warner v. Cunningham*, 3 Dow, 76 ; but according to the doctrine of the text, without express stipulation to the contrary, partnership is dissolved by the death of either partner ; the contract not subsisting for the benefit of representatives ; *Pearce v. Chamberlain*, 2 Ves. Sen. 33 ; *Godfrey v. Browning*, *ib.* 34, and other authorities cited in the notes to the present case.

When the number of partners exceeded two, the death of one, effected a dissolution among the survivors. Sed et si consensu plurium societas contracta sit, morte unius socii solvitur, etsi plures supersint ; nisi in coeunda societate aliter convenierit. *Inst. lib. 3, t. 26, s. 5*. Morte unius societas dissolvitur etsi consensu omniumcoita sit, plures vero supersint, nisi in coeunda societate aliter convenierit. *Dig. lib. 17, t. 2, l. 65, s. 9*. La raison est, que les qualites personnelles de chacun des associes entrent en consideration dans le contrat de societe ; je ne dois donc pas etre oblige lorsque l'un de mes associes est mort, a demeurer en societe avec les autres, par ce qu'il se peut faire que ce ne soit que par la consideration des qualites personnelles de celui qui est mort, que j'ai voulu contracter la societe. *Pothier Traite du Contrat de Societe, c. 8, s. 3, p. 141*.

A partnership, without express agreement for its continuance, might be dissolved by either party, provided that the renunciation was *bona fide*, and seasonable (tempestiva). Dissociamur renunciacione, &c. *Dig. lib. 17, t. 2, l. 4*. Tamdiu societas durat, quamdiu consensus partium integer perseverat. *Cod. lib. 4, t. 37, l. 5*. Manet autem societas eousque donec in eodem consensu perseveraverint. At cum aliquis renunciaverit societati, solvitur societas. Sed plane si quis callide, in hoc renunciaverit societati, ut obveniens aliquod lucrum solus habeat, veluti si totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renunciaverit societati, ut hereditatem solus lucrifaceret, cogitur hoc lucrum communicare. *Inst. lib. 3, t. 26, s. 5*. Labeo autem Posteriorum libris scripsit, si renunciaverit societati unus ex sociis eo tempore quo interfuit socii non dirimi societatem, committere eum in pro socio actione ; nam si emimus mancipia, inita societate, deinde renuncies mihi eo tempore, quo vendere mancipia non expedit, hoc casu quia deteriolem causam meam facis, teneri te pro socio judicio. Proculus hoc ita verum esse, si societatis non intersit dirimi societatem : semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit. Hæc ita accipienda sunt, si nihil de hoc in coeunda societate convenit. *Dig. lib. 17, t. 2, l. 65, s. 5*, and see *Dig. lib. 17, t. 2, l. 14, l. 17, s. 2, l. 65, s. 3, 4*.

The Editor is not apprised of any direct authorities in the *English* law, on the distinction between seasonable and unseasonable dissolution ; but in one instance, the Court of Chancery seems to have assumed jurisdiction to qualify the right of renunciation, by reference to that distinction. "An application was made, some years ago, to the Court of Chancery, for an injunction to inhibit the Defendants from dissolving a commercial partnership ; the other side proposed to defer it, as not having had time to answer the affidavits ; but it was insisted, that this was in the nature of an injunction to stay waste, and that irreparable damage might ensue. At length the Court deferred it, the Defendants undertaking not to do any thing prejudicial in the meantime. But no doubt arose concerning the general propriety of such an application. *Chavany* against *Van Sommer*, in Chancery, *M. T. 11 G. 3*"

(3 *Wooddeson*, *Lect.* 416, n.). The register contains the following entry of the original application in this case. *Peter Chavany*, Plaintiff; *James Van Sommer*, and Others, Defendants. 14th November 1771. "Whereas Mr. Solicitor-General, of counsel with the Plaintiff, this day moved and offered divers reasons unto this Court, that an injunction may issue to restrain the said Defendants, *James Van Sommer*, &c., from dissolving or breaking up the co-partnership, now carrying on between the Plaintiff and the said Defendants, &c.; or from doing any act whatever tending thereto, and also to restrain the said Defendants, &c., from selling or disposing of, or joining in the sale, conveyance, or assignment of the leasehold estate, and interest belonging to the said co-partnership, or contracting for the sale thereof, or joining in such contract, in the presence of Mr. *John Cocks* and Mr. *Maddock*, of counsel with the Defendants, who prayed, that the said notice might be saved; whereupon, and upon hearing what was alleged by the counsel on both sides, it is ordered, that the benefit of the notice of the said motion be saved till the last day of this term, the Defendants consenting not to do any thing contrary to what the Plaintiff now prays, in the meantime, and it is further ordered, that the Defendants do file their affidavits two days before." (*Reg. Lib. A.* 1771, *fol.* 6.) The benefit of the notice was afterwards saved till the first general seal ensuing the term (*Id.* *fol.* 7), and on the 25th of November, the Defendants obtained an order for time to answer. (*Id.* *fol.* 147.) The register has been searched to the end of *Trinity* term 1775, without discovering any farther trace of this cause. In another case, the Court qualified the obligation to continue a partnership, by reference to the design of the contract; and directing an inquiry, whether the business could be carried on according to the true intent and meaning of the articles, expressed a determination to dissolve the partnership, if the Master reported in the negative. *Baring v. Dix*, 1 *Cox*, 213. *Montagu on Partnership*, v. i. p. 90; and in *Waters v. Taylor*, 2 *Ves. & Beam.* 299, Lord *Eldon* declared a partnership dissolved by the conduct of the parties, rendering it impossible to conduct the undertaking on the terms stipulated. See *Denisart voce Societe*, s. 12, p. 539.

It seems clear, that in general, the Court of Chancery, will compel specific performance of an agreement for a partnership, *Buxton v. Lister*, 3 *Aik.* 385; *Anon.* 2 *Ves. Sen.* 629; but Lord *Eldon* is represented to have held, that this doctrine is not applicable to partnerships, which may be immediately dissolved, *Hercy v. Birch*, 9 *Ves.* 360. See *Maddock's Princ. & Pract.* vol. i. p. 411, 2d edit. This distinction, however, must be received, it is presumed, not without qualification. In many such cases, though the partnership could be immediately dissolved, the performance of the agreement (like the execution of a lease after the expiration of the term, see *Nesbitt v. Meyer*, 1 *Swans.* 226) might be important, as investing the party with the legal rights, for which he contracted.

The effect of the lunacy of a partner, as a ground for a court of equity to decree a dissolution (for it seems clear, that lunacy does not, like death, *ipso facto* dissolve the partnership) is not yet settled by decision; *Hudleston's case*, *cit.* 2 *Ves. Sen.* 34, 35; *Sayer v. Bennet*, 1 *Cox*, 107, 1 *Montagu on Partnership*, notes p. 16 (in that case, the question was compromised before the trial of the issue; Mr. *Cox's MSS.*); the dictum of Lord *Thurlow* in *Adams v. Liardet*, *cit.* 2 *Ves. & Beam.* 300, 304. *Waters v. Taylor*, 2 *Ves. & Beam.* 303, 304. It seems principally a question of circumstances, to be decided by reference to the particular character of the disease, as permanent or temporary, the terms of the contract, and the nature of the undertaking, as imposing on the lunatic, an obligation of active interference, for the performance of which he is disqualified, or reserving to him a right of inspection, by the suspension of which the safety of his estate is hazarded.

The following note of *Hudleston's case*, no report of which has yet appeared in print, is extracted from a manuscript in the possession of Mr. *William Blackburn*, and agrees *verbatim* with the account of that case in Lord *Colchester's MSS.*, for access to which, the Editor is indebted to Mr. *Belt*.

*Wrexham v. Hudleston.*

(In Chancery, Nov. 25, 1734. *Reg. Lib. B.* 1734, *fol.* 57.)

"The case was, that the Plaintiff and Defendant, and one *Isaac Spilltimber*, in November 1716, by articles, entered into a partnership in the mercer's

trade, for seven years, from *Michaelmas* 1716, with a proviso in the articles, that *Hudleston* might, at any time after the first year, be at liberty to withdraw from the partnership upon the like terms and in like manner, as upon the death of a partner, the executors or administrators of a deceased partner were, by former articles of partnership between one *Reynell* deceased, and the present partners in 1710; and in all other matters, the partnership of 1716, was to be carried on in the same manner as by the agreements in the former articles; by which articles it was agreed, that in case any of the partners died before the expiration of five years (which was the term they agreed upon), the executors, &c., of the deceased partner, were to take the share of the deceased partner according to the last account stated, which was agreed to be once a-year done, and the surviving partners were to take the whole stock, and pay the executors by instalments at several days and to give bond, &c.

It appeared that in the new partnership, in the year 1720, Plaintiff *Wrexham*, upon losses in the *S. S.*, in *September* in that year, became lunatic, and so continued till *October* 1725. And in *January* 1720, the other partner, *Spiltimber*, died, and thereupon, in *September* 1721, the widow and executrix of *Spiltimber*, and the brother, wife, and relations of *Wrexham*, make up an account with *Hudleston*, and by deed, agree to dissolve the partnership.

*Wrexham*, upon his recovery in 1725, went a journeyman to *Hudleston*, and never complained of the account, &c., till filing this bill in 1732, by which he prayed to set aside the account settled in *September* 1721, and to have an account against *Hudleston*, for the partnership, till *Michaelmas* 1723, according to the articles in 1716. Defendant *Hudleston* as to the account of *September* 1721, if there appeared any errors therein, submitted, the same should be rectified. And upon opening the cause, that matter, and every thing else in difference between the Plaintiff and Defendant *Hudleston*, were, by consent, referred to arbitrators, and the only point reserved for the judgment of the Court was, whether Plaintiff should have an account of the two years partnership, from *Michaelmas* 1721, to *Michaelmas* 1723, as against Defendant, *Hudleston*.

And for Defendant it was objected, that by the death of *Spiltimber*, and the lunacy of Plaintiff, and by-proviso in the articles, the partnership was determined in 1721, &c.

But Lord Chancellor holds, that lunacy does not dissolve the partnership, even as to the party incapacitated, much less as to the rest; and though in partnerships the parties rely upon the mutual skill and assistance of each other, yet that is to be understood subject to the common accidents of life, as lunacy is; and were an incapacity of this kind to determine a partnership, why may not any sickness, or fever, or fit of the gout, &c.? It is true, lunacy is generally of longer continuance, but yet is uncertain, and it may be soon, in some cases, and in others later, removed.

As to the determination of the partnership by the death of *Spiltimber*, His Lordship gave no opinion, whether, in case of a partnership of three or more, and one dies, the whole partnership is dissolved or not; but seemed to incline that it was not, but in the present case held the partnership not dissolved by the death of *Spiltimber*, because, in the first articles to which the second refer, it is provided, that if one of the partners die, the survivor shall take the whole stock, and pay the executors by instalments; which shews the intention that the partnership should survive and continue as to the others. As to the proviso by which Mr. *Hudleston* had liberty to withdraw from the partnership, &c., that is not for dissolving the partnership, and by the accident of Plaintiff's lunacy became impracticable and impossible to be pursued, &c. As to the length of time, and acquiescence since by Plaintiff, &c., there is nothing but silence, and no act done to ratify the transactions during the lunacy, which were certainly null in themselves for want of sufficient authority in the parties transacting. And His Lordship deemed it might seem hard upon *Hudleston*, during the lunacy, to be at all the hazard, &c., and no profit, &c.; but it often happened so in other cases as of infants, &c., however that it would be reasonable to consider *Hudleston* as to his extraordinary trouble, &c., but His Lordship declared his judgment, that the partnership accounts ought to be carried on to *Michaelmas* 1723, the time for determining it by the articles; and as to all other matters the account, &c., referred as before to five arbitrators.

*Note:* His Lordship mentioned the case of Mr. *Cambridge* a few years ago, who was a lunatic and in partnership, and His Lordship said he thought the partnership there went on during the lunacy.

No books or cases were cited, but by Mr. *Floyer* for Defendant, *Vinn. Com.* on *Justin. Inst. l. 3, tit. 26, s. 5*; *Domat Loix Civ. l. 1, tit. 8, s. 5*, and cases put of one partner's becoming bankrupt, or feme partner marrying, to shew by what acts of law partnerships might be dissolved, &c.

As to the point of a partner becoming lunatic, if the partnership is not dissolved, it must continue with all the consequences of partnership, *i.e.* the lunatic must be bound by the debts and contracts of the other partner, which might be greatly to the lunatic's prejudice, especially if he has the greatest share in the stock, &c.; and to say the partnership is to continue as to profit but not to loss, is contrary to the very nature of partnership, which is a sharing in profit and loss, &c., and in fact is impracticable with respect to all strangers and parties dealing with the partnership; because, as to them, the stock of the lunatic will be equally liable, &c. And to the objection that lunacy is an accident, and the act of God, and, therefore, not to prejudice the party, &c., that is true with respect to saving conditions; but yet if one contracts to assist another with stock and service, and in consideration thereof is to have a share of the profits, &c., if by the act of God, as lunacy, &c., he is disabled as to his service, and by law his share of the stock is privileged from any loss or risk, it can never be reasonable or conscionable, that he should nevertheless have a share of the profits made by the others sole service and stock.

This reasoning does not hold where the incapacity is short, or removed soon, but here it was total, and during the whole time to come of the partnership; and the decree seemed the harder in this case because of the great length of time since and after the lunacy removed," &c.

A memorandum in the MS. describes this case, and others which accompany it, as "Cases from Mr. *Floyer*."

(4) See *Thornton v. Dixon*, 3 Bro. C. C. 199. *Smith v. Smith*, 5 Ves. 189. *Bell v. Phyn*, 7 Ves. 453. *Balmain v. Shore*, 9 Ves. 500. *Stuart v. Marquess of Bute*, 11 Ves. 665, 666. *Selkraig v. Davies*, 2 Dow, 242. *Townsend v. Devaynes*, 1 *Montagu on Partnership, Notes*, p. 97; 1 Swans. 508.

[531] *Ex parte* PROCTOR. (In the matter of JOHN RICHARD BIRCH, a lunatic.)  
April 7, 1818.

The committee of the person of a lunatic not removed in consequence of his bankruptcy. On a petition to remove the committee of the person, the Court (not being prevented by the form of the petition from granting relief according to the nature of the case), directed an inquiry, whether the comfort of the lunatic was sufficiently provided for; regard being had to the sum allowed.

This petition prayed the removal of *William Birch*, the committee of the person of the lunatic, on the ground that he had become bankrupt, and that, in the arrangements made, the comfort of the lunatic had not been duly consulted. The evidence on the latter allegation was contradictory.

Mr. *Hart* and Mr. *Wingfield*, in support of the petition, insisted that the committee of the person, having the management of the funds for the maintenance of the lunatic, was in a situation of pecuniary trust; and relied on *Ex parte Mildmay* (3 Ves. 2). In *Smith v. Bate* (2 Dick. 631), a testamentary guardian having been declared bankrupt, Lord *Thurlow* directed a reference to the Master, "to approve a proper person to have the care of the person of the infant").

[532] Sir *Samuel Romilly* for the committee. Bankruptcy disqualifies for pecuniary, not for personal, trusts. The committee of the person is chosen, not from the circumstances of his fortune, but from connection and friendship with the lunatic. From such an office, bankruptcy, unless under circumstances of disrepute, affords no reason for removal; and many affidavits represent this person as highly respectable. He became bankrupt in November 1816, has obtained his certificate, and is now, therefore, in a situation in which no objection could be

made to his holding even a pecuniary trust. In the case cited, the bankrupt had not obtained his certificate.

The *Lord Chancellor* [Eldon]. The Court will not remove a committee of the person merely because he is a bankrupt, whether he has or has not obtained his certificate; but bankruptcy is a circumstance deserving particular attention. Even if he has obtained his certificate, yet possessing, perhaps, no funds but those which are given for the maintenance of the lunatic, the bankrupt is under a temptation to appropriate a part to his own support, instead of applying the whole for the benefit of the lunatic. In the case cited, Lord *Loughborough* says, "It does not follow, that, if another committee is appointed, I shall change the care of the personal attendance of the lunatic; but they would have the administration of the money." It is true, it would not follow in many cases, that the Court would change the custody of the person; but there are instances, in which it might not be practicable otherwise to secure the allowance. The Court [533] undoubtedly possesses a species of controul over the funds, if spent improperly by the bankrupt; but the true subject of consideration is, whether that has been done which is required for the comfort of the lunatic. In many cases, nothing can better promote that comfort, than care to avoid changing the custody of his person. The petition prays no more than the removal of the committee; but I am not bound by the prayer. When the physician, whether right or wrong, states that the establishment of the lunatic is not such as may be afforded from £600 a-year, that is one reason why the establishment should be reviewed; but when I find that the lunatic has an income of £1300 or £1400, if the physician is right in his opinion that the establishment does not provide for the comfort of the lunatic, but wrong in his opinion that more comfort may be afforded from £600 a-year, I will not be stopped by the form of the prayer of the petition, but will direct an inquiry, whether the comfort of the lunatic has been sufficiently provided for, regard being had to the sum allowed.

GERARD v. PENSWICK. *April* 24, [1818].

[S. C. 1 Wils. Ch. 222.]

An agent, defendant to a bill for an account by his principal, ordered, on motion, to leave with his clerk in court, documents in his possession, containing entries relating to the cause; sealing up entries on other subjects, and making affidavit that he has sealed such entries only.

The Defendant was the steward and agent of the Plaintiff, and the bill prayed an account of his receipts and payments in that character, and that he might "produce and deliver to the Plaintiff all books, papers, and writings in his custody or power, relating to the accounts." The Defendant having left with [534] his clerk in court certain books and papers enumerated in his first answer, by a second answer admitted that he had in his possession other books of account, containing entries relating, some to his transactions as the agent of the Plaintiff, and others to his own private business. On this day the Plaintiff moved, that the Defendant might produce, and leave with his clerk in court, the books admitted by his farther answer to be in his possession.

Sir *Samuel Romilly* and Mr. *Horne*, in support of the motion.

The *Solicitor General* [Gifford] and Mr. *Girdlestone*, against the motion. The Defendant offers inspection of the books at his own house in *Liverpool*, in the immediate neighbourhood of the Plaintiff; but objects to the expense and inconvenience of conveying them to *London*. They contain copies of letters, and entries of various transactions, in which the Plaintiff has no concern, relating to the private business of the Defendant, or of other persons for whom he is agent; and some of them are in daily use.

Sir *Samuel Romilly* in reply. The books in question are not the books of a tradesman, containing the accounts of his trade in general, but the books of a steward, in which he was bound to enter his transactions in that character. He cannot privilege them by inserting entries on other subjects. Such entries he may seal up on oath; but the Court never compels a principal to attend at the house of his agent for the purpose of inspecting the accounts. There is no evidence that



the books are in daily use : [535] the last transaction between these parties occurred ten years ago.

The *Lord Chancellor* [Eldon]. There being no affidavit that the books are in daily use, the proper order is, that the Plaintiff shall leave them with his clerk in court, sealing up those parts which do not concern the plaintiff, and pledging himself by oath that he has sealed up those parts only. (*Campbell v. French*, 1 Anstr. 58.)

"This court doth order that the Defendant do, within three weeks, leave with his clerk in court in this cause, the several books of account, accounts, letters, and papers, vouchers and writings, relating to the matters in this cause, admitted by his farther answer to be in his possession, and the Plaintiff, his clerk in court, agent, or solicitor, is to be at liberty to inspect and peruse the same, and to take copies thereof, or extracts therefrom, as he may be advised, at his own expense ; but the said Defendant is to be at liberty to seal up on oath such parts of the said several books, &c., as do not in any manner relate to the Plaintiff."

Reg. Lib. A. 1817, fol. 1038.(1)

(1) In *Jones v. Powell*, 20th of November 1816, on a motion for an attachment for not leaving with the clerk in court, and permitting the inspection of, documents pursuant to an order for that purpose, resisted on the ground that the documents contained passages not relating to the question, and improper for inspection, Lord Eldon, C., said that the Defendants ought, on the motion for an order to inspect, to have stated the existence of passages to the discovery of which they objected, and the order would then have been qualified as to those passages ; and his Lordship, though he refused the application for an attachment, ordered the Defendants to pay the costs.—From Mr. *Merivale's* notes.

[536] "*Jones v. Powell*, 14th December 1816. Whereas Sir *Samuel Romilly* and Mr. *Wray*, of counsel for the Plaintiffs, this day moved and offered divers reasons unto this court, that an attachment might be issued against the Defendants, or some or one of them, for a contempt of this court, in not leaving in the hands of their clerk in court, in this cause, certain books of account, accounts, &c., and in not permitting the Plaintiffs, their clerk in court, or solicitor, to inspect, at the accounting-house of the said Defendants, certain other books, or to take copies of, or extracts from, all or any of the entries made in the said last-mentioned books, so far as the same relate to the matters in question in this cause, pursuant to an order made in this cause, dated the 7th day of August last ; or that the Defendants, or some or one of them, might be ordered, within a week, to leave with their clerk in court, in this cause, all and every the books of account, accounts, &c., admitted by the answers of the said Defendants, or of any or either of them, to be in their, or any, or either of their custody, possession, or power, and that the Plaintiffs, their solicitors, attornies, agents, or accountants, might be at liberty to inspect, and take copies, extracts, or abstracts of the same, and that the Defendants, or some or one of them, might pay to the Plaintiffs the costs of this application ; whereupon, and upon hearing Mr. *Leach*, Mr. *Bell*, and Mr. *Montagu*, of counsel for the Defendants, his Lordship doth not think fit to make any order upon this motion, but doth order, that the Defendants do pay to the Plaintiffs the costs of this application to be taxed, &c."

Reg. Lib. A. 1816, fol. 277.

[537] SAVILE v. The Earl of SCARBOROUGH. *Rolls.* March 11, 12, 1818.

[S. C. 1 Wils. Ch. 239.]

Sir *G. S.* having devised certain estates to *R. L.* for life, with remainder to his first and other sons in tail, and like remainder to *J. L.* and his sons, with proviso, that if the title of Earl of *S.* should descend to *R. L.* or any of the persons named in remainder, the estates should go to the person next in remainder, as if the person so becoming Earl were dead without issue ; and having directed that all his family pictures in his mansion-houses should be heir-looms, and be held with his mansion-houses by the person in possession thereof under his will, and given the use of his prints to *G.* for life, and after his decease to *F.* ; bequeathed to trustees all household

goods, furniture, glasses, and linen, &c., in his mansion-house (except the family pictures and prints not framed), to sell such parts as should be in his house (except his family pictures) as they should think proper, the other part, which might be thought worth keeping, to be removed to his house at *R.*, and to dispose of, or to retain, such of his effects at *R.* as they should think proper; and after his debts should be reduced to £35,000, then as to his family pictures, and such of his effects at *R.* as should remain unsold, in trust for *R. L.* if living, for his own proper use and benefit; but if he should die without leaving issue male living, in trust for *J. L.* or such person as should become entitled to the possession of his estate at *R.*, for the same right and interest as before declared with regard to *R. L.*: The family pictures are heir-looms, but *R. L.* being alive when the debts are reduced to £35,000 becomes absolutely entitled to the remaining personalty.

Sir *George Savile*, of *Rufford*, in the county of *Nottingham*, Baronet, by his will, dated the 19th of August 1783, devised certain freehold estates in the counties of *York* and *Nottingham*, and the bishopric of *Durham* (subject to two terms of twenty-one years and 500 years), to the use of his nephew the Honourable *Richard Lumley*, the second son of his sister *Barbara* Countess of *Scarborough*, by *Richard* late Earl of *Scarborough*, for his life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; remainder to the use of his nephew, the Honourable *John Lumley*, the third son of *Barbara* Countess of *Scarborough*, for his life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male, with remainders over; and the ultimate remainder to the testator's right heirs. The will contained a proviso, that if the title of Earl *Scarborough* should descend or come to *Richard Lumley*, or *John Lumley*, or to any of the other persons named in remainder, the estate which he or they should then be entitled to in the hereditaments devised under the will, should cease and become void; and the same hereditaments should immediately thereupon go to the person or persons who, under the limit-[538]-ations aforesaid, should then be next in remainder expectant, on the decease and failure of issue male of the person to whom the said title should so descend or come, in the same manner as such person or persons so in remainder would take the same by virtue of the will, in case he or they to whom the title of Earl of *Scarborough* should come in possession, was or were actually dead without issue. The will then empowered the persons, who should be successively entitled in possession under the will, to grant leases for any term not exceeding twenty-one years, of the hereditaments devised, except the mansion-house at *Rufford*.

The testator devised his leasehold mansion-house in *Leicester-fields*, and all other his leasehold estates, to *J. H.*, *J. M.*, and *G. M.*, in trust, subject to the rents reserved by, and the covenants contained in, the lease, for such persons, and for such estates, and subject to such provisos and limitations over, as were before expressed concerning his freehold estates in the county of *Nottingham*, or as near thereto as the nature of the leasehold estate would admit, to the end that the said leasehold premises might be enjoyed and go along with the said freehold estates, as long as the rules of law and equity would permit.

The testator directed that all his family pictures which, at the time of his decease, should be in his mansion-houses at *Rufford* and *Leicester-fields*, or either of them, should be deemed and considered as heir-looms, and should descend and go, and be held and enjoyed with, his said mansion-house, by the person or persons who, for the time being, should be in possession of, or entitled to, the same mansion-houses, by virtue of his will; and he gave the use of all his prints not framed, and books of prints, to Mr. *Peter Grandy*, [539] during his life, and after his decease, to *Francis Ferrand Foljambe*; and he gave and bequeathed to the said *J. H.*, *J. M.*, and *G. M.*, their executors and administrators, all the household goods, furniture, glasses, linen, plate, china, books, busts, statues, pictures, and other ornaments, which at the time of his decease should be in his said mansion-houses, or either of them (except the family pictures and prints not framed), and also all the stores of wines, and other liquors and provisions of housekeeping, that should at the time of his decease be in his said mansion-houses, or either of them, and all his carriages and horses, and all his implements and utensils of husbandry and gardening at *Rufford*, and all other his live and dead stock there, for the purposes following;

that is to say, to sell and dispose of such part thereof as should be in his house in *Leicester-fields* (except his family pictures) as they should think proper, and the other part thereof as might be thought worth keeping, to be removed to his house at *Rufford*; and also to sell and dispose of such part of his live and dead stock and effects at *Rufford* as they should think proper, and to retain and keep such part of his effects at *Rufford* as they should think proper; and when the debts he should owe, and the legacies he should think fit to give by any codicil or codicils, should be reduced to £35,000, then as to his said family pictures, and so much and such part of his effects at *Rufford* as should remain unsold, in trust for his said nephew *Richard Lumley*, in case he should be living, for his own proper use and benefit; but if his said nephew *Richard Lumley* should die before that time, without leaving any issue male of his body lawfully begotten, living at the time of his decease, or born in due time after, then in trust for any one of them, the said *John Lumley*, or the several other persons therein named, who should become entitled to the possession of his said [540] estate in *Nottinghamshire*, at the expiration of the term of twenty-one years, for such and the same right and interest as thereinbefore declared, with regard to his nephew *Richard Lumley*, in case he should die without leaving any issue male of his body lawfully begotten, living at the time of his death; the elder of the said younger sons of his said sister the Countess of *Scarborough* being always preferred, and to take before the younger of them. The testator appointed *J. H. F. F. Foljambe, J. M. and G. M.* executors.

The testator died shortly after the date of his will, and his debts having been reduced to the sum of £35,000, *Richard Lumley*, under an order of Court, dated the 22d of *July* 1789, entered into possession of the estates in the county of *Nottingham* and in *Leicester-fields*; and under another order, dated the 18th of *March* 1793, he entered into possession of the rest of the estates; the trusts of the terms of twenty-one years and 500 years having been satisfied.

On the 5th of *September* 1807, by the death of the late Earl of *Scarborough*, the earldom descended to *Richard Lumley*, and thereupon *John Lumley* having (in pursuance of a proviso in the will) assumed the surname, and quartered the arms, of *Savile*, became entitled to an estate for life in the freehold and leasehold premises.

The testator, at the time of his death, was possessed of certain family pictures in his mansion-houses at *Rufford* and *Leicester-fields*, and also of certain household-furniture, glasses, plate, linen, china, books, busts, statues, pictures, and other ornaments, implements of husbandry and gardening, carriages, horses, and live and dead [541] stock, and other articles mentioned in his will, and of certain fixtures in or attached to those houses, of very considerable value. Soon after his death, the executors sold such part of these several articles (except the family pictures) as was necessary for the purposes of the will, and retained the residue on the trusts thereby declared, and in pursuance thereof permitted *Richard Lumley* to enjoy the same, with the mansion-houses. A great part of the household-furniture, glasses, plate, books, busts, statues, and pictures, and other articles bequeathed to *J. H.*, *J. M.*, and *G. M.*, on the trusts of the will, were removed by *Richard Lumley* from the house at *Rufford*.

The bill filed by the Honourable *John Lumley Savile* against the Earl of *Scarborough*, prayed an account of all the household furniture and other articles bequeathed to *J. H.*, *J. M.*, and *G. M.*, of which the Defendant had had the use, and of what part had been lost, destroyed, or disposed of by him; a declaration that the Plaintiff was entitled to the use of such several bequeathed articles for his life; and that the Defendant might be decreed to account for or restore to the Plaintiff such of them as should appear to have been at any time removed by him from the mansion-house at *Rufford*, or to have been lost or destroyed by him or applied to his own use.

The Defendant, by his answer, claimed under the will to be entitled absolutely to all the articles in question, except the family pictures.

*Mr. Bell* and *Mr. Pepys*, for the Plaintiff. The family pictures are unquestionably heir-looms: the testator has, in express terms, declared them such; [542] and the Court will not permit that explicit unequivocal declaration, to be controlled by a subsequent ambiguous clause. On this point, Lord *Hardwick's* judgment in *Trafford v. Trafford* (3 *Atk.* 347) is decisive. The furniture and other property are disposed of by the same clause with the family pictures; and the intention in

the instance of the pictures being clear, the Court will not impute, with reference to the other articles, a different meaning to the same words in the same sentence. Some of these articles being perishable, the testator confers on his trustees a discretionary power of sale, in order that such as are unfit to be retained may be sold. The remainder are to be removed from *Leicester-fields* to his house at *Rufford*; a direction inconsistent with the supposition that they were to become the absolute property of the defendant, but explained by the fact that the testator had only a leasehold interest in the house in *Leicester-fields*, and designed to annex these articles to the inheritance of his settled estate. The reduction of the debts, to the sum of £35,000, an event depending on the discretion and management of the trustees, ascertained the period, not at which the absolute property was to vest, but at which the usufruct was to commence. The expression, that the trustees should hold in trust for the defendant and the successive persons entitled, demonstrates that they were to take the enjoyment only, not the absolute dominion. On the opposite construction, if the defendant had died before the debts were reduced to £35,000, leaving issue, these articles were undisposed of; for the clause contains no gift to his children, and the persons in remainder were to take only in the event of his dying without issue; a most extraordinary omission on a subject about which the testator was so anxious. That clause proves that the testator understood that he had not given an [543] absolute interest to the defendant. In the event specified, the same interest which *Richard Lumley* would have taken is given to the person succeeding to the real estate; the elder being always preferred, and to take before the younger; words descriptive, not of the person, but of the order of succession and quantity of estate, denoting a series of limited interests: the inference is inevitable that *Richard Lumley's* interest was limited only, not absolute. The testator intended a benefit to the issue of the tenants for life, commensurate with their respective interests in the real estate; and that intention can be executed only by annexing these articles in the character of heir-looms to the inheritance.

The *Master of the Rolls* [Sir Thomas Plumer]. You are entitled to present another difficulty; suppose, that before the debts were reduced to £35,000 the Defendant had become Earl of *Scarborough*, was he, having lost by that succession his title to the estate at *Rufford*, in the event of the reduction, to take the furniture?

Sir *Arthur Piggot* and Mr. *Heald*, for the Defendant. The Defendant was the primary object of the testator's bounty: the furniture is given to him, in the actual event, for his own use and benefit, without any direction that it should be annexed to the inheritance. Could the testator intend that carriages, horses, wine, and linen, should be heir-looms? With regard to the family pictures, the latter words of the clause control the former, and the Defendant is entitled to them with the rest of the furniture.

The *Master of the Rolls* [Sir Thomas Plumer]. I have no doubt on the construction of this will, ex-[544]-cept as to the family pictures. The household goods are clearly not heir-looms. I find nothing to unite those articles with the preceding clause, which is exclusively confined to the pictures. The testator begins by distinguishing with predilection the family pictures from all the other furniture, exempting them from the power of sale, meaning to perpetuate them in the family, and denominating them heir-looms. Had he intended to constitute other articles heir-looms, he would then have expressed that intention; knowing how to direct the permanent enjoyment of personal property, by giving to it the character of an heir-loom, he has given that character to the pictures only. It would be difficult for the Court to supply that denomination to other articles not in the same class, or named in the same sentence, or likely to be objects of the same predilection. The testator had evidently quitted the train of reasoning relative to heir-looms, before he proceeded from the family pictures to the general furniture; and then, selecting no particular articles, he commits the whole class to the discretion of his executors, expressly excepting from the power of sale the family pictures. Why is the Court to fetter personal property as an heir-loom by presumption and forced inference, without any word denoting that intention, and in the instance of a testator, who, when such was his design, knew how to express it? He gave an absolute power to sell every item of furniture, except specific bequests and family pictures. Were the articles perpetuated as heir-looms to be what the executors might happen to leave unsold? The gift, of what remained unsold to *Richard*

*Lumley*, is plainly expressed ; a gift for his own use and benefit without qualification. It is needless, more especially in the construction of an instrument which provides very imperfectly for contingencies, to consider an event which has not occurred, his death before the specified period, [545] leaving issue ; it is sufficient that in the actual event the property is bequeathed to him for his use and benefit. The Court must give effect to words admitting a clear interpretation, with whatever difficulties attended.

With respect to all the rest of the furniture, therefore, I entertain no doubt. In reference to the family pictures, the testator has first expressed an intent that they should be heir-looms ; and the Court, instead of presuming that he had abandoned that intent, must, if possible, give effect to it. I think, therefore, that the Court may make a distinction, and declaring that an absolute interest passes in the furniture, may direct the pictures to be enjoyed as heir-looms. With regard to them, the will contains express words to qualify the right ; and that qualification is still consistent with the terms use and benefit. By a similar reasoning, Lord *Hardwicke*, in *Trafford v. Trafford*, held the general expressions restrained. The objection, that this construction imputes a different meaning to the same words, use and benefit, in the same clause, as giving an interest, qualified in one case, and absolute in the other, is not conclusive ; the testator having plainly expressed his intention, in one instance, to give only a limited interest. At present, therefore, I am of opinion that the family pictures are heir-looms, and that the rest of the furniture is the absolute property of the defendant.

July 7, 1819. On this day the cause was reheard ; Mr. *Bell* and Mr. *Pepys* for the Plaintiff, Sir *Arthur Pigott* and Mr. *Heald* for the Defendant.

The *Master of the Rolls* [Sir *Thomas Plumer*], repeating the substance of his former judgment, made the following additional observations.

[546] The Plaintiff insists that having become entitled under the limitations of the will to the real property devised, he is entitled also to certain personal property, which it was the intention of the testator to annex to the real, so long as the rules of law permit. That claim, it is incumbent on the Plaintiff satisfactorily to establish. A claim, which in effect attempts to restrain alienation, and permanently to give to personalty the character of annexation to realty, can be enforced only on clear proof ; not by doubts on the construction of the will, or conjectures of intention insufficient to control plain words. The whole of the testator's furniture, live and dead stock, &c., is given in the first instance to trustees, in trust to sell all that they should think fit, with an exception which I shall presently notice ; the first object seems to have been a sale. A discretion is committed to the executors to retain such part of this property as they shall consider worth keeping, but subject to that, the whole is to be sold in payment of the debts, which were considerable. It has been justly observed that the will is drawn by a person who perfectly knew how to render personal property inalienable, and this clause begins with giving the character of heir-looms to a part of the furniture, the family pictures. The subject of heir-looms being thus particularly presented to the testator's attention, it is natural to suppose that he would then give that character to all which he was desirous to preserve ; that he would not omit to unite with the family pictures whatever other articles he intended to remain with them, as monuments of the antiquity of his family. The pictures he has not expressly given, but directs that they shall be enjoyed by the persons successively taking his estate. Next occur other articles, prints not framed, and books of prints, which he selects from among his personalty, and directs the use of them to Mr. *Grandy* for life, [547] and after his decease, to Mr. *Foljambe*, and bestowing on them a care which he has not applied to any other part of his personalty, directs a list to be immediately made, and an undertaking to be signed by Mr. *Grandy* for their delivery on his decease. This peculiar care of the family pictures and these prints, contrasted with the general discretionary power entrusted to his executors, to sell any part of the rest for payment of his debts, without any rule of discrimination what should be disposed of and what reserved, are little reconcileable with the supposed intention of securing the permanent enjoyment of both these classes of property. That discretionary power might be given to the executors, in order that the first taker should not have his house stripped of live or dead stock, plate, or other articles, which might be more conveniently retained than sold, and affords no evidence, therefore, of a general design to control the particular words ; a design to place the

articles which the executors might select to be retained, on the same basis with the family pictures. Such an intention would probably have produced identification and description of the articles intended; he could not mean that his executors should determine what articles he wished to be heir-looms. But without conjecture, it is enough to say, that his purpose being expressed only as to some articles, and not expressed as to others, the Court is not at liberty to extend it to the latter.

The form of gift to *R. Lumley* is too clear to admit doubt. The words "for his own use and benefit," are the common language to express the largest right that can be given over personal property, and are used throughout the will when rents and profits are to be enjoyed absolutely. The word "proper," introduced here, certainly cannot weaken the force of the sentence. There is nothing to qualify the right of *R. Lumley*, sup-[548]-posing him to live to enjoy the property at all. It is contended that as the testator confessedly did not intend to give the family pictures to *R. Lumley* absolutely, the Court must construe the words "his own proper use and benefit," as giving less than an absolute interest. But it has been fairly replied, that the effect of that argument is not to reduce the general import of those words, but to create doubts whether the pictures should be heir-looms beyond the first taker; for it is clear that the latter words of a will, if not reconcilable with the earlier, must govern the construction. To the family pictures the testator must be understood as having given the character of heir-looms, not by the sentence in which this phrase occurs, but by the antecedent words; but no expressions qualify the phrase, in reference to other articles. The pictures are the subject of two clauses, the first conferring on them alone the general character of heir-looms, the next bequeathing them with the rest, to the use and benefit of the Defendant. In *Trafford v. Trafford* there could be no doubt that the clause was one entire disposition of the several articles nominated, rendering all heir-looms. When the argument was pressed as to the residue, Lord *Hardwicke* says, the inference is not correct, that because the residue is given to the same individuals, it is also to devolve as an heir-loom, "for the devise of the "residue wants the very clause which constitutes and makes the other go as heir-looms." (3 *Atk.* 349.) So I say the bequest of the other goods wants the very words which give to the family pictures the character of heir-looms.

But the question remains, in what event is any thing given to the Plaintiff? By the words of the will, under [549] which alone he claims, if *R. Lumley* died before the debts are reduced to £35,000, and without issue, this property then devolved among the rest to the Plaintiff; but that event has not happened: *R. Lumley* is not dead: how then can the Plaintiff now claim what is given on a contingency that has not occurred? The supposed general intent to transfer the right of enjoying this property, to all persons who were to succeed to the real estate, is not expressed. If in the event of *R. Lumley* living and becoming Earl of *Scarborough*, it was to devolve to the Plaintiff, why has the testator not so declared? The direct contrary is expressed. If *R. Lumley* should live till the debts are reduced to £35,000, then whether Earl of *Scarborough* or not, he is to take this property, and it is not to go over unless he dies without leaving children; the other branches of the family may enjoy the estates, but nothing entitles them to enjoy this property. The words totally fail; no contingency is expressed, in which the Plaintiff could acquire any interest in the personalty, merely by acquiring the real estate.

I am of opinion, therefore, that the Defendant is entitled to this property absolutely, and that the Plaintiff in the actual event has no interest.

The bill was dismissed so far as it sought an account of the household goods, furniture, plate, linen, china, books, and of all the articles bequeathed by the testator to *J. H.*, *J. M.*, and *G. M.*, upon the trusts of the will, except the family pictures, which at the time of his decease were in the mansion-house at *Rufford* and *Leicester-fields*, which were declared heir-looms, to descend and be enjoyed with the mansion-houses.

Reg. Lib. B. 1818, fol. 1950.

[550] BROOKE v. CLARKE. May 2, 1818.

On a bill for injunction against an invasion of copyright, and an account ; a court of law having certified that the Plaintiff had no interest in the copyright in question, the bill cannot be dismissed on the defendant's motion.

The Plaintiff claimed, under an assignment made on the 12th of February 1817, the copyright in Mr. *Hargrav's* notes on Lord *Coke's* First Institute. The bill, alleging that the Defendants had lately published a new edition of the notes, prayed an injunction and an account. On the motion for an injunction (March 13, 25, 1817), the Lord Chancellor, doubting the title of the Plaintiff, directed a case for the opinion of the Court of King's Bench ; and the Judges having certified that the Plaintiff by virtue of the assignment, did not take any interest in the notes (1 *Barn. & Ald.* 396), the Defendants now moved to dismiss the bill with costs.

Mr. *Hart* in support of the motion. The order directing an issue was decretal, and the certificate having negatived the right on which the Plaintiffs insist, the Defendants are entitled to be protected from farther vexation. On bills for specific performance of contracts, the question of title is decided under a reference to the Master, on motion ; and the Court compels the Plaintiff, if the Master's report is adverse to him, to abandon the suit, or subvert the report. The same principle of preventing the vexation of fruitless litigation, on which that practice is founded, authorises the present application.

Sir *Samuel Romilly*, against the motion. The order made was not decretal but interlocutory, for the purpose of assisting the Court to decide the [551] question whether an injunction should be granted. The Plaintiff claims an account of the copies sold.

The Lord Chancellor [*Eldon*]. On a bill for specific performance, in which the single question is, whether the Plaintiff can make a good title, the Court, in modern times, directs on motion, a reference to the Master to inquire into the title.(1) It was not till that rule had been some time established, that we adopted another practice of proceeding on the report by motion : it was long thought that the cause must be heard on farther directions. I altered the course, thinking that after the first question had been decided on motion, the cause might be so disposed of. That may be considered as an exception.

In this case the application is for an injunction : I doubted the Plaintiff's title ; but that being a question of law, a case was directed for the Court of King's Bench. The [552] Judges certify that the Plaintiff has no title. We have therefore advanced thus far, that the Plaintiff cannot succeed in the motion for an injunction ; and the case stands as if I had declared my own opinion to that effect ; but I fear that this bill cannot be dismissed without more delay. The cause may still be brought to a hearing. The person who then presides here may entertain a different opinion on the question of title.

Motion refused.

(1) That practice was introduced by Lord *Thurlow* (*dict. arg.* — v. *Shelton*, 1 *Ves. & Bea.* 517), on an experimental application suggested at a consultation between Sir *James Mansfield* and Lord *Eldon*. (*Eldridge v. Porter*, 14 *Ves.* 139.) Being perfectly established in cases where it appears by the answer (*Moss v. Mathews*, 3 *Ves.* 279. *Wright v. Bond*, 11 *Ves.* 39. *Todd v. Gee*, 17 *Ves.* 278), or by admission at the bar before answer (*Balmanno v. Lumley*, 1 *Ves. & Bea.* 224 (see 1 *Mer.* 372). *Matthews v. Dana*, 3 *Madd.* 470), that the title is the only subject of dispute between the parties (*Briscoe v. Brett*, 2 *Ves. & Bea.* 377), it does not prevail where the performance of the contract is resisted on other grounds. (*Gompertz v. —*, 12 *Ves.* 17. *Blyth v. Elmhirst*, 1 *Ves. & Bea.* 1. *Paton v. Rogers*, 1 *Ves. & Bea.* 351. — v. *Shelton*, 1 *Ves. & Bea.* 516. *Lowe v. Manners*, 1 *Mer.* 19. *Morgan v. Shaw*, 2 *Mer.* 140, and see *Wallinger v. Hilbert*, 1 *Mer.* 104.) The policy of the practice being questionable (*Eldridge v. Porter*, 14 *Ves.* 139), it is not extended by analogy ; and therefore a Defendant to a bill for an account cannot on motion, after answer submitting to account, obtain a reference to the Master to take the account. (*Eldridge v. Porter*, and see *Fullagar v. Clark*, 18 *Ves.* 481.)

PENFOLD v. RAMSBOTTOM. *April 1, [1818].*

The Defendant not appearing in support of a demurrer, the Court, on production of an affidavit of service of the order for setting down the demurrer, will not over-rule the demurrer, but hear the Plaintiff.

In the course of an application in this case, it was stated that the *Vice-Chancellor* had over-ruled the demurrer of one of the Defendants, not appearing when the cause was called on, on production of an affidavit of service of the order for setting down the demurrer.

The *Lord Chancellor* [Eldon]. According to strict practice, on a demurrer, if the Plaintiff has not an affidavit of service of the order for setting down the demurrer, the cause may be struck out of the paper ; if an affidavit of service is produced that authorises the Court, in the absence of the Defendant, not to over-rule the demurrer, but to hear the Plaintiff.

[553] RAVEN v. WAITE. *Rolls. June 12, 1818.*

[S. C. 1 Wils. 204.]

A sum being bequeathed on trust, to apply the interest towards the maintenance and support of *F. R.* (separated from her husband, the testator's nephew, with separate allowance on condition of maintaining her children, and assisted by a voluntary annuity from the testator during his life), and the maintenance and education of her children until the youngest should attain 21, and after that event to *F. R.* so long as she remained the wife or widow of her present husband ; with a direction, in case of her death or marriage before that event, to the trustees, to take the children under their care, *F. R.* is not entitled to interest from the death of the testator ; the exception to the general rule, in case of legacies by persons in *loco parentis*, not extending in favour of an adult legatee, and the will expressly directing payment to certain annuitants within a year from the testator's death. [See 3 *Swans.* 689 (App.).]

*Frances Raven* having, in 1809, exhibited articles of the peace against her husband *John Raven*, he executed a deed of separation, by which some property of the wife, producing a small annual income, was conveyed in trust for her separate use, she agreeing to take upon herself the maintenance and education of her six infant children by her husband. From the date of the deed, the husband and wife had continued to live apart, the husband neither contributing, nor being in circumstances to contribute towards the maintenance of his wife and children. The wife being unable to provide for their support, *Josiah North*, the husband's uncle, assisted her by the advance of several sums ; and about the 1st of *November* 1809, fixed his voluntary allowance to her at £60 a-year, which he paid quarterly till his death, on the 5th of *November* 1815.

By his will, dated the 2d of *April* 1810, *Josiah North* bequeathed to each of the children of his nephew *John Raven*, who should be living at the testator's decease, £300, to be paid as they respectively attained the age of twenty-one years ; directing, that in case any of them should die under that age, unmarried and without issue, their shares should sink into the residuum of his personal estate ; the testator then bequeathed to *John Waite*, *John Day*, and *Robert Day* (his executors and devisees in trust), £1600 upon trust, to place the same at interest on government or real security, and to pay and apply the interest and proceeds, from time to time, [554] as the same should become due, for the maintenance and support of *Frances Raven*, and the maintenance, education, and bringing up of all and every her children, until the youngest of them should attain his or her age of twenty-one years ; and from that event, to pay the interest of the said sum of £1600 to *Frances Raven*, during such part of her life as she should remain the wife of the said *John Raven*, for her own sole and separate use, and he directed that her husband should not intermeddle therewith, neither should the same be subject to his debts, control, or engagements, and that her receipt should be a sufficient discharge to his trustees ; and in case of the death of *John Raven*, he directed his trustees to pay the interest to



*Frances Raven* during such part of her life as she should continue his widow, but in case she should die during the life of her husband, or in case of his death before her, should intermarry with any other person, then he directed that his trustees, and the survivor of them, his executors, &c., should take the said children under their sole care and management (as it was his express will that *John Raven* should not receive any benefit arising from the sum of £1600), and apply the interest thereof towards the maintenance, education, and bringing up of all and every the said children, until the youngest of them should attain the age of twenty-one years; and when the youngest should have attained that age, he directed that the said principal sum of £1600, and the interest then due thereon (in case *Frances Raven* should be then dead or married again), should sink into the residuum of his personal estate for the benefit of the persons entitled thereto. The testator also bequeathed to *John Raven* an annuity of £20 for his life, and to other persons various annuities, with directions for their commencement from the first quarter-day ensuing his death.

[555] The bill filed in behalf of *Frances Raven* (by her next friend) against the executors of *North*, prayed a declaration that she was entitled to the interest on the sum of £1600 from the testator's death, and payment accordingly.

Mr. *Bell* and Mr. *Barber*, for the Plaintiff. The rule, that a pecuniary legacy bears interest only from expiration of a year after the death of the testator, is subject to various exceptions. Legacies for the benefit of the testator's infant children, *Crickett v. Dolby* (3 Ves. 10), or of persons towards whom he stands *in loco parentis*, *Acherley v. Wheeler* (1 P. W. 783), *Hill v. Hill* (3 Ves. & Bea. 183); or, in general, under circumstances from which the court infers an intention, that the legacy should be applied for the support of the legatee, *Beckford v. Tobin* (1 Ves. Sen. 308), *Tyrrell v. Tyrrell* (4 Ves. 1), bear interest immediately from the testator's death. In this case, the testator avowedly placed himself *in loco parentis* to the plaintiff and to her children, allowing an annuity during his life, and bequeathing the legacy in question expressly for their support. The bequest is for the benefit of the children as well as of their mother, and had she died before the testator, the children would have been indisputably entitled to interest from his death? Upon what principle can their claim be prejudiced by her participation? Lord *Alvanley* expressed a decided opinion, that a wife is within the same exception as a child. (3 Ves. 16.) Another circumstance also exempts this case from the general rule: the capital of the legacy is given, not to the children, but to the residuary legatees, and their title to the interest ceases at the age of twenty-one. It has been decided, that the tenant for life of a residue is entitled to [556] interest from the death of the testator. *Gibson v. Bott*. (1) The benefit given to the children is an annuity commencing at the testator's death.

Mr. *Fonblanque* and Mr. *Blenman*, for the Defendants. None of the exceptions to the general rule comprehend this case, a legacy by a *stranger* to an *adult*. The testator was under no moral obligation to provide for the objects of his bounty; the mere direction to apply the interest for their maintenance, will not alone entitle the legatee to interest from the death of the testator. *Beckford v. Tobin*. The benefit here is given to the mother, not to the children; and it has been decided, that a bequest of the interest of a fund, to an individual who has no child, for the maintenance of her children, is due to that individual. (*Hammond v. Neame*, 1 Swans. 35.) The mother being adult, this case is within the terms of *Lowndes v. Lowndes* (15 Ves. 301), in which the Court of Exchequer, overruling the *dictum* of Lord *Alvanley*, declared that the exception is not extended to adults. The testator has directed that some annuities, created by his will, should commence from the quarter-day succeeding his death; had he intended that interest on this legacy should be payable before the usual period, it is presumable that he would in like manner have expressed that intention.

The *Master of the Rolls* [Sir Thomas Plumer]. My present impression is, that the Plaintiff cannot sustain her claim, either on the language of the will, on principle, or on authority.

[557] The Plaintiff to whom the legacy was primarily given, is adult, a wife separated from her husband, with separate maintenance, the amount of which does not appear, given to her on condition of maintaining her children: her situation in life is not in evidence, whether she is in circumstances to provide for herself; but it appears, that in addition to her separate maintenance, the testator allowed to her

an annuity of £60. The question is, whether he intended that interest should commence on this legacy from his death? The undisputed general rule, that a legacy carries interest only from the expiration of a year after the death of the testator, is founded on this reason, that interest is given for non-payment of the legacy when due; and that a legacy for the payment of which no other period is assigned by the will, is not due till the end of the year: but that general rule has exceptions; and however reluctant the Court may be to admit them, as productive of litigation, and the difficulty of knowing where to stop, established and authorized exceptions must prevail. The first exception is a specific legacy, an immediate gift of the fund with all its produce. (*Barrington v. Tristram*, 6 Ves. 345.) This legacy is clearly not specific. Another exception, which raises the present question, is, a legacy for the maintenance of the infant children of the testator. The foundations of that exception are, the natural obligation of the parent to provide for his child, and the incompetence of the child to give a discharge for the principal. The Court, therefore, concludes that the parent has postponed payment of the principal, in respect only of this inability to give a discharge, and infers an intention that interest shall be paid immediately.

It is unnecessary here to inquire whether the exception has not been extended in favour of children without [558] any very solid ground; but can any authority be found which carries the exception further? All the cases decided are cases of infants. In *Cricket v. Dolby* (3 Ves. 16), the reasoning of Lord *Alvanley* is expressly confined to infants; in *Beckford v. Tobin* (1 Ves. Sen. 308), Lord *Hardwicke* founded his decree on the infancy of the legatee; and in *Hill v. Hill* (3 Ves. & Bea. 183), Sir *William Grant* recognized the authority of *Beckford v. Tobin*, upon the point of infancy, and adopted the same principle. In *Lowndes v. Lowndes* (15 Ves. 301), the Court of Exchequer decided, that in the case of illegitimate children infancy will not authorize an exception to the general rule. I own, I do not see the distinction between that case, so far as the *Hooks* were concerned, and *Beckford v. Tobin*; the declared and principal purpose of the testator was not, as by what I cannot but think a forced construction, the Court held, to prevent alienation, but to provide maintenance. There, however, under the circumstances, the Court refused to extend the exception to a legacy in favour of an infant; but no case has been produced in which it ever was extended to a legacy in favour of an adult, though cases innumerable must have occurred of legacies to persons aged and decrepid, objects of the testator's bounty during his life.

On what principle could such an exception in favour of adults be founded? On necessity? But it is said, that the circumstances of the legatee are immaterial. On the terms "maintenance and support?" What charm is there in those words? In what instance of an adult legatee have they been held to confer a right to immediate interest? Neither reason nor authority extend the exception to adults. The only instance in [559] which such a doctrine has been countenanced, is the dictum of Lord *Alvanley* in *Cricket v. Dolby*, that "a wife would come under the same exception as a child"; but he immediately reduces the authority of that dictum, by acknowledging that all his learning and experience had discovered no such case; and suggesting, that it could hardly ever happen that a wife has not some other provision. Lord *Alvanley* adds, "and that may make a difference in the case of a child"; intimating, that the claim of a wife partially provided for might be distinguished from the claim of a child.

Opposed to the dictum of Lord *Alvanley* thus qualified, is the direct decision on the point by the Court of Exchequer in *Lowndes v. Lowndes*; a decision which was unanimous, and pronounced after having been suspended from a deference to the dictum of Lord *Alvanley*, and for the purpose of maturely considering it. The extension of the exception to an adult is therefore negatived by the latest, or rather the only, decision on the subject. The present is the case of an adult, and an adult partially provided for: the husband of the Plaintiff has actually made a provision for her and her children. For any thing that appears to the Court, she may be in affluent circumstances.

No expression in the will indicates the intention for which the Plaintiff contends. The disposition in favour of the annuitants shews that the testator knew how to direct an immediate provision when such was his meaning. Had he entertained that intention in favour of the Plaintiff, would he not have declared it, and inserted a direction for the payment of interest from his death?

It is then insisted, that this is a provision for the joint [560] benefit of an adult parent and her infant children ; and that the exception in favour of the infants must prevail. But the gift here is to the mother, to enable her to maintain herself and her children, and the legacy is payable to her during her life ; after her death, indeed, the trustees are to apply it for the maintenance of the children, but the mother is the primary object of the testator's bounty. Such a gift cannot form an exception to the rule.

The only remaining argument is, that if the Plaintiff had died in the life of the testator, the children would have been the immediate objects of this bequest. But supposing that the legacy had been given to an affluent individual for life, with remainder to the children, the general rule evidently could not be affected by the death of that individual in the life of the testator. The will must be construed as it stands, not as affected by events : the rule cannot change with subsequent accidents, because it depends on the intent of the testator ; that is, the intent with which the will was written, and according to the state of circumstances at that time.

Neither the principle of the rule, and of the exceptions, therefore, nor the terms of the will, support the Plaintiff's claim. I cannot carry the exception beyond the authorities, and introduce a new case in which the rule is to be relaxed.(2)

[561] Bill dismissed ; costs to be paid from the residuary estate.

Reg. Lib. B. 1817, fol. 1398.

(1) 7 Ves. 89. And see *Francis v. Young*, 9 Ves. 553. But it has since been decided by the present *Vice Chancellor*, that a residuary legatee for life is not entitled to interest until the expiration of a year from the death of the testator. *Stott v. Hollingworth*, 3 Madd. 161.

(2) In *Stent v. Robinson*, 12 Ves. 461, Sir William Grant refused to extend the exception to the case of a wife, remarking that Lord Alvanley's dictum is unsupported by authority, notwithstanding the numerous instances of legacies to adults. The following case, cited by Mr. Maddock, *Princ. and Pract. of Chancery*, vol. ii. p. 84, is taken from a manuscript in the possession of the Editor.

*Pett v. Fellows and Others*. In *Canc. Michaelmas*, 8 Geo. 2, 1733.

The testatrix bequeathed to her cousin *Phineas Pett*, the sum of £100, to her cousin *Peter Pett*, £200, to her cousin *Elizabeth Pett*, £1000 ; " and in case any of the aforesaid three children, *Phineas*, *Peter*, or *Elizabeth*, shall die before the age of twenty-one, my intention being that their legacies shall be paid when they respectively attain those years, his or her legacy shall be equally divided between the survivors ; and in case two of them shall die before the age of twenty-one, then the whole shall go to the survivor. I also give a power to my executors to apply any part of the aforesaid legacies towards the maintenance or education of the aforesaid three children, during their minority, as in their discretion they shall think fit." The question arising upon this will was, whether the legacies should carry interest, and if so, from what time ?

The *Lord Chancellor*. It plainly appears that the testatrix intended these legacies should carry interest, and that she made them payable at twenty-one years of age, for no other reason than that if one of them died, his legacy might go to the survivors. It is a general rule, that legacies do not of their own nature carry interest till default is made in payment ; if of an indefinite legacy, from a year after the death of the testator ; if made payable at a future day, then to carry interest from such time of payment : but this is in case of strangers only ; for in case of a child unprovided for, the legacy shall carry interest from the death of the father or mother who gave it. In the present case, the legatees are called cousins, and it is [562] admitted in the answer that they had no other subsistence.

Therefore decreed, that the executors should be accountable for interest, from the death of the testatrix, and that what had been paid for education and maintenance should be deducted, and what remained should be placed out in the funds till the legatees came of age, and then to apply to the Court to have them paid.

It was said at the bar, that the late *Attorney-General* and Mr. Mead had given their opinion that these legacies would not carry interest.

BARKSDALE v. GILLIAT. May 21, [1818].

[Cf. *In re Colles's Will*, 1869, L. R. 8 Eq. 271.]

A testator having directed legacies to be paid at the expiration of six months after his decease, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors.

By his will, dated the 20th of *December* 1814, *Thomas Dent* bequeathed, among other pecuniary legacies, £500 to the Plaintiff. The will contained the following clause: "I desire my executors to make payment of all the legacies, including the charitable donations or legacies, without any deduction, as given and bequeathed in this my will, at the expiration of six months from the time of my decease, or sooner if convenient: and I desire they will make sale of my property, my fifty-four shares in the Commercial Docks, my forty shares in the *East London Waterworks*, and all the shares I have or may have in the Banks of *Virginia*, and likewise my stock or property in the British funds, and all other property I have or may hereafter possess, for that purpose. A list of all my property at this time, or rather a statement of the presumed amount of the [563] same, is left with this will, being about £40,000 sterling. I do hereby direct that my said executors shall make payment of my debts, if any, my funeral expenses, stamp-duty, and charges of proving this my will, and all other charges or expenses whatsoever, out of the surplus which may remain, or residue of my effects."

With the testator's will was enclosed a writing, dated 21st of *December* 1814, in these words: "Private remarks relative to my will. My property, by an estimate, I have made out and left with my private papers, exclusive of interest and dividends, which may be received, will be about £40,000 or £41,000; the different sums left in my will amount to £36,700 sterling. When the Commercial Dock shares, the *East London Waterworks* shares, the *Virginia* Bank stock, and my property in the British funds are sold, my executors will be enabled to pay the legacies and donations within the time stated, and have a surplus of about £3000. Out of this surplus sum is to be paid my debts (if any), the stamp-duty, and expense of proving my will, funeral and all other expenses. *T. C. and Co.*'s note for £3000, can be paid to *T. C.* as his legacy. In addition to the surplus above stated, are debts due to me in *Virginia*, *North Carolina*, &c., *G. J. of Petersburg, Virginia*, is agent, having the books, bonds, and accounts, and acting under a power of attorney. The presumed value of these debts is 4000 dollars. The residue of my effects when all the payments are made, and all the claims are paid, is to be equally divided among my executors."

Soon after the death of the testator, one of the executors proved the will, together with the testamentary paper. After payment of the testator's debts, a surplus remained more than sufficient to satisfy all his legacies [564] and bequests, his property having been considerably augmented since the date of the will, by the rise of the public funds of this country.

The bill filed against the executors prayed payment of the legacy of £500, without deduction. The defendants insisted on deducting the legacy duty.

On this day the Plaintiff moved, that the Defendants might be ordered to pay the legacy without deduction.

*Mr. Bell* and *Mr. Roupel*, in support of the motion, relied on the terms "without deduction," which, if the executors were allowed to deduct the legacy-duty, would become nugatory.

*Sir Samuel Romilly* and *Mr. Clason*, against the motion. The legacy-duty, although for the prevention of fraud the legislature has required it to be paid by the executor, is not a deduction from the legacy, but a charge upon the legatee after payment of the legacy. The testator has specified the charges which he meant his executors to defray, the stamp-duty, and expenses of proving his will. If the executors are to pay the legacy-duty, in addition to the legacy, the amount of the testator's estate at his death would not be sufficient to pay all the legacies; and the additional sum will itself be subject to duty, the payment not being expressly directed in terms required for the purpose of exemption, by stat. 36 *Geo.* 3, c. 52, § 21.

The *Lord Chancellor* [Eldon]. It seems admitted, that unless some qualified

construction can be put on the words "without deduction," [565] the will ought to be construed as directing payment of the legacies without deduction of the legacy-duty, as between the pecuniary and residuary legatees. It is contended, first, that the legacies being payable at the end of six months, the words "without deduction" mean payment of the full amount, without any allowance on account of payment before the expiration of the usual period, a year : that the executors were to pay, at the earlier period assigned, as much as would otherwise have been payable at the ordinary time. The difficulty of that argument consists in this, that the same construction must have been adopted, if the will had not contained the words "without deduction" ; because, with or without those words, a duty is imposed on the executors of making payment at the end of six months, or sooner, if the funds could be conveniently applied. It struck me, that the legatees living in distant parts, some in Philadelphia, &c., the meaning of the testator might be, that their legacies should be paid without any charge in respect of the difficulty of making payment among individuals so resident ; on reconsideration, I think that argument rests too much on conjecture.

The case amounts to this : the testator, shewing that he is estimating the amount of his property, and its adequacy to the payments which he directs, the Court is competent to examine the proportion of that property to those demands. Calculations of property are clearly evidence in a case in which the testator has stated on his will, how, as he imagines, his property will stand, after the dispositions which he has made ; and if, by the testamentary paper annexed to his will, he had shewn that the funds would not be sufficient to pay the legacies and the legacy-duty, the legacies must be paid, charging the duty. As far, however, as I am master of figures, I cannot discover that ; and, therefore, though [566] I have a suspicion that the testator intended that the legacy-duty should be deducted, my opinion, subject to considerable doubt, is, that these legacies must be paid without deduction of the legacy-duty.

SKRYMSHER v. NORTHCOTE. *Rolls. June 12, July 8, 15, [1818].*

[S. C. 1 Wils. Ch. 248. Inapplicable, *In re Judkin's Trusts*, 1884, 25 Ch. D. 750. Doubted, *In re Parker*, [1901] 1 Ch. 408.]

A testator having, by his will, directed his executors to transfer £500, part of his residuary estate, to *H. N.*, and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of *H. N.*, and by a codicil declared that he razed her name out of his will with his own hand ; the £500 belong, as undisposed of, to his next of kin. The costs of ascertaining the right to that sum, paid thereout, in exemption of the general residue.

By his will, dated the 19th of June 1794, *Simeon Coley*, after a direction for the payment of his debts and some pecuniary legacies (including £10 to each of his executors for their trouble in executing the trusts of his will), bequeathed to trustees all the residue of his estate and effects, upon trust to sell and convert into money such parts as should not consist of money, and invest the same, together with all the rest of his estate and effects not already invested in the funds, in the purchase of 5 *per cent.* Bank annuities, and to stand possessed of all his said estate and effects, and of the funds and securities for the same, upon trust to pay the dividends and annual produce between his two daughters, *Elizabeth Amelia Coley* and *Helen Coley*, in equal proportions for their separate use, during their respective lives, and after the respective decease of his said daughters as to their respective half parts, in trust for all and every their children, who being sons, should attain twenty-one, or being daughters, should attain twenty-one or be married. The will then proceeded thus : " And in case of and after the death of either of my said daughters, *Elizabeth* and *Helen Coley*, without leaving any issue entitled, or who shall live to become entitled, to the half part or share of her so dying, then as to the [567] half part or share of her whose issue shall so fail, upon trust to pay or transfer £800 5 *per cent.* Bank annuities, part of such moiety, unto my son *Simeon Coley*, his executors and administrators, and upon trust to pay or transfer £500 like annuities, other part of such moiety, unto my " daughter *Hannah Northcote*, wife of *Thomas Northcote*, of *Piety-street* "

(Note : In the original will, a pen had been drawn through the words printed between inverted commas), in the parish of *St. James, Clerkenwell*, in the county of *Middlesex*, goldsmith, her executors and administrators, and upon trust to pay and apply the interest, dividends, and annual produce of the remaining part of such last-mentioned moiety," for the separate use of the survivor of his two daughters during her life, in the same manner as her original moiety ; and after the death of the survivor, the remainder of the moiety of his daughter first dying without issue, and the original moiety of the survivor, to be in trust for the children of the survivor, in the same manner as their mother's original moiety ; and in case of, and after the decease of the survivor of his daughters *Elizabeth* and *Helen*, without leaving any issue who should live to become entitled to the said trust monies, he bequeathed one moiety of all the residue of the trust monies to his son *Simeon Coley*, his executors, &c., absolutely, and the other moiety " unto my said daughter *Hannah Northcote* " (Note : In the original will, a pen had been drawn through the words printed between inverted commas), her executors, &c., absolutely. The testator then appointed *John Swertner*, and his son *Simeon Coley*, joint executors.

A codicil, executed by the testator on the 7th of June 1798, contained the following clause : " I razed the name of *Northcote* out of my will with my own hand. *S. Coley.*"

[568] On the 22d of June 1798, the testator died, leaving a son, *Simeon Coley*, and three daughters, *Hannah Northcote*, *Elizabeth Amelia Coley*, and *Helen Coley*, his next of kin. *Helen Coley* died on the 3d of August 1815, unmarried, having attained twenty-one. By her will, dated the 29th of July preceding, she gave the whole of her property to her sister *Elizabeth Amelia Burrow* (formerly *Coley*), without naming any executor. On the 13th of January 1811, *Simeon Coley*, the son, died, having by his will, dated the 13th of March 1808, given all sums of money and other property to which, at the time of his decease, he should be entitled under the will of his father, and the stocks, funds, and securities, in which such sums of money and other property should be then invested, to *Christian Ignatius Latrobe*, *John Lewis Wollin*, and *John Clarke*, in trust for his two daughters, *Frances Elizabeth* (afterwards married to *John Skrymsher*), and *Ann Amelia* (afterwards married to *William Croft Fish*), equally, to be vested at their respective ages of twenty-one years.

The bill filed by *Skrymsher* and *Fish*, and their respective wives, against the trustees named in the will of *Simeon Coley*, the younger, *Hannah Northcote*, and *Elizabeth Amelia Burrow*, prayed a declaration of the rights of the parties claiming under the wills of the father and the son. The question argued at the hearing was, who were entitled to the sum of £500 five *per cent.* bank annuities, part of *Helen Coley's* moiety of the residuary estate of her father, given in the event of her death without issue, to *Hannah Northcote*, whose name the testator afterwards erased.

Mr. *Trower* and Mr. *Maddock* for the Plaintiffs, Mr. [569] *Hart* and Mr. *Hone* for *Hannah Northcote*, and Mr. *Bell* for the executors of the son. The bequest of the sum of £500 stock, was revoked by the erasure of the name of the legatee, and no other disposition of it being contained in the will, that sum passes as undisposed of to the next of kin. In this respect a residuary bequest differs from every other. A specific or pecuniary legacy being revoked, or, from whatever cause, failing, becomes a part of the residue for the benefit of the residuary legatee ; but if a gift of some portion of the residue itself fails, the residue being given as in this instance, in distinct shares, the share so failing will not accrue to the remaining shares, but belongs as undisposed of to the next of kin. *Bagwell v. Dry* (1 P. Wms. 700, and see the cases cited by Mr. *Cox*, n. 2), *Page v. Page* (2 P. Wms. 489 ; Str. 820 ; Mos. 42). In *Leake v. Robinson* (2 Mer. 363 ; see p. 392), Sir *William Grant* observing, that " with regard to personal estate, every thing which is ill given by the will falls into the residue, and that it must be a very peculiar case indeed in which there can at once be a residuary clause, and a partial intestacy," subjoins the qualification, " unless some part of the residue itself be ill given." In *Cresswell v. Cheslyn* (2 Eden, 123), the testator having by his will given his residuary estate among his three children, equally as tenants in common, by a codicil revoked the appointment of one of the residuary legatees, giving to her a pecuniary legacy. Lord *Northington* declared that her share belonged, not to the other residuary legatees, but to the next of kin ; and his decree was affirmed in the House of Lords. (*Cheslyn*

v. *Cresswell*, 3 Bro. P. C. ed. Toml. 246.) The objection to that decision suggested by a high legal authority [570] (Serjeant *Hill*, ap. 2 *Eden*, 126, n.), is not applicable to the present case; the words of gift or declaration of trust remaining in this will, and nothing being erased but the name of the legatee.

Mr. Parker for Mrs. *Burrow*. The testator having erased the name of *Hannah Northcote* from his will, and by his codicil recognised the erasure, denoted an intention wholly to revoke and annul the gift to her. The will, therefore, must be read as if that clause had never been inserted in it. No reason is assigned for imputing to the testator the design to die intestate as to this stock. The will and codicil stand as if the bequest, which is revoked, had never been expressed; and under the will so framed Mrs. *Burrow*, in addition to her share of the capital of the £500 stock, as one of the testator's next of kin, and as the executrix of *Helen Coley*, is entitled to the dividends of the stock during her life.

The *Master of the Rolls* [Sir Thomas Plumer]. The question with respect to the sum of £500 bank-annuities, given by the will of *Simeon Coley* the father, is, whether the rule applicable to residue is different from that which prevails in the case of every other legacy? It seems clear on the authorities, that a part of the residue of which the disposition fails, will not accrue in augmentation of the remaining parts, as a residue of residue; but instead of resuming the nature of residue, devolves as undisposed of. Residue means all of which no effectual disposition is made by the will, other than the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails, the [571] will is inoperative. In the instance of a residue given in moieties, to hold that one moiety lapsing should accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole. Whatever argument applies to the entirety of the moiety applies to every part of it; the distinction is mere sub-division. In this case the testator, in the event of one daughter dying without children, instead of disposing of her moiety of the residue entirely, divides it, and gives £500 to his daughter *Hannah*: she ceasing to be an object of his bounty, he substitutes no other person. Of that sum, therefore, which once formed a portion of the residue disposed of, in the actual event, no disposition is made, and the testator is as to that intestate.

July 8, 15. The cause was again mentioned on the subject of costs, the question being whether the costs should be defrayed from the general residue, or from the sum of £500, the portion of residue which had lapsed. An objection was also suggested to the frame of the suit, instituted by the legatees of *Simeon Coley* the son, instead of his personal representatives, without any allegation of fraud. *Elmslie v. M'Aulay* (3 Bro. C. C. 624). The following cases were cited as authorities for the proposition, that the costs should be paid by the general personal estate. *Attorney-General v. Earl of Winchelsea* (3 Bro. C. C. 373, under the correct title of *Attorney-General v. Hurst*, 2 Cox, 364). *Curtis v. Hutton* (14 Ves. 537). *Cresswell v. Cheslyn*, from the registrar's book (2 *Eden*, 123. The fact is not mentioned in the printed report, but by the register it appears that the costs of all parties were paid out of the general estate. Reg. Lib. A. 1761, fol. 180).

[572] The *Master of the Rolls* [Sir Thomas Plumer] said, that the objection of form was too late, and the interest of all parties would be promoted, by permitting the suit instituted for settling a family question to proceed; that the cases cited of gifts to charities, in which the costs had been apportioned between the charitable fund and the general residue, were not precisely parallel to the present case; for if the gift to the charity failed, the fund would form part of the general residue, comprehending all not effectually disposed of; but the question here was, whether the sum of £500 was not more undisposed of than the residue distributed specifically among legatees named; and in that respect, the case of *Cresswell v. Cheslyn* was more analogous to the present; that the claims of the residuary legatees, and next of kin of *Coley* the elder, required to be decided before any disposition could be made of the fund in Court, and the costs of that decision were chargeable on his estate; but that the increased expense occasioned by the institution of the suit in behalf of the residuary legatees, instead of the representatives, of *Coley* the younger, and by questions between them, must be defrayed from the estate of the latter.

The decree declared, that the sum of £500 5 per cent. annuities, in the will of *Simeon Coley* the elder mentioned to be given to his daughter *Hannah Northcote*,

whose name was afterwards struck out of the will, remained undisposed of, and, together with the dividends accrued since the death of *Helen Coley*, became distributable among the next of kin of *Simeon Coley* the elder, living at his decease; and directed an account of such dividends, and payment of them, one-fourth to *Latrobe* and *Clarke*, the surviving executors of *S. Coley* the younger; one-fourth to *Hannah Northcote*; one-fourth to *E. A. Burrow*; and the remaining one-fourth to *E. A. Burrow*, as the executrix of *Helen Coley*. The [573] decree also directed the Master to tax, "as between solicitor and client," (1) the costs of all parties, except the bank, and apportion the same, and ascertain how much related to the question arising on the will of the testator *S. Coley* the elder, respecting the £500 bank-annuities, and how much to the £800, and how much to the residue of the £2700 (*Helen Coley's* moiety): so much of the £500 as would raise such part of the costs as the Master should apportion in respect of the said £500 to be sold and paid into the bank to the credit of the cause, the remainder to be paid to the same parties, and in the same proportions, as before specified for payment of the accrued dividends.

Reg. Lib. B. 1817, fol. 603-606.

(1) The words between inverted commas, interlined in the registrar's book, were omitted by mistake in the original decree, and introduced on an application by Mr. *Maddock* for the Plaintiffs, with the consent of all parties, on the 29th of April 1819. See *Madd.* Principles and Practice of Chancery, 2d edit. vol. ii. p. 487, 488, and the cases there cited.

GRESLEY v. ADDERLEY. GRESLEY v. HEATHCOTE. May 21, [1818].

A mortgagee of a term created for raising portions, and expired, is not entitled to an account of rents and profits in the hands of a receiver, accrued before the expiration of the term.

By indentures of lease and release, dated the 20th and 21st of July 1697, Sir *Thomas Gresley*, Bart., and *Frances* his wife, and *William Gresley*, his son and heir apparent, conveyed to trustees certain estates in the county of *Derby*, as to part, to the use of *William Gresley* for life; remainder to the use of *Barbara* his wife, for life, in lieu of dower; and as to the rest, to the [574] use of Sir *Thomas Gresley* for life; remainder as to part, to the use of *Frances Gresley* for life, in lieu of dower; remainder as to the rest, from the death of Sir *Thomas Gresley*, to the use of *Gilbert Thacker* and *Thomas Skeffington*, their executors, &c., for the term of one hundred years; remainder as to the part limited to *Frances Gresley* for life, from her death, to the use of *Thacker* and *Skeffington* for the like term of one hundred years; remainder to *William Gresley* for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail-male, with ulterior remainders, and the ultimate remainder to the heirs of Sir *Thomas Gresley*. The trusts of the terms of one hundred years were declared to be for raising £3000 for the portions of the three daughters of Sir *Thomas Gresley*, and, in certain events, £4000 for the younger children of *William Gresley*; with a proviso, that in case any of the persons entitled to the inheritance should pay the sums so to be charged, the terms should remain a security for reimbursing them, with interest from the decease of the person making the payment.

The first term commenced on the death of Sir *Thomas Gresley* in 1699; and the second, on the death of *Frances Gresley*, in July 1711.

Sir *William Gresley* died in 1711, leaving *Thomas Gresley* his only son, and *Bridget* (afterwards the wife of *Adam Otley*) his only daughter, the latter of whom became entitled to have the sum of £4000 raised by sale or mortgage of the estates comprised in the terms.

By indenture of assignment and mortgage, dated the 5th of October 1719, *Elizabeth Thacker*, the representative of the surviving trustee, in consideration of £3000 paid to *Otley* and his wife by *Arabella Marrow*, [575] and £1000 paid to them by *John Browne*, assigned the premises comprised in the terms to *R. Wilmot*, his executors, &c., in trust for *Marrow* and *Browne*, subject to redemption.

In 1746, Sir *Thomas Gresley*, the son of Sir *William*, died; and, in 1753, Sir *Thomas Gresley*, his son, also died, leaving *Wilmot Gresley* his only child, who there-



upon became entitled to the fee-simple of the estates, subject to the mortgage debt of £4000.

In 1776, on the marriage of *Wilmot Gresley* with *Nigel Bowyer Gresley*, by indentures dated the 16th and 17th of *January*, certain estates, including those comprised in the terms, were conveyed (subject to a term of 1000 years, for raising a sum not exceeding £14,000, according to the appointment of *Wilmot Gresley*) to the use of Sir *Nigel Bowyer Gresley* for life, with remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the marriage, in tail-male; remainder to the use of such persons as *Wilmot Gresley* should appoint.

*Wilmot Gresley* died in 1790, leaving no son, and having by her will and codicil made a provision for her daughters, and limited the estates, after the decease of Sir *Nigel*, to the use of his first and other sons in tail-male, with ulterior remainders.

Letters of administration with the will and codicil annexed, were granted to Sir *Nigel*, who continued in possession of the estates as tenant for life, subject to the mortgage debt for £4000, and the sums which *Wilmot Gresley* had directed to be raised. By his second marriage Sir *Nigel* had issue *Roger*, his eldest son.

[576] The second term of 100 years, which commenced in 1711, having become vested in the Earl of *Buckinghamshire*, *John Sullivan*, and *George Davis*, as trustees for *Edward Desbrowe*, on their application for payment of the sum of £4000, Sir *Nigel* executed a bond, payable by instalments, and paid £3600, leaving £400 unpaid at his death, on the 26th of *March* 1808.

By his will, dated the 18th of *February* 1808, he gave all his real and personal estate to his executors, Sir *John Heathcote*, *William Gresley*, *Edward Sneyd*, and *Theophilus Levett*, for the benefit of his three daughters.

Three of the executors proved the will, and paid the remaining instalment of £400 and all interest due on the mortgage, and took an assignment of the term by indenture of the 20th of *August* 1808.

The first suit was instituted by the infant Sir *Roger Gresley*, against one of the trustees appointed by *Wilmot Gresley*, to raise a sum for her daughters (the trustee having, on the death of Sir *Nigel*, taken possession of the estates), for the appointment of a guardian, and maintenance, and a receiver. (Reg. Lib. A. 1817, fol. 1515.) To the second cause the executors of Sir *Nigel*, and the persons interested in the estates, were Defendants.

By an order in the first cause, dated the 3d of *June* 1808, it was referred to the Master to appoint a receiver of the rents and profits of the real estates of Sir *Roger Gresley*, including the estates comprised in the term of 100 years; Sir *John Heathcote* was afterwards appointed, and the rents and profits received by him were paid into Court. The decree pronounced on the [577] 25th of *June* 1808, directed a reference to the Master for the appointment of guardians, and allowance of maintenance to the Plaintiff, and an inquiry to what charges and incumbrances the estates were subject, and what was due in respect of them, and ordered the receiver to keep down the interest of the incumbrances affecting the estates. (Reg. Lib. A. 1817, fol. 1515.)

On the 28th of *September* 1809, *Sneyd* and *Levett*, two of the executors of Sir *Nigel Gresley* (no previous measures having been taken by them to obtain possession of the estates, or the receipt of the rents and profits by virtue of the term, or to establish a charge under the decree), and his two surviving daughters and their husbands, filed a bill against Sir *Roger Gresley*, as tenant in tail of the estates, and against the trustees and incumbrancers, for an account and payment of what was due to Sir *Nigel's* executors in respect of the sum of £4000.

By an order dated the 29th of *June* 1813, made in both the causes of *Gresley v. Adderley*, and *Gresley v. Heathcote*, proceedings in the second cause were stayed.

On the 1st of *December* 1817, the cause of *Sneyd v. Gresley*, was heard at the Rolls, and the bill was dismissed (Reg. Lib. B. 1817, fol. 242), on the ground that the term had expired.

On this day Sir *John Heathcote*, *Sneyd*, and *Levett*, moved, in both the former causes, for liberty to go in before the Master, and make proof of what was due to them, as executors of Sir *Nigel Gresley*, under the indentures of the 20th and 21st days of *July* 1697, and that the Master might take an account of the rents and profits of the premises comprised in the term mentioned [578] in those indentures, which had come to the hands of the receiver from the time of his appointment to the expiration of the term, or which accrued during that period.

Mr. *Hart* and Mr. *Dowdeswell* for the motion. The question is, whether the persons entitled to the money secured by the term are to lose the benefit of that security. The rents accruing during the term are received for the use of the termor. The suit instituted for rendering the security available, in consequence of delays occasioned by deaths of parties, was not heard till after the expiration of the term, and as there could be no foreclosure of a term expired, the bill was dismissed. The Court will not refuse that relief which would have been given, if the money had not been secured by a term. No report has yet been made of debts and incumbrances; the executors are entitled to a report as incumbrancers.

Sir *Samuel Romilly* and Mr. *Joseph Martin* against the motion. The amount claimed was a debt of the estate, and can be enforced, therefore, only to the extent of the interest pledged, a term which has expired. The motion seeks to have the whole principal of the debt paid out of the rents and profits. Even on an application while the receiver was in possession, during the term, it would have been very doubtful whether such an order could be made; the regular direction to the receiver is to keep down interest, not to pay off debts and incumbrances. At least the Court never, for such purpose, directs a retrospective account of rents. The appointment of a receiver in a cause to which the incumbrancers are not parties, can not aid their claim.

The *Lord Chancellor* [Eldon]. The sum in question could not be the debt of any [579] individual, and could remain the debt of the estate, so long only as the estate is charged. By the operation of the deeds, the estate has contracted debt, for a term of 100 years, and at the expiration of that term is discharged. The question comes round to this, whether the Court, having appointed a receiver, towards the close of the term of 100 years, when the mortgagee might, perhaps, have been entitled here, if not at law, to receive the rents, will pay the charge out of the rents so received? That question I will not decide on motion: the parties are at liberty to file a bill. But there is a great difficulty in the way.

The order appointing a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it. The Court would not deprive them of the advantage of their legal estate; they might perhaps be obliged to come here to be examined *pro interesse suo* (*Hunt v. Priest*, 2 *Dick.* 540); but this Court would not interfere against them. But I apprehend that when the Court interposed to receive the rents beyond what was required for keeping down the interest on incumbrances, all the surplus rent, after payment of interest, was received for the benefit of the heir. I think that the mortgagee of a term, if he chooses not to lay his hands on the rents during the term, must be in the situation of a mortgagee in fee, who has suffered the rents to be applied for purposes other than the satisfaction of his security.(1)

Motion refused.

(1) See *Higgins v. The York Buildings Company*, 2 *Atk.* 107. *Mead v. Lord Orrery*, 3 *Atk.* 244. *Colman v. Duke of St. Albans*, 3 *Ves.* 25. *Drummond v. Duke of St. Albans*, 5 *Ves.* 433. *Ex parte Wilson*, 2 *Ves. & Bea.* 252.

#### [580] APPENDIX.

The Princess of WALES v. The Earl of LIVERPOOL. 1 Swans. 114.

"His Lordship doth order that the Defendants have a fortnight's time to answer the Plaintiff's bill, to be computed from the time when the Plaintiff, Her Royal Highness *Caroline Augusta*, Princess of Wales, shall have produced and left in the hands of her clerk in Court the said promissory note, or instrument in writing, bearing date the 24th day of August 1814, in the bill mentioned; whereby it is alleged, that *William Duke of Brunswick*, deceased, assured to the Plaintiff payment, in the month of August 1816, of the sum of 15,000 *French Louis*, at the rate of 24 *French livres* each, together with interest for the same; and it is ordered that the Defendants, their clerk in Court, and solicitor, after the same shall have been pro-

duced, have liberty to inspect the same, and take copies thereof, or extracts therefrom, as they shall be advised, but the same is to be at their own expense."

Reg. Lib. B. 1817, fol. 768.

PREBBLE v. BOGHURST. 1 *Swans*. 309.

" His Lordship doth declare that the condition of the said bond of the 10th day of *August* 1768, in the pleadings in these causes mentioned, ought to be [581] specifically performed ; and that according to the true construction of the said condition, all the freehold and copyhold (1) messuages, tenements, lands, and hereditaments, which *John Prebble*, the testator, in the said pleadings mentioned, became seised of in possession at any time during his natural life, ought to be settled upon the issue of the said *John Prebble* and *Mary Townshend*, his first wife ; and his Lordship doth declare that *Mary Townshend*, the first wife of the said testator having died in his lifetime, *John Prebble*, *Thomas Prebble*, *Richard Prebble*, and *Letitia Fenner*, four of the Plaintiffs in the said original cause, the only children of the said *John Prebble* by the said *Mary Townshend*, became entitled to have all the messuages, tenements, lands, and hereditaments, of which the said testator died seised in possession, conveyed to them as tenants in common in fee, free from any charges or incumbrances, and to have also the title-deeds thereof delivered to them, and also entitled to the clear rents and profits thereof, from the death of the said testator, after all just allowances and deductions ; and also entitled to be paid and compensated out of the said leasehold and other personal estate and effects of the said testator, for all the said [582] freehold and copyhold messuages, lands, tenements, and hereditaments, of which the said testator was, at any time after the date of the said bond, seised in possession during his life, which have been sold and disposed of by him, together with interest from the death of the said testator ; and his Lordship doth order that it be referred to Mr. *Courtenay*, one, &c., to inquire and state to the Court, whether it will be for the benefit of the infant parties, Defendants in the original cross-bills, and supplemental bills, that the other matters in difference, and particularly whether the Plaintiffs are entitled to the value of the estates sold by the said testator, at the time of the death of the said testator, or the sums produced by such sale in his lifetime, and all the accounts sought for in these causes should be referred to the award," &c.

Reg. Lib. B. 1817, fol. 1985-1997.

(1) The report of the judgment (1 *Swans*. 319), represents the *Lord Chancellor* to have expressed a clear opinion, that the bond, being conditioned for settling lands of which the obligor should become seised in possession, would not affect leasehold or *copyhold* estates ; the decree, however, directs, it will be observed, a settlement of the obligor's *copyholds* ; it is to be presumed, therefore, that his Lordship's expressions on the former occasion were misunderstood. The direction in the decree seems conformable to the authorities. The possession of a copyholder entitled to an estate of freehold or inheritance, is, in pleading, denominated *seisin* ; the copyholder being described, in the first instance, as seised in his *demesne* as of freehold, and in the second, as seised in his *demesne* as of fee, according to the custom of the manor. *Bro. Abr. Tenant per Copie*, pl. 13, *Co. Entr.* 206. 1 *Saund.* 147. *Co. Copyholder*, 11.

Reports of CASES ARGUED and DETERMINED in the HIGH COURT OF CHANCERY, during the Time of LORD CHANCELLOR ELDON; from the Commencement of the Sittings before Hilary Term, 1818, to the End of the Sittings after Michaelmas Term, 1819. By CLEMENT TUDWAY SWANSTON, Esq., Barrister-at-Law. Vol. II.

[1] CROWLEY'S Case. July 10, 13-18, 20, 21, 1818.

S. C. 1 Buck. 264.—The Lord Chancellor can issue the writ of *habeas corpus* at common law in vacation. Whether, for the purpose of determining that the answers of a bankrupt on his examination are unsatisfactory, the commissioners can resort to the evidence of third persons, *quære*. Commissioners having, on the evidence of third persons, committed the bankrupt for not answering satisfactorily, must state that evidence *in hæc verba* on the warrant of commitment; and a warrant stating only the effect of the evidence, is defective in substance. A bankrupt answering a question embodying a statement relative to the acts of a third person, without denying or qualifying that statement, is not understood as admitting it.

A commission of bankruptcy, dated the 7th of March 1815, having been issued against John Crowley, he was, on the 18th of June 1816, committed to prison by the commissioners. The warrant of commitment was in the following words:—  
“At Guildhall, London, 18th day of June 1816. Whereas his Majesty’s commission, under the great seal of Great Bri-[2]-tain, grounded upon the several statutes made and now in force concerning bankrupts, or some or one of them, bearing date at Westminster, the seventh day of March 1815, in the fifty-fifth year of his present Majesty’s reign, hath been awarded and issued against John Crowley, late of Saint James Street, in the parish of Saint James, Westminster, in the county of Middlesex, tavern-keeper, wine merchant, dealer, and chapman, directed unto G. W., A. E. J., M. F. A., W. K. S., and R. G., Esquires, any four or three of them: And whereas the said commissioners, in the said commission named, or the major part of them, having first respectively taken the oath appointed by an act of parliament passed in the fifth year of the reign of his late Majesty King George the Second, intituled, ‘An act to prevent the committing of frauds by bankrupts,’ for commissioners of bankrupts to take before they act as commissioners in the execution of the powers or authorities given and granted by the said act or acts of parliament now in force concerning bankrupts, and having begun to put the said commission into execution, upon due examination of witnesses, and other good proofs before them had and taken, did find that the said John Crowley, before the date and issuing forth of the said commission, did become bankrupt, within the true intent and meaning of some or one of the statutes made and now in force concerning bankrupts, and did adjudge and declare the said John Crowley bankrupt accordingly; And whereas the major

part of the said commissioners did cause notice to be given in the *London Gazette*, that the said *John Crowley* was thereby required to surrender himself to the said commissioners in the said commission named, or the major part of them, on the 15th day of *April* 1815, on the 22d day of *April* 1815, on the 20th day of *May* 1815, at one of the clock in the afternoon on each of the said days, on the 8th day of *July* 1815, at ten o'clock in the forenoon on that day, on the 26th day of [3] *August* 1815, at ten o'clock in the forenoon on that day, on the 2d day of *December* 1815, at one o'clock in the afternoon on that day, on the 24th day of *February* 1816, at one o'clock in the afternoon on that day, on the 4th day of *June*, instant, at ten o'clock in the forenoon on that day, on the 18th day of *June*, instant, at twelve o'clock, at *Guildhall, London*, in order to finish his examination, and to make a full disclosure and discovery of his estate and effects; and being then and there duly sworn and required by us to make such disclosure and discovery, we, being the major part of the commissioners in the said commission named, whose hands and sales are hereunto subscribed and set, having first respectively taken the oath above mentioned, appointed to be taken by commissioners of bankrupts, did cause the following questions to be propounded to him the said *John Crowley*, that is to say; On the 4th day of *June* last, when you appeared before the commissioners at *Guildhall* to pass your last examination, you had no accounts ready to present to them; you then requested the commissioners to adjourn your last examination, undertaking to produce your accounts to your assignees on *Thursday* then next ensuing; on the 14th of *June* you were brought up to be examined before the commissioners, and upon being asked whether you had produced your accounts to your assignees, you stated that you had not and could not, because your books and papers were in the possession of a friend of yours, a *Mr. Hamilton*, at No. 122, in the *London Road*, to whom you had delivered them since your bankruptcy, who refused to redeliver them to you; the commissioners have since that time issued their summons to bring *Hamilton* before them, but it appears, from the deposition of the messenger, that although he waited on *Saturday* night till between twelve and one o'clock for the return of *Hamilton* to his lodging, and went again to his [4] lodging at eight o'clock on *Monday* morning, that he was not able personally to serve *Hamilton*, who had returned home after the time above stated on *Saturday* night, and had gone out again before the messenger arrived again on the *Monday* morning; it likewise appears to the commissioners, from the deposition of their messenger, that a woman in the house had informed *Mr. Hamilton*, that the messenger had been there, who replied he knew what he wanted, but that all the proceedings were illegal, and there was an end of it: Have you any accounts now to produce to the commissioners, or any further reason to give why you do not produce them? Answer. I have no accounts to produce, and I have no further reason to give why I do not produce them, except that I have two petitions before the *Chancellor* to supersede this commission; the first, upon the grounds of a commission being now in force against me, bearing date in 1808; and the second, of no act of bankruptcy to this commission; but still am ready to render every account possibly in my power to the commissioners: which answer of the said *John Crowley* not being satisfactory to us the said commissioners, these are therefore to will and require and authorise you, immediately upon receipt hereof, to take unto your custody the body of the said *John Crowley*, and him safely convey to his Majesty's prison of the *King's Bench*, and him there to deliver to the marshal, keeper, or warden of the said prison, who is hereby required and authorised, by virtue of the commission and statute aforesaid, to receive the said *John Crowley* into his custody, and him safely keep and detain, without bail or mainprize, until such time as he shall submit himself to us the said commissioners, or the major part of the commissioners by the said commission named and authorised, and full answer make to our or their satisfaction, to the question so put to him as aforesaid; and for your so doing this shall be your sufficient warrant. To *I. W.* our mes-[5]-senger, or *W. B.* his assistant, and to the marshal, keeper, or warden of his Majesty's prison of the *King's Bench*, or to his deputy there."

*July 10.* The bankrupt at his own instance being brought up by writ of *habeas corpus*, *Mr. Rose*, for the assignees, objected that the writ had issued improvidently. In *Jenkes's case* (*July* 1676. Cited 3 *Bl. Com.* 132. Reported 6 *Howell's State Trials*, 1189) Lord *Nottingham*, after great research, decided that the *Lord Chancellor* cannot issue a writ of *habeas corpus* at common law in vacation. The bankrupt

having remained in prison since *June* 1816, without any previous application for his liberation, is not entitled to a writ under the *habeas corpus* act (31 *Car.* 2, c. 2), the fourth section of which provides, that any person wilfully neglecting, by the space of two whole terms after his imprisonment, to pray a *habeas corpus* for his enlargement, shall not have any *habeas corpus* to be granted in vacation time in pursuance of that act. The bankrupt therefore is not entitled to the writ either at common law, or under the statute. Serjeant *Onslow's* act (56 *Geo.* 3, c. 100) leaves the law unchanged in this respect.

*July* 13. On this day Sir *Samuel Romilly* and Mr. *Cullen* were heard in support of the writ.—

The objection that this court cannot issue a writ of *habeas corpus* at the common law in vacation, rests on a passage in *Blackstone's Commentaries* (vol. 3, p. 132), who states that in *Jenkes's* case, Lord *Nottingham* refused the writ, [6] because no precedent could be found where the Chancellor had granted it in vacation. *Blackstone* refers to Lord *Nottingham's* manuscripts, of which some few copies are in private hands, but the only printed account of *Jenkes's* case is contained in the *State Trials* (vol. 6, p. 1189). It there appears, that *Jenkes* having been committed to prison by the Privy Council, during the long vacation, for a speech uttered by him on the hustings at *Guildhall*, a motion was made on his behalf at one of the sales after *Trinity* term 1676, for a *habeas corpus*, on the authority of Lord *Coke* (2 *Inst.* 53; 4 *Inst.* 88, 182, 290), "but the Lord Chancellor, making light of the Lord *Coke's* opinion, saying that Lord *Coke* was not infallible, and slighting all that Mr. *Jenkes's* counsel offered, over-ruled the matter, denying to grant the writ." (6 *Howell's State Trials*, 1196.)

High as is the reputation of Lord *Nottingham*, his decision in this instance cannot be supported by principle or authority. Unlike the courts of common law, this Court is not open in term only; the Chancellor sitting in vacation at the seal, is invested with all the jurisdiction incident to his office. For that reason various authorities expressly ascribe to him the power of issuing the writ of *habeas corpus* in vacation.

In the chapter of the fourth Institute which treats of the Court of Chancery, Lord *Coke* says, "And this Court is the rather always open, for that if a man be wrongfully imprisoned in the vacation, the Lord Chancellor may grant a *habeas corpus*, and do him justice according to law, where neither the King's Bench nor Common Pleas can grant that writ but in the term time; but this Court may grant it either in term time or vaca-[7]-tion" (page 81). In a subsequent passage of the same book he mentions, as the readiest remedy for unjust imprisonment, "*Habeas corpus* in the term time, or in the vacation out of the Chancery" (chap. 31, p. 182). And in the commentary on *magna charta* he uses these emphatic expressions, "The like writ (of *habeas corpus*) is to be granted out of the Chancery, either in the time of the term (as in the King's Bench), or in the vacation; for the Court of Chancery is *officina justitiæ*, and is ever open, and never adjourned, so as the subject being wrongfully imprisoned, may have justice for the liberty of his person as well in the vacation time as in the term." (1)

Lord *Hale*, an authority on such questions equal, perhaps superior, even to Lord *Coke*, with no less explicitness asserts the right and duty of this Court to issue the writ in vacation. "By virtue of the statute of *magna charta*," he says, "and by the very common law, an *habeas corpus* in criminal cases may issue out of the Chancery; but it seems regularly this should issue out of this Court in the vacation time, but out of the King's Bench in the term time, as in case of a *supersedeas* upon a prohibition." (*Pleas of the Crown*, v. 2, p. 147.)

For the same reason this Court, being always open, may grant prohibitions in vacation. The authority of Lord *Coke* is express that the Court of Chancery "may grant prohibitions at any time either in term or vaca-[8]-tion": (2) and in a recent case, the Lord Chancellor of Ireland refused a prohibition in term, on the ground that this Court should not entertain the application while the other courts are open (3); reserving therefore, as its peculiar jurisdiction, the right of issuing the writ in vacation.

What is opposed to the weight of these authorities? A report, which seems not very accurate, that Lord *Nottingham*, on a case arising in times of great violence, declared that Lord *Coke* was not infallible, and finding no precedent of the writ

granted in vacation, refused it. At least the want of precedents cannot be alleged in the present instance; the greater part of the writs of *habeas corpus* at common law issued by this Court in late years have been granted in vacation.

*Jenkes's* case may, according to a prevalent notion (6 *Howell's State Trials*, 1208, n), have been the occasion of the *habeas corpus* act (31 *Car. 2, c. 2*); but that statute was designed not so much to confer new rights on the subject, as to provide new remedies for ancient rights. No clause gives to this Court the power of issuing the writ in vacation; but the whole frame of [9] the act assumes the existence of that power. The third section applies only to persons committed during vacation, whom it entitles to the writ, upon production, or oath of denial, of a copy of the warrant of commitment and detainer; but instead of proceeding to give a general power of issuing the writ in vacation, the next section limits the provisions of the former to the case of persons who have not neglected to apply for the writ during two terms. The tenth section inflicts penalties on the *Chancellor*, or any other judge, denying the writ in vacation, on production, or oath of denial, of a copy of the warrant; a clause obviously intended only to enforce the third section. But the act nowhere contains a general authority for granting the writ in vacation; and strange indeed would it be, were so important an enactment found in a statute, the preamble of which refers not even to a doubt on the subject.

The question in this case may be decided by a reference to the statutes of bankruptcy. The 5 *Geo. 2, c. 30, s. 18*, provides, that in case any person committed by the commissioners shall bring any *habeas corpus*, in order to be discharged from any such commitment, a mere insufficiency in the form of the warrant shall not prevent a recommitment. A statute framed for providing a review of the exercise of a jurisdiction the most delicate and dangerous that can be confided to a court, must be construed in a manner to secure to it the most ample efficacy. On such a construction this clause must be understood as conferring on the subject a right to the writ, without restriction of time or court.

Mr. *Rose* in reply. On the question whether this Court can issue a writ of *habeas corpus* in vacation, few authorities exist: but the result of those authorities, as stated by the counsel [10] for the prisoner, is not such as has been deduced from them by text writers. *Blackstone* clearly considers the dicta of Lord *Coke* and Lord *Hale* as overruled by the decision of Lord *Nottingham*.

The Lord *Chancellor* [Eldon]. Has *Blackstone* stated by what authority the Chancellor issues the writ in term, if he cannot issue it in vacation? His Court is open every day of his life, at the pleasure of any suitor.

Mr. *Rose*. *Blackstone* has not engaged in the discussion of a question, which he considered as concluded by the deliberate judgment of that high authority.

The Lord *Chancellor* [Eldon]. The writ of *habeas corpus* under the statute 31 *Charles 2, c. 2*, is perfectly different from the writ at common law, and opens to different consequences; and the differences are so familiar, that on application to the offices from which the writs issue, they always adapt the writ to the occasion. With respect to writs at common law, the difficulty does not now occur for the first time. I have formerly experienced difficulties arising from a variation in the practice; bankrupts being brought up, sometimes by writ, sometimes by order; and I then thought that the writ of *habeas corpus* might be issued by this Court in vacation, and if so, that it was not wholesome to substitute an order for an old common-law writ (*Ex parte Tomkinson*, 10 *Ves.* 106), which affords perhaps to the person brought up, better security for his liberty than the process for punishing disobedience of an order of the Chancellor.

[11] The reason of the common law courts not granting the writ in vacation is, that there is no common law court but in term time. On the question put to the Judges at a former period (in 1758. *Vide 2 Swans. 60 et seq.*), the majority were of opinion that the Judges in the Courts of King's Bench or Common Pleas could not issue the writ in vacation. On that occasion they did not refer to the Chancellor, and for this reason, that his Court being not a term court, but always open (see 6 *Ves.* 771; 2 *Swans.* 21, 22), there seemed no ground for saying that he can grant the writ in term time and not in vacation.

*Jenkes's* case was decided by one of the ablest men that ever sat in any court in this country. I have in my possession an authentic copy of Lord *Nottingham's* manuscript reports, which belonged to the late Chief Baron *Thompson*, and I will

see what is to be found there ; but the modern text-books, and with reference to more authorities than have been cited, maintain that the Chancellor can issue the writ in vacation ; and though by the statutes 16 *Charles* 1, c. 10 ; 31 *Charles* 2, c. 2 ; and 56 *George* 3, c. 100, the liberty of the subject appears to be properly secured through all future times, it should seem that there was a great defect in the law, if during the long interval between *magna charta* and the 31 *Charles* 2, the subject could not, in vacation, have obtained the writ. My opinion, formed not on this occasion, is, that the Chancellor has the power of granting a writ of *habeas corpus* at common law in vacation. The writ under the statute 31 *Charles* 2, c. 2, cannot be granted after neglect of application during two terms ; but the rights of the subject under the one writ and under the other are very different. Much better security is afforded by the last, more particularly from the penalty of £500 inflicted on [12] a judge denying the writ ; a penalty to which he is liable even if the denial proceeds on the most honest doubt. According to the law and usage of *England*, the usage constituting the law, at this day the Chancellor has a right to issue this writ in vacation.

July 14. The Lord Chancellor [Eldon]. I have found in Lord Nottingham's MSS. a statement of *Jenkes's* case, which certainly deserves great attention. It is as follows : " July, 28 Car. 2. *Francis Jenkes*, a prisoner in the Gatehouse by order of the council-board, moved me at the third seal for an *habeas corpus*, upon the authority of 2 *Inst.* 53, where it is said the subject hath remedy for his liberty in vacation time by *habeas corpus* out of Chancery, which is *officina justitiæ*, and always open. I directed Mr. *Welldon* his counsel, who moved it, to move it again this day, being the last seal, that in the mean time I might look upon the book and consider of it ; which I did, and also advised with the Judges. And now, upon the second motion, I said my Lord *Coke* had indeed delivered such an opinion there, and again 4 *Inst.* 81. But in neither place had cited any one precedent of it, or authority for it, except the book of 4 *E.* 4 (the margin of the MS. contains the following reference, " 27 Year Book, 4 *E.* 4 "), which goes no further than to say, that when the term is adjourned, the Chancery is not adjourned. Which book is too weak a foundation to build such an opinion upon ; for though the Chancery be *officina justitiæ*, and always open, for the granting of writs returnable in other courts in term time, yet no writs can be issued and made returnable in Chancery on the Latin side in time of vacation, for [13] the Chancery is not open as a court of record to proceed in but in term time ; and the prisoner doth not pray a *habeas corpus* returnable next term, but *immediate* ; which cannot be, for many reasons. For, 1st. Suppose the *habeas corpus* obeyed and returned, yet can no prisoner be bailed or discharged, till after the return be filed, and no return can be filed in vacation, because there is no Latin side to file it in. 2dly. If the *habeas corpus* be disobeyed even to the *pluries*, yet the attachment for that disobedience must be returnable next term, and perhaps in some other court too, directly parallel to the case of the prohibition which my Lord *Coke* puts in the same place, 4 *Inst.* 81, where he holds that the Chancery may grant a prohibition in time of vacation ; but if it be disobeyed, the attachment upon that prohibition must be returnable next term, into the Court of King's Bench or Common Pleas. 3dly. For indeed there is no precedent of any *habeas corpus ad subjiciendum* made returnable in Chancery in term time, when perhaps it might be proceeded in, much less in time of vacation. 4thly. Had the law warranted such a proceeding, without doubt there would have been some practice of it, for there was occasion for it in *Chambers's* case (*Cro. Car.* 133, 168), who was committed in 4 *Charles* 1, in time of vacation. 5thly. It is to be presumed that the stat. 17 *Car.* 1, cap. 14 (16 *Car.* 1, c. 10), would have taken some notice of the Chancery, and have provided against the delays of *habeas corpus* there as well as in other courts, if that court had been proper for *habeas corpus* to issue from it. (4) 6thly. If the Chancery had any such standing [14] power in time of vacation, doubtless the whole vacation business of the Chancery would by this time have been nothing else but a gaol delivery for all *England*. 7thly. And then the late bill which passed the House of Commons for remedy of imprisonments in time of vacation (see 2 *Swans.* 29) had been needless. For which reasons I did, as the judges had before advised me, put it upon precedents, without which they said it ought to be refused.

" The writ was not granted.

" A writ of mainprise appears to have been afterwards applied for : it was not



granted ; but in the beginning of *September* following, he was discharged." (Note : For the preceding copy of the statement read from Lord *Nottingham's* MSS. by the Lord Chancellor, the editor is indebted to his Lordship's favor.)

Lord *Nottingham* also states the circumstances of another proceeding before him, not noticed in the printed account. He says that a petition was presented to him on the *Monday* morning, as he was on his way to his coach, by certain *London* merchants, who styled themselves friends of *Francis Jenkes*, setting forth that *Jenkes* was a prisoner for a fact bailable, and that by the ancient usage of the Chancery, on putting in bail, a writ of mainprise ought to issue to deliver the party ; and the petitioners offered themselves as bail ; that the petition was accompanied by precedents, eighteen being stated of very ancient date ; and that there came also a forward attorney, who brought a copy of *Fitzherbert's Natura Brevium*, and referred to page 250. Lord *Nottingham*, remarking that this was a captious application, for the prisoner did not complain, told the petitioners that on his humble petition he made no doubt that his Majesty would order *Jenkes* to be bailed ; that [15] the present was not a time to give a further answer, and that he would consider of it. On *Wednesday* following, Lord *Nottingham* stated the matter to the king in council ; and considering that a subject of this nature ought not to rest on his single judgment, the granting or denying this writ being of great effect in his Majesty's government, he prayed a reference to the Attorney and Solicitor General. Lord *Nottingham* states what passed in council : the opinions of the judges were ordered to be taken, and three or four pages of great learning follow, in support of the opinion that the writ could not be granted, since the statute, 28 *Edward* the Third, c. 9. At length *Jenkes* was set at liberty, the King intimating his pleasure to that effect. (For a farther account of *Jenkes's* case, see 2 *Swans.* 43-47.)

After such an account of *Jenkes's* case, of the authenticity of which no doubt can be entertained, giving a view of that decision very different from that which has prevailed, it is necessary to use great research in settling the question. Lord *Nottingham's* distinction is, that though the Court of Chancery is always open, it is not always open as a court of record ; the Latin side being open in term only : but it would be impossible to account for a great deal of what passes in this Court on that distinction.

I shall not determine the question, without giving to the bankrupt's counsel an opportunity of commenting on the reasoning and authorities by which Lord *Nottingham's* decision is supported. Lord *Nottingham's* objections are, that the Latin side of the Court (by which I understand him to mean the petty bag), is not open in vacation ; and the difficulty of attaching parties in vacation for disobedience to the writ. [16] I have directed inquiry into the proceedings in this Court by *habeas corpus*, and also in discharge of bankrupts from commitments by the order of the Chancellor on petition ; for that has been done. The usage, as far as I can ascertain, is, that where the party is brought up by *habeas corpus* and discharged, the return is put into the jailor's hands as an authority for the discharge. It is unfortunate that the question is brought here, when no fewer than six judges are in town, about the power of every one of whom no doubt can exist.

*July 15.* The following passage from Chief Justice *Wilmot's* opinion on the writ of *habeas corpus* was read by Mr. *Rose*.

" In 2 *Inst.* 53, and 4 *Inst.* 81, 182, Lord *Coke* says, ' it ought to issue out of the Court of King's Bench in term time, and out of Chancery either in term time or vacation. All writs, in supposition of law, do issue in the term ; and he might mean no more, than that Judges could not grant them by their own proper authority, as separate and detached from the court, as they issue warrants. First, this was no judicial determination ; a mere '*prolatum*,' which, as to the Court of Chancery, is very doubtful. For no writ of *habeas corpus* can be found to have ever issued out of the Court of Chancery, except some returnable in the House of Lords. The 16 *Car.* 1, takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the writ had issued out of that Court in vacation. And the 31 *Car.* 2, seems to proceed upon a supposition, that it could not issue out of the Court of Chancery, because the 10th section ex-[17]-pressly empowers the Court of Chancery to grant it, which would have been unnecessary,

if it could have granted the writ before." (Opinions and Judgments of Chief Justice *Wilmot*, p. 100, 101.)

July 16. The Lord Chancellor [Eldon]. If the writ were issued under the statute (31 *Car.* 2, c. 2), after the expiration of two terms, the bankrupt might reply to the exception in the third section, that the omission to make an earlier application was not wilful.

I have found that, previously to the statute 5 *Geo.* 2, c. 30, the Chancellor disposed of commitments by commissioners by order (see the instances, 2 *Swans.* 30 *et seq.*); but I cannot find any instance after that act; though I see nothing in that or the subsequent acts to exclude such a power if it previously existed.

With respect to Lord Nottingham's observation on the difficulty in the issue and return of a *habeas corpus* in vacation, by reason of the *Latin* side of this Court not being then open, on the researches which I have directed in that *Latin* side, nothing has been found which throws any light on the subject; no return of this writ or any other.

July 17. Mr. Cullen, in support of the writ. *Blackstone* describes the writ of *habeas corpus* as "a high prerogative writ, and therefore, by the common law, [18] issuing out of the Court of King's Bench, not only in term-time, but also during the vacation, by a *fiat* from the Chief Justice, or any other of the judges. (3 *Bl. Com.* 131.)

The Lord Chancellor [Eldon]. I am sure that *Blackstone's* opinion was, that though the law might be in a better state if the writ were issuable in vacation, that point was extremely doubtful. The best account of the writ of *habeas corpus* is to be found in the opinions of the judges, given to the House of Lords, on occasion of the bill for extending the provisions of 31 *Car.* 2, c. 2, introduced in the time of Chief Justice *Wilmot*. (*Vide* 2 *Swans.* 60 *et seq.*) The Court of King's Bench had always issued the writ in term-time; but it appeared (I speak from memory, for I have not been able to find the papers), that there had been a practice for the judges of that Court to issue the writ in vacation. The Courts of Common Pleas and Exchequer, being confined to civil matters, never issued the writ till empowered by statute. Many of the judges were of opinion that, at common law, the judges of the Court of King's Bench had no right to issue the writ in vacation; many thought that they had acquired that right by practice. By the late act (56 *Geo.* 3, c. 100) authority is given to all the judges to issue the writ in vacation; but had the question arisen some years ago, unless this Court, as *officina justitiæ*, had authority to issue the writ, any of the king's subjects might have lain in prison during the vacation.

Mr. Cullen. *Blackstone* supposes the writ to be issuable in vacation by the judges of the Court of King's Bench: he says, if the writ "issues in vacation, it is usually returnable [19] before the judge himself who awarded it." (3 *Bl. Com.* 131.) It would be most extraordinary, considering the nature of the writ, designed as a summary mode of delivering the subject from imprisonment, while any judge of a court of common law could issue it in vacation, to deny a like authority to the Lord Chancellor. No one ever doubted his power to issue a *Habeas Corpus* returnable before himself, though some of Lord Nottingham's reasons go to that extent; the only doubt is, whether he can exercise that power in vacation. The doubt originates in the single and anomalous case of *Jenkes*; a case not only decided under political circumstances, from the influence of which it was scarcely possible for any judge to deliver his mind, but, speaking with every respect to the memory of Lord Nottingham, decided by a judge who was himself a party. From the account of that case given in the *State Trials*, which is not inconsistent with Lord Nottingham's MSS., it appears that he took an active part in the examination of *Jenkes* before the Privy Council, and put to him several most pressing questions.

The Lord Chancellor [Eldon]. By whom is that account given? I have seen so many accounts of proceedings before the Privy Council, not containing a word of what really passed there, that, without at present questioning the fact, I wish to know the authority.

Mr. Cullen. The statement purports to proceed from *Jenkes's* friends. It remains, however, to consider the grounds of that case. Had the reasons of Lord Nottingham been good, it would have been unnecessary to refer his refusal to the want of precedents. The doctrine which Lord Coke [20] rested on constitutional

and *Nottingham* controverts by narrow, technical, special pleading, derived from the distinction of the *Latin* and *English* sides of the court, and return of writs.

4 *Edward* 4, which Lord *Nottingham* says, is too weak a foundation, rather than to say, that when the term is adjourned the *Chancery* adjourned, will be found on examination a most material authority. In 1464, a pestilence prevailing in *London* and the neighbourhood, the Court of King's Bench, Common Pleas, and Exchequer were adjourned to the next Term, not by act of parliament but by the King's writ; a proceeding means singular; many other instances occur in which the term has been adjourned by the King (see *Viner*, Abr. Adjournment, A., *Officina Brevium*, 7), and it seems therefore that the adjournment of the term depends upon the King's pleasure. The report states that the Judges of the Common Pleas having met in Court, caused the King's writ of adjournment to be read; the King's Bench was adjourned in like manner, and the Exchequer as to pleas of parties: but debtors to the King were to account there as usual; and the Book proceeds, "also the Chancery was not adjourned, for the Chancery is always open." (4 *Ed.* 4, fol. 20, 21; *Bro. Abr. Brief*, 349; *Jurisdiction*, 74.) Why Lord *Nottingham* should have declared this too weak a foundation, I know not. It fully justifies the inference which Lord *Coke* deduces from it, and in principle decides the question; deciding that the Court of Chancery does not, like the other courts, depend on the term, but is always open; nor is there a pretence for saying that these expressions, which are applied to the whole Court, do not extend to the *Latin* side. That [21] the Chancellor sits at one place in term, and at another in vacation, is an arrangement of mere convenience. The statutes abbreviating the terms, show that the Court of Chancery is not affected by the distinction of term and vacation. (*Trinity* term is abbreviated by stat. 32 *H.* 8, c. 21, and *Michaelmas* term by 16 *Car.* 1. c. 6, and 24 *Geo.* 2, c. 48.) The courts to which those acts apply are described in them, as "the high courts of record of our Sovereign Lord the King, holden at *Westminster*, or other place or places at the assignment or appointment of the King." The Court of Chancery is not holden at any place by the appointment of the King, but follows the person of the individual having the custody of the great seal. The correlative words, term, and vacation, have no application to the Court of Chancery, which knows no vacation. Lord *Nottingham's* objection, therefore, that the writ cannot be returned in vacation, because the *Latin* side of the Court is not then open, is an assumption contrary both to the authority of the text-writers cited, and to the fair inference to be drawn from these statutes. Probably Lord *Coke* and Sir *Matthew Hale*, in concurrence, possess a better claim to infallibility than Lord *Nottingham* alone.

The second reason, that if the writ is disobeyed, the attachment can be returnable only in term time, seems answered by the same authorities.

The Lord Chancellor [Eldon]. You will find, I believe, that, in suits in the petty bag, which is the *Latin* side of the Court, these steps can be taken only in term time. If an action were brought there, a declaration could not be filed, or plea [22] put in, or issue joined, in vacation. (5) On these points I will direct inquiry. With reference to some of the passages which you have cited, it may be material to recollect, that Lord *Coke* took a conspicuous part in the question relative to the antiquity of the equity side of the Court of Chancery, warmly contending for its modern origin. (6)

[23] Mr. *Cullen*. The officers of the Petty Bag, may have accommodated their practice to the periods of business in other courts: [24] if writs are to be returned in those courts, they must be made returnable in term, and that convenience of [25] arrangement may explain the practice, if such exists, of making all writs returnable in term only, and suspend[26]-ing proceedings during vacation: but in principle, this Court, in all its functions, is equally open through every period of the year.

[27] The third reason is most extraordinary as an assertion of a fact, and, as an argument, proves too much. Lord *Nottingham* says, that he finds no precedent of an *habeas corpus ad subjiciendum* returnable in Chancery in term time, when perhaps it might be proceeded in, much less in time of vacation. Could Lord *Nottingham* mean that the Lord Chancellor never issued a *habeas corpus* returnable

before himself in term time? If not, the proposition is nugatory, and to that extent it is quite untenable. The fourth objection is, that if the law warranted such a proceeding, there would be some practice of it; for there was occasion for it in *Chambers'* case. That case is reported in *Croke (Cro. Car. 133, 168)*, but it does not justify the observation. The reason that there was no application to the Chancellor in that case is obvious. *Chambers* having obtained a writ of *habeas corpus* in the King's Bench, the marshal returned that he was committed on the 28th day of *September*. At that time *Michaelmas* term began early in *October*. Considering, therefore, that the interval between his commitment and the commencement of the term exceeded not a few days, his omission to apply to this Court for a writ in vacation may well be explained without the supposition of a defect of jurisdiction. There is a good general reason also for forbearing to make the application to the Lord Chancellor, which may account for that want of precedents to which Lord *Nottingham* attaches so much importance. Commitments are commonly for criminal, or supposed criminal matter; if the Lord Chancellor, on the return of the writ, found that the party was committed for a bailable offence, he could not discharge him, and bail could be taken only in the other court; the Chancellor being unable to proceed in a criminal matter, the return must be made in the King's Bench. The practice of applying to that Court, therefore, became almost universal; nor could any benefit in such cases be obtained by an application to the Lord Chancellor in vacation.

Lord *Nottingham* then refers to the statute 17 *Car. 1, c. 14*, meaning 16 *Car. 1, c. 10* (see sect. 8). and argues that that statute would have provided for delays in granting the writ in Chancery, as well as in other courts, if this court had been competent to grant it. But the object of that act was the abolition of the Court of Star-Chamber; and the provision for issuing a writ of *habeas corpus* was merely incidental, and confined to cases of commitment by the order of any court pretending a like jurisdiction; for those cases it provides against delay in the remedy by writ to be obtained from the King's Bench or Common Pleas. The jurisdiction of particular courts was not in question. The sixth reason is, that if the Chancery had any such standing power in time of vacation, doubtless the whole vacation business of the Chancery would by this time have been nothing else than a gaol-delivery for all England. Considering the nature of the commitments at that time, namely, for insolent speeches before the council, and turbulent speeches at *Guildhall*, charges of which the Chancellor could take no cognizance, this apprehension seems rather gratuitous. Of the bill which had then recently passed the House of Commons, and [29] stands as a seventh reason, I know nothing. (7) The observation in the margin, that the act for the abbreviation of *Michaelmas* Term passed in that very session, to which act the objection was made, that the prisoner would lie a fortnight longer in vacation, applies to those persons only who had recourse to courts of common law. It was true that an application to the Court of King's Bench would be delayed; and that objection exists, although the Chancellor is competent to issue the writ in vacation.

Considering, therefore, the situation of the judge, and the reasons which he assigns, no authority can be ascribed to this decision. The principal ground on which, as Lord *Nottingham* says, he was advised to put it, namely, the want of precedents, was a mere pretence, and most untrue; and the conclusion is expressly contradicted by the opinions of Lord *Coke* and Sir *Matthew Hale*, adopted by subsequent text writers. (8)

In the present instance, the bankrupt was committed four days after the term began; this therefore is not a case of commitment in vacation, within the statute; and the writ, if issuable at all, can be issued only at common law.

The Lord Chancellor [*Eldon*] having read an entry of the result of an application to Lord *Loughborough* in 1797, in [30] *Nowlan's* case, in which the discharge of the bankrupt was refused, Lord *Loughborough* expressing an opinion that he had no jurisdiction (*Note*: On diligent search in the office of the secretary of bankrupts, this entry has not been found); proceeded thus:

Speaking with great deference to Lord *Loughborough*, it appears to me that this reasoning is wrong. I find that it was the practice before the statute 5 *Geo. 2, c. 30*, for the Lord Chancellor to discharge prisoners under commitment from commissioners of bankrupt, by order; and it seems clear that that act has not deprived this court of the authority which it then possessed. It is to be observed also, that

the application in *Nowlan's* case was within two terms after the commitment ; and the *Lord Chancellor* therefore should not have stated that the only mode of obtaining the prisoner's discharge was by application to a common-law judge. I think that that must have been the mistake of the person who sat under the *Lord Chancellor*.

This Court has, in several instances, on petition, ordered the discharge of persons committed by the commissioners ; sometimes ordering the commissioners to discharge him, sometimes the jailer, passing over the commissioners.

The instances, however, are not numerous. One of the earliest is *Ex parte James* in 1719.(9) In *Ex parte* [31] *Lingood* (1 *Atk.* 240 ; see p. 242), on the petition of a bankrupt committed by one of the common-law judges on the certificate of the commissioners of his refusal to attend their summons (5 *Geo.* 2, c. 30, s. 14), Lord *Hardwicke* said, " It is an entire new question, and quite a new case ; and therefore at the first opening of it I had a great doubt, whether I could properly determine the legality of the commitment, as a *Habeas corpus* might have been sued out, and have been decided by the judges of the common law, which is the ready way. But I do remember a case of *John Ward*, before Lord Chancellor *King*, not unlike the present, where he determined a commitment by commissioners of bankrupt to be justifiable, after he had taken some time to consider of it."

A like practice occurred in *Ex parte Brailsford*, 13th October 1725,(10) and in the bankruptcy of *Thomas Mace*, in September and December 1728.

[32] Mr. *Cullen*. It was understood that your Lordship in *Taylor's* case (8 *Ves.* 328, and see *Ex parte Tomkinson*, 10 *Ves.* 106. *Ex parte Hiams*, 18 *Ves.* 237) had decided that a bankrupt under commit-[33]-ment for not answering, could not be discharged on petition, but must obtain a writ of *habeas corpus*. That [34] rule is consistent with Lord *Loughborough's* decision in *Ex parte Nowlan*. The question, however, is not material to the present case, the bankrupt being brought before the Court by writ of *habeas corpus*.

[36] The *Lord Chancellor* [Eldon]. Since I was last here, I have spent many hours in researches on this question. I have not yet arrived at [37] the end of them, but I will now dispose of it, so far as to explain the real state of *Jenkes's* case, which seems to me not to have been fully understood.

[38] It is a circumstance material to be recollected, that Sir *Mathew Hale*, who adopts Lord *Coke's* doctrine (and in [39] such a manner as to show that that part at least of his work cannot be justly characterised as a loose note (*Wilmot's* Opinions, p. 100), for he takes a distinction which *Coke* had not taken, and must be considered as having applied his great judicial mind to the subject), Sir *Matthew Hale*, I say, retired from the office of Chief Justice, in 1675, and died in 1676. (*Emlyn's* Preface to *Hale's* Pleas of the Crown.) The dates are important in this way ; Lord *Nottingham* in *Jenkes's* case, argues on the statute 16 *Car.* 1, that the Court of Chancery could not have power to grant the writ at common law, because no provision has been made as to this court in that statute ; but it is clear that Lord *Hale*, who left his work transcribed for publication after his death, and there expressly states that the Chancery has the power of issuing a writ of *habeas corpus* in the vacation as well as in the term, must have known the statute of 16 *Car.* 1, and could have seen no objection arising from it against that doctrine.

*Blackstone*, in his Commentaries (vol. iii. p. 131, *et seq.*) has given the history of the writ of *habeas corpus ad subjiciendum*, perhaps not altogether with his usual accuracy. His words are (3 *Comm.* 131), " but the great and efficacious writ, in all manner of illegal confinement, is that of *habeas* [40] *corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf." It is very material to the jurisdiction of this court, to recollect in how many cases it issues the writ, with reference to infants and to lunatics, concerning which scarcely any notice is taken in any of our books, except books of practice.

*Blackstone* then states this to be, " a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench, not only in term time, but also during the vacation, by a *fiat* from the Chief Justice or any other of the Judges, and running into all parts of the King's dominions : for the king is at all

times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." If the account of *Jenkes's* case published by persons who denominate themselves his friends is correct, it would appear that a previous application had been made to Chief Justice *Rainsford* for a writ of *habeas corpus*, in the vacation, and that he had refused it. (6 *Howell's State Trials*, 1195, 1196.) That representation is not confirmed by Lord *Nottingham's* statement.

*Blackstone* proceeds, "if the writ issues in vacation, it is usually returnable before the Judge himself who awarded it, and he proceeds by himself thereon unless the term should intervene, and then it may be returned in court." If this is applied to the practice of the King's Bench, subsequent to 31 *Car. 2*, it is accurate; that is, supposing the opinion of the Judges [41] delivered in 1758 (*vide 2 Swans. 60, et seq.*) to be correct, that the justices of that court could issue the writ in the vacation.

*Blackstone* continues, "indeed, if the party were privileged in the Courts of Common Pleas and Exchequer, as being (or supposed to be) an officer or suitor of the Court, an *habeas corpus ad subjiciendum* might also by common law have been awarded from thence, and, if the cause of imprisonment were palpably illegal, they might have discharged him; but if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the Court of King's Bench, which occasioned the Common Pleas for some time to discountenance such applications": that is, to discountenance such applications even in the case of privileged persons; "but since the mention of the King's Bench and Common Pleas, as co-ordinate in this jurisdiction, by statute 16 *Car. 1*, c. 10, it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common-law writ, in either of those courts, at his option." That doctrine is very remarkable; for the statute 16 *Car. 1* gives no jurisdiction to the judges of the Common Pleas to issue a writ of *habeas corpus*, except in cases there mentioned; but then, by a construction in favor of the liberty of the subject, they have granted the writ in other cases; and have inferred from a statute giving to them power in certain specified instances, that they possess a general power to issue the writ, though applied for by persons not privileged; a very material observation as to the supposed operation of the statute 16 *Car. 1*, to work a negative on the proposition that this Court can issue the writ in vacation.

*Blackstone* subjoins, "it has also been said, and by [42] very respectable authorities that the like *habeas corpus* may issue out of the Court of Chancery in vacation: but, upon the famous application to Lord *Nottingham* by *Jenkes*, notwithstanding the most diligent searches, no precedent could be found where the Chancellor had issued such a writ in vacation, and therefore his Lordship refused it." I observe on this passage, that in substance it is true, but that the refusal rested on reasons beyond the mere want of precedent.

Why, on that occasion, the search was confined to precedents of writs of *habeas corpus* issued in vacation, if there is foundation for so many doubts as have been expressed, whether the Lord Chancellor has power to issue the writ in term time, it is not easy to explain. If well directed towards the object of inquiry, the search would have been instituted to ascertain in what instances this Court had, as well as in what it had not, issued the writ, for the purpose of collecting the principle on which it was issued, and of discovering what was the defect of power in the particular case in which application for the writ was made.

*Blackstone* then states the ground on which the stat. 31 *Car. 2* passed. "In the case of *Jenkes*, before alluded to, who in 1676 was committed by the King in council for a turbulent speech at *Guildhall*" (if we are to collect what the offence of *Jenkes* was from matter to be found in the warrant (6 *Howell's State Trials*, 1195; I doubt whether *Blackstone* has correctly put this in his text), "new shifts and devices were made use of to prevent his enlargement by law; the Chief Justice (as well as the Chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c., whereby the prisoner was discharged at the *Old Bailey*." (3 *Bl. Com.* 135.)

[43] According to this you would suppose that there had been an application in the vacation, not only to the Lord Chancellor, but to the Chief Justice, for a writ of *habeas corpus ad subjiciendum*, that they had refused it, and that a writ *ad deliberandum* had been afterwards issued, and that he was then discharged.

The account in the State Trials, purporting to be published by *Jenkes's* friends,

I suppose accurate as to the particulars which I shall mention. It states his speech, and the charge by the King in council which according to his statement was founded, on affidavits, the substance of which is also stated. Then follows a dialogue (6 *Howell's State Trials*, 1193) adverting to the distinction now very well known, that the Common Hall is not a Court, except for the purposes for which it is made a court by charter; a distinction which has introduced the custom of the King receiving addresses from the Lord Mayor and Common Council on the throne, not addresses from the Common Hall; the House of Lords also receiving a petition from the latter body only as the petition of the individuals who signed it. *Jenkes* is then committed by a warrant, the words of which are given.

The statute of 16 *Car.* 1, c. 10, having been passed before this commitment, and having given to the Judges of the King's Bench and Common Pleas a right to issue the writ of *habeas corpus* in cases therein mentioned (and I should think this case one of them, because the act is expressly made to apply to commitments by the King and others in person in his council), in the then state of the law, a subject committed for what is here represented (on which I shall make no comment, except that the commitment was of such a nature, that one should wish to find in the law a power to examine [44] its propriety), it being clear that under that act of *Car.* 1, the Courts of King's Bench and Common Pleas could not issue the writ in vacation, was altogether without remedy, unless the Chancellor, being applied to, could issue the writ in vacation, and make it returnable not *immediate*, supposing him to have issued it for the purpose not of giving immediate relief, but of securing to himself, if he knows the distinction of term, or to some other court, in term, the means of deciding whether the commitment was proper.

This case of *Jenkes* has been so often mentioned, that it becomes material to have a statement of it, which cannot be doubted. In what I consider an authentic copy of Lord *Nottingham's* Manuscripts, I have found a full account, entered by himself, of all these proceedings. (4) Lord *Nottingham* has not given exactly the same account of what he said as this printed book (the *State Trials*), but in effect it amounts to the same. Speaking with all deference and respect to this great man, I cannot agree that the passage in the Year Book (11) is of no consequence; because the proposition that when the courts of common law are adjourned the Chancery is not adjourned, at least raises the question, Can the Chancery grant the writ in term time, and if then, why not in the vacation? If you are to say there is a reason why this Court can grant it in term time, and not in vacation, the doctrine that the Court is not adjourned in vacation is applicable to that distinction; and I therefore cannot accede to [45] Lord *Nottingham's* description of this passage as too weak a foundation to build on.

Lord *Nottingham* then relates a proceeding, or rather circumstances of another proceeding before him (see 2 *Swans.* 14) which circumstances are not noticed in the printed account. All the precedents mentioned are very ancient, and very remote from the day on which this happened. It appears from the printed case, that this gentleman and his friends intimated to Lord *Nottingham*, and no one can blame them for the intimation, that they were applying, not to know on what petition the King of his grace might have discharged the prisoner, but for the writ to which he was entitled in order to his discharge by right, not by favour; and Lord *Nottingham* seems to have been a good deal distressed by the application. How the authors of the statement in the *State Trials* got at what passed in the Privy Council I know not. The result of what occurred afterwards, as far as I am at liberty to state it is, that some of the Lords thought that the Lord Chancellor had no right to ask their opinion on such a subject, but ought to advise them; and it ends in a resolution that the opinion of the Judges should be taken on their return from the circuits. There follows a large collection of cases in which, in old time, the writ of mainprize had issued; with a very learned statement of Lord *Nottingham's* opinion, that the right to the writ had been abolished by a subsequent statute (28 *Ed.* 3, c. 9. *Vide* 2 *Swans.* p. 83, *et seq.*).

I observe that in the *State Trials* this is described as a very singular case, because the Lord Chancellor refused to bail *Jenkes* in one instance for want of precedents, and in another against a multitude of precedents. Lord *Nottingham* explains that, by the observation that [46] in the last instance, the right to the writ was taken away by an old statute, and that the statute (3 *Ed.* 1, c. 15) which had given the writ in criminal cases, did not authorise issuing it on commitments by the Privy Council. The account in the *State Trials* relates that Chief Justice *Rainsford*

was applied to for a writ of *habeas corpus*, who refused it ; but that afterwards, on his representation, *Jenkes* was discharged.

It is important, in cases of this kind, to know how they end. I have here an account which I cannot but take to be very authentic ; and it seems that the circumstances under which this person was discharged are such, as can hardly be forgotten in weighing the authority of the case. Lord *Nottingham's* statement is, that afterwards in *September*, Chief Justice *Rainsford* being returned from the circuit, and the sessions at the *Old Bailey* approaching, *Jenkes's* friends moved him for a writ to remove the prisoner to the county prison, in order that he might be brought within the process of jail-delivery, in which case he must be delivered. The Chief Justice came to Lord *Nottingham's* house where he was indisposed, to be advised ; Lord *Nottingham* thought it of ill example, that, without precedent, commitments by the Council should, by these means, become subject to justices of jail-delivery ; the Chief Justice told him there were precedents where writs of *habeas corpus* had been issued to the Lieutenant of the Tower, to remove a prisoner to *Newgate* ; Lord *Nottingham* said that might be, where the King was desirous to expedite the trial. Afterwards, considering that all imprisonments before trial were *ad custodiam* and not *ad pœnam*, and that the man, though he used extraordinary means to deliver himself, had lain long enough, and that if he should come out by the jail-delivery (Lord *Nottingham* [47] therefore doubts whether he would not come out) it would be of ill-consequence ; therefore, says Lord *Nottingham*, I advised the Chief Justice to counsel the King that it would be better to direct the Chief Justice to take security of the prisoner, to appear the first day of next term and answer an information. That advice was approved by the King, and followed. About this time, continues Lord *Nottingham*, Sir *Philip Moreton* applied to me for a writ of mainprise. I advised him to petition the King, and I would speak for him : he did so, and I obtained an order for his bailment.

The result is, that the course that was then taken was, to apply for a writ of *habeas corpus* to remove the prisoner from the gate-house, into the county where the jail-delivery would reach him ; and without determining whether that writ could be had, he was discharged. In weighing the authority of *Jenkes's* case, we should not at this day look to it with the impartial eyes which become a court, if we did not recollect the beginning, the course, and the conclusion of it. (*Vide 2 Swans. 65, 83, et seq.*)

*July 20.* The Lord Chancellor [*Eldon*] having inquired, whether notice of the bankrupt's application for the writ had been given to the commissioners, and having received an answer in the negative, proceeded thus :

It appears on the old orders that notice was given to the commissioners, and I learn from some reports published a few days ago, that an action has been brought for this commitment, against the commissioners (2 *Stark.* 261). On looking at the affidavit to take this case out of the exception in the statute 31 *Car. 2*, which [48] seems a little insufficient, it does appear that the bankrupt has been pressing to obtain his release, for the purpose of enhancing damages for the commitment.

I proceed to state what I find in the books on the competence or incompetence of this Court to grant the writ of *habeas corpus*.

The doctrine originates in the maxim of law, that the writ of *habeas corpus* is a very high prerogative writ, by which the King has a right to inquire the causes for which any of his subjects are deprived of their liberty (see *Hale's History of the Common Law*, 193) : a liberty most especially regarded and protected by the common law of this country. The first mention of the doctrine which it is necessary now to cite, is to be found in Lord *Coke's* reading on *Magna Charta*, in which he states his opinion that this Court has a right to issue the writ. His words are these, "The like writ" (of *habeas corpus*) "is to be granted out of the Court of Chancery, either in the time of the term (as in the King's Bench), or in the vacation ; for the Court of Chancery is *officina justitiæ*, and is ever open, and never adjourned, so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time, as in the term." (2 *Inst.* 53.)

In another part of the same reading, he says, "Now it may be demanded, if a man be taken, or committed to prison *contra legem terræ*, against the law of the land, what remedy hath the party grieved ? To this it is answered, first, that every act of Parliament made against any injury, mischief, or grievance, doth either expressly



or impliedly give a remedy to the party wronged, or grieved, as in many of the chapters of this great charter [49] appeareth ; and, therefore, he may have an action grounded upon this great charter, &c. And it is provided and declared by the statute of 36 *Edw.* 3, that if any man feeleth himself grieved, contrary to any article in any statute, he shall have present remedy in Chancery (that is, by original writ), by force of the said articles and statutes. 2. He may cause him to be indicted upon this statute at the King's suit, &c. 3. He may have an *habeas corpus* out of the King's Bench or Chancery, though there be no privilege, &c., or in the Court of Common Pleas, or Exchequer, for any officer or privileged person there." (2 *Inst.* 55.)

There is a passage in his reading on a later statute, not so explicit, to the same purpose. "That *Curia Cancellariæ*, was *officina justitiæ* ; for in those days" (he refers to the reign of *Edw.* 1), "not only original writs in *Regist' Cancellariæ*, but all commandments upon any occasion for the safety of the nation, or the good government thereof, were by writs, and passed under the great seal ; and therefore necessary in those days, that the *Chancellor*, having the custody of the great seal, should be about the King at all times ; and this is the cause that the Court of Chancery cannot be adjourned." (2 *Inst.* 552.)

Lord *Coke* again, in two or three passages of the Fourth Institute, notices this power of the Court of Chancery. "This Court," he says, "is the rather always open" ; and then he subjoins the special reason why it is always open : "for, that if a man be wrongfully imprisoned in the vacation, the *Lord Chancellor* may grant a *habeas corpus*, and do him justice according to law, where neither the King's Bench nor Common [50] Pleas can grant that writ but in the term time ; but this Court may grant it either in term time or vacation. (4 *Inst.* 81.)

It is quite clear here, that Lord *Coke*, when he wrote the fourth volume of his Institutes, still continued of opinion that the Court of King's Bench could grant the writ only in term time ; an opinion which I think is not well founded, but which it is extremely difficult to deny would have been thought well founded, at the time when Lord *Coke* wrote : he appears of opinion also, that the Court of Common Pleas can grant the writ only in term time ; and when he wrote it would have been extremely difficult to maintain that the Common Pleas could grant the writ at any time, except in favour of a privileged person ; though afterwards, in *Bushell's case*, (See 2 *Swans.* 54) the judges of that Court were of opinion that they could grant the writ in the case of persons not privileged.

In another passage of the same treatise, Lord *Coke* says, "So odious was unjust imprisonment, or unjust detaining of any freeman in prison, as in ancient time there lay a writ *De pace et imprisonmento*, &c., *ubi liber homo*, &c., *uno modo propter injustam captionem*, et alio modo propter *injustam detentionem*, &c. And there you may read the form of the writ of appeal, *de pace et imprisonmento*, which we have the rather remembered, that it may be observed what several remedies the law hath allowed for the relief and ease of the poor prisoner. But the readiest way of all is by *habeas corpus* in the term time, or in the vacation out of the Chancery, as you may read at large in the second part of the Institutes, *Mag. Carta*, cap. 29, and *Statut. de Gloc.* cap. 9, and the exposition upon the same." (4 *Inst.* 182.)

[51] In the chapter on the Courts of the Forest, is a passage which seems not to have been cited in many discussions on the subject :—"Out of this case we do observe six conclusions. 1st, That the law of the forest is allowed and bounded by the common laws of this realm, and therefore it is necessary, that the judges should know, and be learned in the same. 2d. That though the verderors be judges of the Swanimote, and the steward but a minister, yet the presentment in that court is as well by them as verderors, as by foresters, or keepers, regarders, and agisters, by the law of the forest. 3d. That a forester or keeper may arrest any man that kills or chaseth any deer within the forest when he is taken with the manner within the forest, or if the offender be indicted. But then it is demanded, what if a man be so imprisoned, and after offer sufficient pledges, and they are not taken, what remedy for the party, seeing there are very seldom justice seats for forests holden ? The answer is, that in the term time he may have *ex merito justitiæ*, a *habeas corpus* out of the King's Bench, or if he have privilege, out of the Court of Common Pleas, or of the Exchequer, or out of the Chancery, without any privilege, either in the term time, or out of the term in time of vacation ; and upon the return of the

writ, he may be bailed to appear at the next'eire to be holden for the forest. (4 *Inst.* 290.)

Such being the doctrine of Lord *Coke*, it becomes necessary to take notice next of the statute 16 *Car.* 1, c. 10, "For the regulating of the Privy Council, and for taking away the Court commonly called the Star-Chamber," which contains this enactment relative to the writ of *habeas corpus*; "That if any person shall hereafter be committed, restrained of his liberty, or suffer [52] imprisonment, by the order or decree of any such Court of Star-Chamber, or other court aforesaid, now or at any time hereafter, having, or pretending to have, the same or like jurisdiction, power, or authority, to commit or imprison as aforesaid, or by the command or warrant of the King's Majesty, his heirs or successors, in their own person, or by the command or warrant of the Council Board, or of any of the Lords or others of his Majesty's Privy Council, that in every case every person so committed, restrained of his liberty, or suffering imprisonment, upon demand or motion by his counsel, or other employed by him for that purpose, unto the judges of the Court of King's Bench or Common Pleas, in open Court" (that is, to the Court, and not to the judges individually), "shall, without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of *habeas corpus* to be directed generally unto all and every sheriffs, gaoler, minister, officer, or other persons in whose custody the party committed or restrained shall be, and the sheriffs, gaoler, minister, officer, or other person in whose custody the party so committed or restrained shall be, shall, at the return of said writ, and according to the command thereof, upon due and convenient notice thereof given unto him, at the charge of the party who requireth or procureth such writ, and upon security by his own bond given, to pay the charge of carrying back the prisoner, if he shall be remanded by the court to which he shall be brought, as in like cases hath been used, such charges of bringing up and carrying back the prisoner to be always ordered by the court, if any difference shall arise thereabout, bring, or cause to be brought, the body of the said party so committed or restrained unto and before the judges or justices of the said Court from whence the said writ shall issue, in open Court, and shall then likewise certify the [53] true cause of such his detainer or imprisonment, and thereupon the Court, within three court-days after such return made and delivered in open Court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner; and if anything shall be otherwise wilfully done, or omitted to be done by any judge, justice, officer, or other person aforementioned, contrary to the direction and true meaning hereof, that then such person so offending, shall forfeit to the party grieved his treble damages, to be recovered by such means, and in such manner as is formerly in this act limited and appointed for the like penalty to be sued for and recovered." (S. 8.)

The following section enumerates the different courts to which the act is to extend.

If the power of the King's Bench or Common Pleas were to be collected from this act, it must be observed, that the act gives to these Courts respectively the power of interposing in the cases which are distinctly here pointed out, but does not give to them as Courts any power of interposing in other cases, nor to the individual Judges a power of interposing in any case. The statute, therefore, has not enabled us to say what was the power of the Court of King's Bench out of term, or in other words, what was the power of the individual Judges of that Court out of term, or what was the power of the Court of Common Pleas in term, or of the individual judges of that Court out of term, relative to the writ of *habeas corpus*, in cases not within the act; and it makes no mention of the Court of Chancery. [54] There is a great deal of authority, indeed, that the Judges of the King's Bench could issue the writ of *habeas corpus*, in criminal cases in term time, great doubt whether the individual Judges of that Court could issue the writ out of term, and great doubt whether the Court of Common Pleas could in term time issue it in criminal cases, or in any case except that of a privileged person, or a person whom by fiction they consider privileged, or whether the individual Judges of that Court could issue it in vacation. In *Bushell's case*, (12) however, it was held that the Court of Common Pleas could grant the writ in favour of a person not privileged. Chief

Justice *Vaughan's* individual opinion seems to have been that the writ could not be issued (see *T. Jones*, 13, 14, and *Anon. Carter*, 221); but was over-ruled by the opinions of his three brethren. That case is in many respects very material to the question now before the Court.

*Bushell* was committed in the 22d year of *Charles 2*, for a verdict given by him as a jurymen contrary to evidence and the direction of the Judge in matter of law. I mention the cause of commitment, thinking that the case affords some doctrine applicable to the present warrant. The first point agitated and resolved in the affirmative was, that the return was insufficient, even if there had been a proper cause of commitment. A return of commitment because the jury had acquitted the prisoner against full and manifest evidence is bad; for although the truth of the fact might be so, the court before which the return was made, ought to have the same means of judging whether the verdict was against full and manifest evidence, as the court by which the party was committed; and it clearly would not have [55] the same means of forming that judgment, unless it had the evidence on which the verdict was returned. (13)

The case also involved the question, whether the Court of Common Pleas could issue the writ, except in the instance of privileged persons? Three of the Judges held the affirmative: Chief Justice *Vaughan*, it seems, had thought otherwise, but concurred in discharging the prisoner. The judgment supports the right of issuing the writ on board principles; namely, that the King's court could not, *salvo juramento suo*, have before it the King's subject unlawfully committed, without releasing him from that unlawful imprisonment.

On this decision my first remark is, that the authorities which deny to the Court of Chancery the power of issuing the writ, deny it expressly in term as well as in vacation, and certainly on reasoning which applies to term; but in *Bushell's* case the principle of the conclusion that the Common Pleas can issue the writ in general cases is, that the King's Bench cannot have an exclusive right to issue it, because, without question, it may be issued by the Court of Chancery. Thus the Judges, on the foundation of text-law to be found in the books, assert the right of the Court of Chancery to issue the writ of *habeas corpus*, and then argue from that fact, that the King's Bench cannot have an exclusive right.

*Bushell's* case, therefore, is applicable in two very material points to the question now before us.

Lord *Hale* in the passage cited from his History of [56] the Pleas of the Crown, states the right of the Court of Chancery to issue the writ of *habeas corpus*; and instead of stating it in a way which implies doubt in his mind, I think the manner of his statement rather shows that he entertained no doubt. His opinion is very material, regard being had to the time in which he lived, and the different offices which he filled. He was appointed Judge in 1653, became Chief Baron in 1660, Chief Justice of the King's Bench in 1671, resigned that office in February, 1675–1676, and died in December 1676. (*Emlyn's* Preface to *Hale's* Pleas of the Crown, p. 1, n.) In weighing the opinion of Lord *Hale*, it becomes us to recollect his eminence as a lawyer, and the stations he adorned, and that he lived at a period in which he must have been very conversant with the notions of the different courts of *Westminster Hall* on this writ; at a period when he must have known what was the construction to be put on the statute of *Car. 1*, and what were the defects of the law before the statute passed in the reign of *Car. 2*. Thus familiar with the doctrine of the Courts of *Westminster Hall*, thus qualified to form a judgment on the question, he delivers his opinion.

After stating the law relative to writs of *habeas corpus* of different kinds, he says, that the Courts of King's Bench and Chancery have an original power to grant an *habeas corpus*, and to bail, or discharge, or remand, as the case requires; and having stated certain distinctions in the exercise of the power of those Courts respectively, he applies himself to the writ of *habeas corpus ad subjiciendum*, "which is for matters only of crime, and is not regularly to issue nor be returnable but in term time, when the Court may judge of the return, or [57] bail, or discharge the prisoner" (2 *Hale P. C.* 145); and subjoins these words: "By virtue of the statute of *Magna Charta* and by the very common law, an *habeas corpus* in criminal causes may issue out of the Chancery" (2 *Hale, P. C.* 147); referring to a passage in the second Institute. (2 *Inst.* 55.)

I take this opportunity of observing, that a great deal of the difficulty objected to the power of this Court to issue the writ of *habeas corpus* in vacation in *Jenkes's* case, consists in the difficulty of issuing an *alias* or *pluries* writ in vacation. It is true there may be a difficulty, and the rather because, as I now understand, the return is never filed in the Petty Bag Office, but the writ remains with the person who brings up the prisoner, as an authority for his discharge; (14) but let it be recollected, that though the issuing the *alias* and *pluries* writ is the regular course for enforcing obedience, yet there is another way stated in the opinions of the Judges given on the occasion, to which I shall hereafter allude, namely, that the disobedience may be visited as a contempt of the Court; and I see no reason why, if courts of law can treat those who disobey the writ as guilty of contempt, this Court, cannot in the same way, enforce obedience to its order by the usual process of contempt.

Lord *Hale* proceeds thus: "It seems, regularly, this" (the writ of *habeas corpus*) "should issue out of this Court" (the Court of Chancery) "in the vacation time, but out of the King's Bench in the term time, as in case of a *supersedeas* upon a prohibition. 38 *Ed.* 3, 14 a, [58] B. *Supersedeas*, 13. When the cause is returned, the Chancellor may judge of the sufficiency or insufficiency thereof, and may discharge or bail the prisoner to appear in the King's Bench, or may *proprios manibus* deliver the the record into the King's Bench, together with the body, and thereupon the Court of King's Bench may proceed to bail, discharge, or commit the prisoner. But if the Chancellor shall not discharge him, but bail him, this surety must be to appear in the King's Bench; or if the Chancellor shall do neither, it seems he may commit him to the *Fleet* till the term, and then he may be turned over to the King's Bench, and there proceeded against, for the Chancellor hath no power to proceed in criminal causes." (2 *Hale*, P. C. 147.) That is, if the commitment on the face of it, is good, but is for a bailable offence, as the *Lord Chancellor* cannot try criminal matter, he must put the prisoner in such a situation, that he will be amenable to a court which can try criminal matter; but if the return appears bad, the *Lord Chancellor* ought not to proceed as if the return were good, but should at once discharge the prisoner.

This passage seems to warrant this observation; that when Lord *Hale* states that the writ of *habeas corpus* may issue out of Chancery, by virtue of *Magna Charta*, he adopts the reasoning of Lord *Coke*, that where a statute ordains, as that statute has ordained, that no man shall be imprisoned, but by the judgment of his peers, or the law of the land (*Magna Charta*, c. 29), it is a principle of our constitution, that our courts of law, must find a remedy, and provide means to make the law effectual; and upon that general principle, if it was the prevailing opinion, as I shall state presently, that the Court of King's Bench had power to issue the writ only in criminal cases, and the Court of Common Pleas only in the case of privileged persons, and only in term, the power of giving effect to the law, must have been inherent in this Court, which as *officina justitiæ* was always open. Lord *Coke's* statement that the Court of Chancery is always open, must, I think, be understood as referring to the *Latin* side of the Court; he took great pains to prove that the Court of Equity is a very junior court, and his expression must have been intended to apply to the ancient jurisdiction.

Lord *Hale* has pointed out the distinction, that regularly the writ should issue out of Chancery in vacation only; a distinction which renders it impossible to suppose that he entertained a doubt that this Court in vacation can issue the writ. The subsequent passage proves that he was not merely copying from Lord *Coke*; for he goes on from his own authority, and without citing any book, to state what is the proceeding in Chancery, when a party being brought up by *habeas corpus* on a commitment for criminal matter, which this court cannot try, appears to be bailable, and enters into all the particulars of the manner in which the *Lord Chancellor* is to deal with a prisoner in custody under a good warrant, but charged with a bailable offence. Can I then doubt that Lord *Hale* thought it lawful for the *Lord Chancellor* so to bring the prisoner before him?

It is said, that if the Court of Chancery possessed power to issue the writ, some notice would have been taken of it in the statute 16 *Car.* 1, c. 10, which in certain cases confers that power on the King's Bench, and Common Pleas, sitting only in term. But considering the period in which Lord *Hale* flourished, approaching [60] so nearly to the time of *Charles* 1, and his having passed through the offices of Justice of the Common Pleas, Chief Baron, and Lord Chief Justice of the King's

Bench, his opinion on the construction of that statute possesses the highest authority; and if he thought the doctrine that this court can issue the writ in vacation, inconsistent with it, can it be believed that he would have laid down that doctrine in terms thus express and unqualified?

In the year 1758, I think, on some proceedings in parliament for giving a prompt remedy to subjects restrained of their liberty, it became necessary to put various questions to the Judges. We have in Sir *John Wilmot's* Notes, on account of his answers. I have seen the answers of the other Judges; and there was a great difference of opinion on several questions then put. (15) [61] With respect to the present application some passages of Sir *John Wilmot's* opinion are material.

On the first question, "Whether in cases not within the act 31 *Car.* 2, writs of *habeas corpus ad subjiciendum*, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?" (*Wilmot's Opinions*, p. 81) the Judges were unanimous. They agree that it is a very high prerogative of the crown to issue the writ of *habeas corpus ad subjiciendum*, because absolutely necessary to the liberty of the subject. "It is a remedial mandatory writ, by which the King's supreme court of justice, and the Judges of that court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it." (*Id.* 88.) They distinguish writs, as either writs of course, or writs not to be issued except on proper cause shown, and then assign reasons why the writ of *habeas corpus* is not to be issued except on cause shown; as, if persons were confined on board of ship, and a writ of *habeas corpus ad subjiciendum* were to be granted without an affidavit showing that it was proper, the [62] most serious mischiefs might ensue; supposing, for example, that they were confined on board of ship subject to quarantine. (*Wilmot's Opinions*, 92. See *Hobhouse's* case. 3 *Barn. & Ald.* 420.)

On the second question, "Whether, in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation by *fiat* from a Judge of the Court of King's Bench, returnable before himself?" (*Wilmot's Opinions*, 94) great difference of opinion appears in the reasoning of the Judges, but they agree in the conclusion, that a Judge of the King's Bench might then issue writs of *habeas corpus* in vacation by *fiat*; and they rest that right certainly on great principles, but on very little practice; for they cannot trace the practice beyond the Restoration, except in one or two cases. But how does Chief Justice *Wilmot*, as a great lawyer, conclude on this subject? He says that the practice since the Restoration he shall receive as evidence of preceding practice; but, he adds, if the commencement of the usage can be shown, that argument is not applicable, and the legality of the usage must be supported not by presumption, but by some other principle, and he refers to the principle, that where the reason is the same, the law is the same; and he would not hear it said, that if the Court of King's Bench had power to grant the writ in term time, the subject shall, during the vacation, be deprived of his right to the writ; and he could have it only if the Judges possess authority to issue it. The Chief Justice argues also from the powers of justices of the peace; and it is to be recollected that the Judges of the King's Bench are all justices of the peace, though I believe not the Judges of the other [63] Courts. (16) He does not seem aware of all the passages in Lord *Coke's* Institutes relative to the question, nor of *Jenkes's* case. (*Wilmot's Opinions*, 94, *et seq.*)

I understand him to say, that previously to the statute 31 *Car.* 2, c. 2. there was not more of authority for the right of the Chancery to issue the writ in vacation, (if that which is to be found in our best writers may be called authority), than there was for the right of the Judges of the King's Bench; not so much authority. He says, "No writ of *habeas corpus* can be found to have ever issued out of the Court of Chancery, except some returnable in the House of Lords. The 16 *Car.* 1, takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the writ had issued out of that Court in vacation. And the 31 *Car.* 2, seems to proceed upon a supposition, that it could not issue out of the Court of Chancery, because the 10th section expressly empowers the Court of Chancery to grant it, which would have been unnecessary, if it could have granted the writ before: and it only shows, what I really take to be the truth of the case,

that there was no settled fixed practice then established, of their issuing in vacation ; but if they could not, nor ever did issue out of the Court of Chancery, it is the strongest reason that can be urged in support of the practice of issuing these writs by the Judges of the Court of King's Bench, in vacation, before the statute, because there could not otherwise [64] have been a perfect and complete remedy at all times for the subject against imprisonment, for a bailable offence at the common law, and before the statute of 31 *Car. 2.*" (*Wilmot's Opinions*, 101.)

The paucity of precedents in Chancery may be accounted for as easily as the paucity of precedents in the Common Pleas, and on the same principles. On the argument, that without a power in the judges of the Court of King's Bench to issue the writ in vacation, the subject would be left without remedy, I say, on the other hand, it seems that, previous to the Restoration, the instances are very rare indeed, of writs of *habeas corpus* issued by the judges of the King's Bench out of Court and in vacation ; it is quite clear, that till *Bushell's* case, the Judges of the Common Pleas had no belief that the Court possessed a power to issue the writ, even in term time, in criminal cases, or that it was possible for them, as individual Judges of the Court to issue the writ in vacation, before that power was given to them by statute 31 *Car. 2* ; then I find the texts that have been cited from Lord *Coke* ; I find that, in the period in which Lord *Hale* lived, as justice of the Common Pleas, as Chief Baron, and as Chief Justice of the King's Bench, he acknowledged the infirmity of those Courts, and that even the Judges of the Court of which he was Chief Justice had no power to grant the writ except in term ; and I ask, with Chief Justice *Wilmot*, if *Magna Charta* secured to the subject his liberty, and if it be a principle of our constitution, that the Courts shall give effect to the law, and that speedily, and if I find not only authorities that the Court of Chancery has power to issue the writ, but principles on which those authorities are founded, and distinctions taken which re-affirm the proposition, and [65] not only doctrines laid down, but methods of proceeding pointed out, by such men who held such offices as Lord *Hale*, I ask, what was to become of the liberty of the subject between *Magna Charta* and 31 *Car. 2*, if the Judges of *Westminster Hall* held that those Courts had the power of issuing the writ only in term, and if they were wrong in holding that the Chancery had at all times a power of issuing the writ ? What must have been the state of the subject ? And how can I reconcile that state with those admitted legal principles ?

We now come to *Jenkes's* case, certainly a positive decision that the *Lord Chancellor* could not grant the writ at common law in vacation ; and Lord *Nottingham* says, that he conferred with the Judges : but it does not appear that on that occasion all the authorities in the books had been consulted, and every consideration given to the subject ; and it is not going too far to say, that a case which is capable of being rendered so doubtful as that is rendered, when we look at all the proceedings in it, I cannot think one which ought to bind me, against the stream of authority.

The only other authorities requiring observation are *Wilkes's* case (2 *Wils.* 151) in 1763, and *Wood's* case (2 *Blackst.* 745 ; 3 *Wils.* 172) in 1770. It seems, that even at this late period considerable doubt existed whether the Court of Common Pleas, though it had acquired power in certain cases by the statute 16 *Car. 1*, could issue the writ in criminal cases. I think the judges of that Court decided properly that they could issue it. In *Wood's* case, Chief Justice *de Grey* says, that he sees the objection to the jurisdiction of that Court " had arisen from what is dropped, in 2 *Inst.* 55 ; 4 *Inst.* 290 ; *Dyer*, 175 ; 2 *Hal. P. C.* 144, [66] that the Court of Common Pleas may grant *habeas corpus* if the person be privileged there, or in order to charge him with an action." (2 *Blackst.* 745.) The Court of Common Pleas having no jurisdiction except in civil cases, although, as it was held in *Bushell's* case, and in the case to which I now refer, they could issue writs of *habeas corpus*, yet they discouraged applications to that Court ; and for this reason, that the party who was to have the benefit of the writ was placed in a situation as distressing as if application had been made to the Court of Chancery ; provided, I mean, that the warrant appeared good, but stated a bailable offence ; for the Court of Common Pleas could not try him, and therefore there was a convenience in applications to the King's Bench, which did not exist in applications to Chancery, or to the Common Pleas ; and although it is true that no such inconvenience would occur where on the warrant of commitment, it appeared that the prisoner ought to be discharged,

yet there had grown a habit of practice out of those cases where the warrant stated a bailable offence, of applying to the King's Bench, which extended to almost every case.

Chief Justice *de Grey* then refers to *Bushell's* case, in which it is laid down as a great principle, that if a subject of the King is brought from prison before one of the King's superior courts, and it appears that the imprisonment is unlawful, the Court cannot, *salvo juramento suo*, remand him to that unjust imprisonment; in other words, cannot refuse to discharge him.

*Blackstone*, in his judgment, has given something of a satisfactory account of the course in which the Court of Common Pleas acquired the general power of issuing [67] the writ. "He thought that originally the writ of *habeas corpus* at common law could only be issued out of the Court of Common Pleas, when the party was privileged, or to charge him with a suit. But afterwards, *in favorem libertatis*, a mere suggestion of privilege was allowed to be sufficient to grant the writ; and a *capias* was afterwards sued out of conformity, to affirm the jurisdiction. This is the meaning of 2 *Hal. P. C.* 144. "If a person is sued in the Court of Common Pleas, or is supposed to be so sued, a *habeas corpus* lies in the Common Pleas." But when the statute 16 *Car.* 1, had put both courts upon the same footing, with regard to the writs of *habeas corpus* therein mentioned, this nicety began to be disregarded, and the cases cited by Lord Chief Justice in *Charles* the Second's time, have now established the general jurisdiction beyond a doubt." (2 *Blackstone* 746.) See in what manner, according to this statement, the Judges argued in order to support their power of granting the writ of *habeas corpus*, and how they dealt with the subject in granting it, first at common law, and then after the statute 16 *Car.* 1. Originally, for the purpose of enabling them to give effect to the right which the subject had to his liberty, where by the circumstances of the commitment he had that right, they admitted the fiction or suggestion of privilege, in order to obtain jurisdiction; and they drop that fiction or suggestion after the 16 *Car.* 1. Now that statute gave them no jurisdiction except in the instances there specified; but from what they are to do in those instances, they have inferred, upon the words which I am about to mention, that it was no longer necessary for them in any case to retain this suggestion of privilege. A remarkable example of the strength of the principle which our law has in it, that, with respect to the liberty of the subject, the courts [68] are to struggle to secure it; for that statute says, that in the particular cases there mentioned, the subject for obtaining his liberty, shall without delay have a writ of *habeas corpus*, "for the ordinary fees usually paid for the same." (16 *Car.* 1, c. 10, s. 8.) On this clause the Judges of that Court have argued, that there must have been usual fees payable in the Common Pleas on the issue of the writ of *habeas corpus*, and therefore though the statute has not conferred on them general powers which they had not before, yet because it has directed them to exercise the power in these particular cases, and in these terms, they conclude that it was the opinion of the legislature that they had the power in all other cases. They have therefore, according to *Blackstone*, discontinued the suggestion of privilege, and have said, When the subject comes before us unjustly imprisoned, we cannot refuse to him his liberty.

It is then contended that the statute 31 *Car.* 2, contains an implied negative of the general power of the Court of Chancery to issue the writ, because it expressly confers that power in particular cases. Be it so: but if the power existed before that statute, a power vesting a very high prerogative in the King, I say that it could not be taken away in any case by inference, from an enactment which enforced it in some cases. I go farther; if the prerogative of the King cannot be affected by general words in a statute, will a British court of justice permit it to be said, that a statute designed to enforce in particular instances the prerogative in favor of the liberty of the subject shall deprive the subject of that liberty in any case? That is a sufficient answer; but I have always understood that the statute 31 *Car.* 2, in all its enactments, is to be construed with reference to applications for a writ *under that statute*.

[69] The statute 31 *Car.* 2, c. 2, recites that "great delays have been used by sheriffs, gaolers, and other officers, to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus* to them directed, by standing out an *alias* and *pluries habeas corpus*, and sometime more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of

the King's subjects have been, and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation" (s. 1): then, if application is made under that statute, inasmuch as it was intended to give additional remedies beyond what the subject had at common law, or under the previous statute, the third section directs, that the writ shall be marked, and proceed to enact, that "if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation time, and out of term," they shall be entitled to a writ of *habeas corpus* to be issued by the Lord Chancellor or Lord Keeper, or any one of the Judges of either bench, or the Barons of the Exchequer; and provides the mode of proceeding. Mr. Cullen seems to think that this clause has relation only to persons committed in vacation; but the words are, if any person shall be or stand committed in vacation; that is, as I understand, if he shall be committed in vacation, or being committed in term shall stand committed in vacation. The Judges who argued, on the questions proposed in 1758, against the power of the Court of Chancery to issue the writ in vacation, by reason of the enactments of this statute, held that the Judges of the [70] King's Bench had power to issue the writ in vacation, and thought that they derived that power from this statute; and yet the reasoning is just as strong to one court as to the other.

The fourth section denies the benefit of the statute to persons wilfully neglecting to apply for a writ during two terms; but will any one say that if a man has been unjustly deprived of his liberty during two terms, without being aware that the restraint was unlawful, he cannot have the writ at common law? That can never be maintained.

Then follows a clause very carefully worded, providing that it shall be lawful "for any prisoner and prisoners as aforesaid, to move and obtain his or their *habeas corpus*, as well out of the high Court of Chancery or Court of Exchequer, as out of the King's Bench or Common Pleas, or either of them" (words from which it has been inferred that the writ could not be previously obtained from the Courts of Chancery or Exchequer); "and if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons for the time being of the degree of the coif, of any of the courts aforesaid, in the vacation time" (not in term but in vacation), "upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made, that such copy or copies were denied as aforesaid, shall deny any writ of *habeas corpus*, by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds, to be recovered in manner aforesaid" (s. 10).

With respect to the Court of Exchequer, this is a [71] very singular clause. It gives to that Court power to grant the writ in term; it cannot as a court grant the writ in vacation, for the court sits only in term, (17) while the Chancellor sits both in term and in vacation; but the penalty applies to the vacation only.

If this clause is to be reasoned on to its general effect; that is, if it is to be said, that because there is a clause empowering the Court of Chancery to issue the writ, that Court had not power to issue it before, that conclusion strikes at the power of the Court not in vacation only, but in term; at all times. The question is, whether this statute is to be construed with reference to applications under the statute; applications with a view to subject those to whom they are made to the penalties which it inflicts in the event of disobedience? or whether, in consequence of these particular enactments, all that we find in the books in support of the Chancellor's authority is to stand for nothing? Whether, recollecting that we have found very few precedents of applications to individual Judges of the King's Bench, previous to the Restoration, we are to hold that this Court before 31 Car. 2, and before 16 Car. 1, had no power to enforce the provision of *Magna Charta*, but [72] when the party was brought before it, and the Court saw that he was in unjust durance, it was compelled to leave him there; the subject, during a considerable period of our history, being without remedy?

Before the statute 5 Geo. 2, c. 30, I see that orders for the discharge of prisoners committed by the commissioners of bankrupt, were in the form of recommendations to the commissioners to discharge them. It had occurred to me that this Court had no authority to discharge by petition, and that the right way was by writ of



*habeas corpus*. I believe, but I am not certain, that in some instances in which I have discharged bankrupts by *habeas corpus*, the application was made within two terms after the commitment, but the writ was not marked according to the statute ; and I must admit, therefore, that I was wrong, if the Court has not power to issue the writ in vacation, at common law.

Another difficulty has been much pressed, namely, how we are to proceed under the writ, between the equity and the Latin sides of the Court ? Lord *Nottingham* has said, supposing the writ disobeyed, the Chancellor can grant no attachment till term time ; and that he ought to grant the attachment as he would grant the writ of prohibition, returnable in the King's Bench. I answer, with Chief Justice *Wilmot*, in all the books we find that the proceeding under the writ of *habeas corpus*, if disobeyed, is by *alias* and *pluries* in term time ; but notwithstanding that, when on the occasion to which I have repeatedly referred, a question was put to the Judges, " Whether, in case a writ of *habeas corpus ad subjiciendum*, at the common law, be directed to any person returnable *immediate*, such person may not stand out an *alias* and *pluries habeas corpus*, before due obedience thereto can be regularly enforced by the course of the common law ? " (*Wilmot's Opinions*, p. 104.) [73] Chief Justice *Wilmot* answers, " I am of opinion, that in case a writ of *habeas corpus ad subjiciendum*, at the common law, be directed to any person returnable " *immediate*, " the Court, upon the affidavit of the service of the writ, will grant a rule for an attachment. By the course of the common law, he might have stood out an *alias* and *pluries* ; but by practice the course is now altered, and in many cases the Court has enforced obedience to a writ for private restraints, in the first instance, by attachment, for the furtherance of justice. The method of proceeding by *alias* and *pluries* is gone into disuse, in almost all cases, and the process by attachment substituted in its stead : and that practice stands upon this legal principle ; that disobeying the King's writ is a contempt, and equally a contempt to disobey the first writ as the last." (*Wilmot's Opinions*, p. 104.)

If I do not misunderstand the principle, I say, that if the Courts of King's Bench and Common Pleas can issue the writ of attachment, in the manner in which they can issue it for disobedience to a writ of *habeas corpus* returnable *immediate* (the *King v. James Winton*, 5 T. R. 89), this Court can issue process of contempt for that purpose, and can apply its process in the same mode in which it is applied in other cases.

On the whole, therefore, it seems to me, that it is the duty of this Court to grant the writ if applied for : there may be great inconvenience ; but I say with Lord *Hale*, that if the object chooses to apply here, as I understand the law, I cannot, *salvo juramento meo*, refuse the writ. What is to be the consequence of granting it, is another question.

[74] I see that in these cases the Court has caused notice to be given to the commissioners, and therefore I will hear them, if they have any thing to say, to-morrow.

July 18. Mr. *Rose* having stated that two of the commissioners who had issued the warrant were absent from town, and that the third commissioner submitted the question to the judgment of the Court.

Sir *Samuel Romilly*, and Mr. *Cullen*, proceeded to object to the validity of the commitment.

The commissioners are authorised to commit the bankrupt, for not fully answering, to their satisfaction, all lawful questions put to him by them, or refusing to sign his examination (5 *Geo.* 2, c. 50, s. 16) ; but it appears on this warrant that the commitment is founded, not on the answer of the bankrupt, but on the deposition of the messenger. For the purpose of deciding whether the answers of the bankrupt are satisfactory, the commissioners are not entitled to resort to extrinsic evidence, but must confine their attention to his answers. In no former instance have commissioners contrasted the testimony of third persons with the answers of the bankrupt ; unless the bankrupt's answers are intrinsically unsatisfactory, they will not justify a commitment. If the commissioners were authorised to advert to the deposition of the messenger, it ought to have been stated to the bankrupt, and he should have been examined upon it, and the deposition and examination should both have been set forth in the warrant. The requisition of the statute, that the com-

missioners shall in their warrant of commitment specify the questions which they consider not satisfactorily answered (*Ibid.* s. 17), is designed to secure to the Court, before which the [75] validity of the commitment may be controverted, the means of deciding whether the answers are satisfactory; and for that purpose the commissioners must specify the whole of the evidence on which their dissatisfaction arises. *Coombe's case* (2 *Rose*, 396). *Brown's case* (*Ibid.* 400).

Mr. *Rose* insisted that the warrant was sufficient, or if not, that the alleged insufficiency was formal only, and that the Court, under the provisions of the statute (5 *Geo.* 2, c. 30, s. 18), must recommit the bankrupt.

The *Lord Chancellor* [Eldon]. The questions which remain to be determined are, whether this warrant is sufficient; and, if insufficient, whether the insufficiency is in form or in substance; in the former case another duty is imposed on me, of amending the warrant; and it becomes me to be as sure as my judgment enables me, that I am right, if, in deciding that the warrant is insufficient, I consider the insufficiency to be in substance as well as in form.

I take it to be clear, that for deciding this question on the return to the writ of *habeas corpus*, the Court cannot travel out of the return. Indeed, it is difficult to know how that could be done; for although the *Lord Chancellor* has the proceedings under the bankruptcy, in one sense, in his own custody, yet when the party is brought before him by *habeas corpus*, the proceedings must be exactly the same as if he were brought before the common-law Judges; and I cannot conceive how they would have other means than the return, of informing themselves of what passed under the commission. In the present case it is clear that there had been a great deal of examination, before the examination on which the [76] bankrupt was committed. I make that remark, because, if this subject should ever be discussed elsewhere, it is right to say that this is one of the most insufficient jurisdictions that can exist. It is not possible for the commissioners to address their minds to what appears on the warrant, without being in some measure influenced by what does not appear; and the doctrine that the commissioners could not commit if the bankrupt gave a positive answer, however unsatisfactory, having been over-ruled, (18) and the Court now being bound to ask itself, on the return of the *habeas corpus*, whether, to a reasonable mind, the answer is satisfactory, I am compelled, to decide whether that which is satisfactory to one mind, ought to have been satisfactory to the minds of those who knew thrice as much of the subject of examination; and there is danger of producing an apparent conflict between the original and the appellate judicature, while the real grounds of decision by each are different.

After repeatedly reading this warrant, I find it impossible not to believe that the minds of the commissioners, at the time of the commitment, were in some degree influenced by the previous examinations, and not only by what then passed; and I desire to be understood as saying, that I *bona fide* know not how any mind can avoid that influence.

Let any man read the warrant, with or without so much as relates to the deposition of the messenger, and [77] ask himself, after reading it, in each of those ways, whether the answer is clearly unsatisfactory?

I read it first without the deposition. The question begins with a statement: "On the 4th of *June* last, when you appeared before the commissioners at *Guildhall*, to pass your last examination, you had no accounts ready to present to them; you then requested the commissioners to adjourn your last examination, undertaking to produce your accounts to your assignees on *Thursday* then next ensuing; on the 14th of *June* you were brought up to be examined before the commissioners, and upon being asked whether you had produced your accounts to your assignees, you stated that you had not, and could not, because your books and papers were in the possession of a friend of yours, a Mr. *Hamilton*, at No. 122, in the *London Road*, to whom you had delivered them since your bankruptcy, who refused to re-deliver them to you." A statement, in effect, that on the 4th of *June* the bankrupt had undertaken to produce his accounts; what passes on the 14th of *June* is an admission that he had not made good that undertaking, but an admission coupled with a declaration that he could not make it good, because his books were in the possession of a Mr. *Hamilton*.

I pass over what relates to the deposition of the messenger. The question is, "Have you any accounts to produce to the commissioners, or any further reason to

give why you do not produce them?" That question is addressed to a man who had before stated a reason with which the commissioners did not express themselves dissatisfied; and he answers that he has no other reason: that is not a waiver of his former reason.—"I have no accounts to produce, and I have no further reason to give why I do not produce them, except that I have two petitions before the Chancellor to supersede [78] this commission; the first upon the ground of a commission being now in force against me, bearing date in 1808, and the second, of no act of bankruptcy to this commission, but still am ready to render every account possibly in my power to the commissioners."

The result is, that on the 4th of *June* he undertook to produce the accounts; on the 14th he said, that he had not produced, and could not produce them, and assigned the reason for the non-production; and on his third examination he stated that he could not produce them; that he had no other reason but that before assigned, and that he had presented two petitions to the *Lord Chancellor*.

Now on the examination thus stated, the commissioners knowing what had passed before, might have known enough to induce them not to believe the bankrupt on his oath; but my mind not having these previous examinations before it, is not in a state to arrive at that conclusion.

Then insert that part of the warrant which relates to the deposition of the messenger. (*Vide 2 Swans. 3, 4.*) Taking all this representation to be the fact, it might be considered, in this point of view, independent on what the bankrupt had said in his examination; that *Hamilton* evaded those who were in search of them; that they had met a person who had communicated their object to him, and that he refused to deliver the accounts, because they had no right to them. That is not inconsistent with the bankrupt's examination.

The next question is, how am I, according to established principles, to deal with this warrant? I think it has been settled, that where a question is put to a bankrupt [79] on his examination, and in that question is embodied a proposition expressing, as a fact, what he said or did on a preceding day, if he gives such an answer as implies that he does not deny that he said or did so, or does not qualify it, I think it has been settled, even in cases of life or death as *Perrot's case* (2 *Burr.* 1122, 1215), that the bankrupt must be taken to admit that proposition. In this instance the bankrupt gave no answer, denying or qualifying the statement that he had undertaken to produce his accounts, and he must therefore be considered as having admitted it.

I desire to be understood as not expressing any opinion, whether commissioners are at liberty to obtain satisfaction on the subject of the examination, by application to any other person than the bankrupt. Mr. *Cullen* argues that they are not entitled to resort to evidence *alunde*, for the purpose of deciding whether the bankrupt's answer is satisfactory or not. I leave that question where it is; but the commissioners here have acted on the evidence of the messengers; and then the question arises, have they so stated the evidence on the warrant, that the Court can have the same means, if they are due means, as the commissioners had, of deciding whether the answer is satisfactory? It does not appear on these proceedings that the deposition of the messenger was made in the presence of the bankrupt, or read to him, or that he had any other information concerning it than the terms of the question.

With respect to propositions stated to the bankrupt, in a question addressed to him, relative to acts alleged to have been done, or declarations made by him, one sees the principle on which courts have held (whether it might not have been better to have taken a different course, is another consideration) that [80] if he does not deny, he is understood to admit the statement; because the question embodies a proposition relative to his own acts or expressions, and he must be presumed to know whether he so did or said: but when the question embodies a proposition relative to acts or words of third persons, the bankrupt may properly be supposed to know nothing about them; and then the point to be decided is, whether the Court, judging on the liberty of the subject, shall be bound to judge without the means of knowing that the statement so incorporated is accurate, and the assurance of forming a correct conclusion on the propriety of the commitment? The Court would never act on any representation of the commissioners that they asked a question such in substance, and received an answer such in substance; the question

and answers must be set forth in terms. (5 *Geo. 2, c. 30, s. 17.*) On what principle does the statute require that? On this principle, that the Court before which the bankrupt is brought, by *habeas corpus*, may decide whether the commissioners have not misunderstood the effect of the questions and the answers. The only course for that purpose is to return them *totidem verbis*.

The warrant is insufficient in this respect; it refers to a deposition which I cannot read, and of which neither the bankrupt nor the Court can be taken to know, that it is such as it is stated to be on the warrant. It is clear that the deposition had an effect on the minds of the commissioners; they evidently meant to convey that to the bankrupt.

Another question then arises, Is this defect matter of form, or of substance? Where the warrant is defective in form, the Court is required to amend it, and itself [81] to make a new warrant. (19) This is a defect in substance; as much so as an omission to state an examination subsequent to the original commitment.

Under these circumstances I am not only not required to issue another warrant, but I should not be justified in issuing it.

It seems to me that the question in this case falls very much within the reasoning in *Coombe's case* (2 *Rose*, 396). There, on the return of the *habeas corpus*, it appeared, that there had been an examination subsequent to that in which the commissioners considered the answer of the bankrupt unsatisfactory; then it was impossible for me to judge of the whole matter. They had recommitted him to prison after his second examination; and the question was, whether it was proper to detain him in prison after that second examination, as well as to commit him on the first? I was not supplied with the same means which the commissioners had, of deciding that question, and could not declare the commitment and detention proper.

The distinction established by all the cases is this, that if the commissioners say to the bankrupt, On your former examination you answered to this effect, and he does not qualify that statement, the Court must take it to be true; because he must know whether he said so or no; a hard rule, but now clearly settled. But if the commissioners state that they have derived information from other persons, and the bankrupt does not qualify that statement, I am not bound to take it to be true, [82] because he has no means of knowing whether or how far it is true. When the commissioners receive facts on the deposition of persons other than the bankrupt, they ought to set out on the warrant the deposition *in hæc verba*; for if they state only what they consider to be the effect of the deposition, the Court before which the writ is brought, is to judge whether the effect of the deposition is such as the commissioners represent, without the means of forming that judgment.

We may safely lay down this as the principle, except so far as the cases break into it, that the Court before which the writ is brought, and which cannot travel out of the return, must, on the return, have the same means of judging as the commissioners had. (20) *Perrot's case* (2 *Burr.* 1122, 1215) seems to me to break into that prodigiously. If the commissioners state that the answers were unsatisfactory, because contradicted by a deposition, how is it possible for me to know whether they ought to have been satisfactory, unless the deposition is returned?

I repeat that this question, whether to a reasonable mind an answer should or should not be satisfactory, experience authorises me to say, imposes as difficult and painful a duty, as the Court can discharge. Chief Justice *de Grey*, and all the other Judges of one Court, thought an answer satisfactory, which another Court unanimously pronounced unsatisfactory. (Note: Possibly *Miller's case*, 2 *Bl.* 881; 3 *Wils.* 420, and the remarks of the Court of King's Bench on that decision, in *Nowlan's case*, 6 *T. R.* 118.)

[83] The warrant is insufficient, and the prisoner must be discharged. Let the gaoler discharge him, so far as he is in custody under the commissioners' warrant.

Since the report of this case was prepared, the *Lord Chancellor*, with a kindness more highly gratifying because unsolicited, has conferred on the editor the signal favor of a communication of Lord *Nottingham's* MSS. From that most valuable collection is subjoined the following statement of the precedents on the authority of which *Jenkes's* friends claimed, and of the reasons that inclined Lord *Nottingham* to withhold, the writ of mainprise. (*Vide* 1 *Swans.* 14, 15.) The editor has also on some subsequent occasions availed himself of the permission with which he has

been honored, to illustrate the doctrines discussed in the course of these reports, by a reference to Lord *Nottingham's* decisions.

"The petition set forth that *Francis Jenkes* was a prisoner by virtue of the warrant annexed, for a fact bailable; that by the ancient usage of Chancery, upon putting in bail there, a writ of mainprize ought to issue, directed to the sheriff or jailer to deliver the party; that the petitioners, being men of good estates, offered themselves as bail, whereof they prayed the acceptance, and a writ of mainprize accordingly. This petition was accompanied with a note of precedents, viz.

"1. 11 E. 3, pt. 1, rot. cl. Mainprize in Chancery for *John Brice*, removed from *Lincoln* to the *Tower*, to appear *coram concilio vel justiciariis nostris vel alibi quandocunque et ubicunque ad faciend. et recipiend. quod per nos vel justic. nostros consideratum fuerit*.

"2. 11 E. 3, pt. 1, memb. 29, dors. rot. cl. A writ of [84] mainprize directed to the constable of the *Tower*, upon putting in bail in Chancery, to deliver *Bernard Pouche*, committed for felony.

"3. 11 E. 3, pt. 1, memb. 28, dorso, the like directed to the steward and marshal of the household, to deliver *Richard Moneywood*, committed by his majesty's command, for trespass and contempt, teste 19 Martii, out of term.

"4. 11 E. 3, pt. 1, m. 28 dorso, the like directed to the constable of the *Tower*, to deliver *Henry Compton* committed for felony, teste 26 Martii, out of term.

"5. 11 E. 3, pt. 1, memb. 23 dorso, the like for *John de Wesenham*, directed as before, committed for felony and divers excesses, teste 12 April.

"6. 44 E. 3, pt. 1, m. the like directed custod. Forest, for delivery of several persons committed for hunting in forests, teste 12 November.

"7. 44 E. 3, m. 17, the like, teste 6 May.

"8. 44 E. 3, m. 10, the like, teste 20 August.

"9. 45 E. 3, m. 25, the like for *William de Charle*, who stood committed for divers felonies and deceits to the King and his son *John Duke of Lancaster*, teste 12 Junii.

"10. 3 R. 2, m. 36, dorso, the like writ directed to the sheriffs of *London* upon bail put in in Chancery, to discharge *Mich. de Swardeston*, and *John Pye*, for designing to go out of the land to prosecute and act many things prejudicial to the king and his people, teste 5 December.

"11. Simile directed Vic. Norf. ibm.

"12. 3 R. 2, m. 25, dorso, the like in appeal of mayhem, directed to the sheriff of *Hertford*, teste 1 Dec.

"13. 3 R. 2, m. 20, dorso, the like for deliverance of a prisoner out of the *Tower* upon bail put in, in Chancery to appear *coram consilio regis quando et quoties usque prox. [85] pentecost, et ad turrin reintrandum nisi judicium pro deliberatione sua redditum fuerit*.

"14. 3 R. 2, m. 12, dorso, the like for divers intending *ad mutiland. et interficiend.* directed to the bailiff of the liberty of *Westminster*, teste 5 Febr.

"15. 3 R. 2, m. 11, dorso, the like for divers persons charged with divers conspiracies, directed Vic. Suffolk.

"16. 3 R. 2, m. 7, dorso, simile de incendio domorum, directed Vic. Hertf. for *Smith* and others, teste 5 Martii, nine of the like together.

"17. 3 R. 2, m. 2, dorso, the like directed to the justices of *North Wales*, for *Lloyd*, committed for felony and trespass.

"18. 3 R. 2, m. 1, dorso, supersedeas for *Ralph* vicar of *Wasteldon*, being accused by an approver for robbery, granted upon bail in Chancery, *quia bonæ famæ*."

The reasons which "moved Lord *Nottingham* to deliberate upon the writ of mainprize, and for the present to incline against it," are thus stated:

"1. The writ *de manucapione capienda*, is grounded upon the statute of *Westminster* 1, c. 15, as to criminal cases; for as to civil cases there is such a writ at the common law, but the application of it to criminal cases is merely by force of the statute.

"2. That statute was made to provide for the bailment of those who by the sheriffs or lords of leets or others, who had liberties of *infangthef* and *outfangthef* were kept in prison for small felonies.

"3. The first line of the statute is *pur ceoque viscounts et autres queux ont prises et retenus in prison gents rettes de felony*; for before the statute, and long after,

the she-[86]-riffs in their turns by warrant of the King's writ or commission did take many indictments of felony.

"4. The mischief recited in the preamble was that these sheriffs and others did (what they pleased) bail those who were not bailable for money, and kept in prison those who were bailable out of malice.

"5. Then the statute proceeds to define the cases of felonies bailable and not bailable.

"6. And then the writ *de manucaptione capienda* came to be applied to these cases; and, as if there had never been any such writ before, the Register 270 b, lays it down for a general rule, *omnia brevia de manucaptione fient sup. stat. W. 1, c. 15*, which must be understood of criminal cases only.

"7. The writ which pursues the statute always recites a felony, and an indictment or inquisition thereon founded, and a tender of bail below which has been refused, and then commands bail to be taken, if there be no other case of imprisonment but the felony aforesaid. *Vide Reg. and F. N. B.*

"8. Then came the statute of 28 E. 3, c. 9, which takes away all power from the sheriffs to take indictments in their turns, by the King's writ or by commission.

"9. And now *Fitzherbert*, and my Lord *Coke* are both agreed that the statute of 28 E. 3, has by consequence repealed the writ *de manucaptione capienda*, (21) as to criminals; and with them agrees my Lord Chief Justice *Hale* in a little compendious manual of crown learning written by him, a copy whereof is in many hands. (22)

[87] "13. And yet *Fitzherbert* for learning sake proceeds to comment upon this writ, as he does also upon the writ *de odio et atia* and many others that are expired; which led many men into mistake who look upon him as a writer in *Henry* the Eighth's time, but penetrate no farther into the matter.

"11. While the writ was in use, the practice was not to put in bail in Chancery, but to have a writ from thence, commanding others to take bail.

"12. And yet no doubt there always was and still is a writ *de manucaptione capienda* at the common law in civil cases. As when erroneous judgment is given below, this writ lies to keep a man out of prison, while he prosecutes his writ of false judgment; so if a man brings an appeal of mayhem, and be arrested in an inferior court upon process frivolous on purpose, to hinder that prosecution, this writ lies; *F. N. B.* 250 k, l; *Reg.* 272. The same writ might also have been issued at the common law, in all cases where a man was arrested in debt or trespass, or indicted of trespass *F. N. B.* 251 b; *Reg.* 273 a; but this is now supplied by 23 H. 6, cap. 9.

"13. And in some civil cases a man may come into Chancery and voluntarily tender bail, and shall have a writ to be discharged of his imprisonment. As where a *capias* upon a statute-merchant sued out of Chancery, and the cognisor comes and shows how he has paid part and has a release for the rest, and brings his mainpernors with him to be bound body for body, he shall, upon that manucaption so taken, have a writ to be taken charged. *F. N. B.* 251 d; *Reg.* 273 a, b.

"14. So likewise in some cases which look like criminal; as, if a *ne exeat regnum* or a general *supplicavit* be awarded; if the party, instead of putting in bail before the sheriff or the justices, will come into the Chancery [88] and tender bail, which is there accepted, no doubt he shall be discharged by writ from his imprisonment; for in all these and the like cases the Chancery works upon itself, and does, as all other courts may do, quicken or stop their own proceedings.

"15. But then the question is reduced to this, whether, by the ancient common law, there be a standing power residing in Chancery to accept bailable cases, and to discharge all imprisonments.

"16. For the power of doing it by the writ of mainprize, which is founded on *W. 1, c. 15*, is agreed on all hands to be taken away by 28 Ed. 3, c. 9.

"17. It seems not reasonable to believe that any such power should remain in Chancery, either by common law or by statute: 1st, From the non-user of it these 300 years; for *Richard* the Second began his reign anno 1377, and yet no precedent of it is offered since 3 R. 2. 2. The precedents between 28 Ed. 3 and 3 R. 2, are to be imputed to the strong current of former practice, it being some considerable time before it began to be understood that the statute of *Ed. 3*, had repealed the writ of mainprize, viz. not till 3 R. 2. 3. The precedents before that

time are for the most part such as concern indictments for felonies and great offences. 4. The case of *F. N. B.* 250 f, where a man, taken by the king's commission, and upon tender of bail in Chancery by his friends, had a writ of mainprize, is of the same nature; for it is not meant of a commitment by the King, but by commissioners of *oyer & terminer*, as appears by the *Register*, 271 a, b, from whence that case is taken, and is the only case of that kind which is extant in the *Register*.

"18. And it seems less reasonable, if such a power there were, that it should extend to commitments by the King in council: 1. Because if the writ of mainprize desired [89] be founded upon the statute of *Westm.* 1, c. 15, then it is plain the statute begins with persons of an inferior nature; *pur ceoque viscounts et auters*, and so can never extend to persons of a higher rank and order, viz. lords of the council, &c. 2. If the writ desired be founded upon the common law, or upon the general maxim, that whenever a statute gives a remedy, there the Chancery ought to frame a writ upon it, then it must be observed that it was never yet so practised, though there have been very frequent occasions for it. 6 *Jac. B. R. Cro.* 219, *Addis'* case, committed by the Lord Chancellor for certain matters concerning the King; and again 4 *Car.* 1, *Cro.* 233, *Chambers'* case, who was committed by the council in the long vacation, yet no attempt to get out by writ of mainprize, though several petitions were unsuccessful; and long before, viz. *P. 9 Eliz., Rich. Constable*, committed to the Tower *per dominos privati consilii*, never asked a writ of mainprize, nor could be bailed till he brought his *habeas corpus*. So *Hilary*, 40 *Eliz., Edward Harcot*, committed *per dominos privati consilii*, never attempted to get out any otherwise than by *habeas corpus*, vide *Sir Fra. Moor*, 813, pl. 32 (probably 839, pl. 182); and the twelve precedents cited by Mr. *Selden* (at the conference in the Painted Chamber) (3 *Howell's State Trials*, 97-102), when persons committed by the privy council were bailed upon *habeas corpus* brought, do all prove that a writ of mainprize was not then dreamed of or thought practicable. Of these the fourth and fifth were in the time of Queen *Mary*; the sixth, seventh, eighth, ninth, and tenth, in time of Queen *Elizabeth*; the eleventh and twelfth, in time of King *James*, but the first was in 18 *Ed.* 3, upon a commitment by the King under his great seal to the [90] *Tower*, when the writ of mainprize was undoubtedly in force, and might have been had in Chancery if the law had extended it to such commitments; but there the bailment was upon a return into *B. R.*, which may serve to answer the precedent of 11 *E.* 3, m. 28, cited before. 3. If a man be imprisoned by command of the King, suppose the command unlawful, yet he cannot be delivered by a writ *de homine replegando*; but justice shall be done by the superior courts upon a *habeas corpus*, 2 *Inst.* 187. How vain were this law, if he might get out by mainprize in the meantime! 4. For mainprize is a greater liberty than bail: he that is bailed is still in the custody of his bail; but he that is mainprized is absolutely at large: again, bail in criminal cases, is an undertaking body for body, and in civil cases is an undertaking to pay the condemnation; but mainprize is no more than an undertaking in a sum certain; see 33 & 36 *E. F. Mainprize*, 12, 13, arg. *d'hab. corp.* 62, 68, 69. 5. The statute 17 *Car.* 1, cap. 14 (16 *Car.* 1, c. 10) enacts, that the judges of the *C. B.* as well as the *B. R.* may grant *habeas corpus*, that the prisoner shall be bailed or remanded within three days after the return, otherwise the Judge shall forfeit treble damages: in this great zeal for public liberty, how was it possible they should forget to require the Chancellor also to make speedy deliverance in vacation, by writ of mainprize, if any such power had been in him? 6. When the writ of mainprize did lie, the body of the writ always supposed that bail had been first refused below; no man was to come into the Chancery *per saltum*, and turn this Court into a court of gaol-delivery. 7. In all the debates in parliament touching personal liberty, no man ever mentioned this way of coming out; not *Noy*, nor *Selden*, nor [91] any who argued the *habeas corpus* case; nay, my Lord *Coke*, who strained a point so far as to hold that a *habeas corpus* might be had in Chancery in the vacation, never stirred this point, which surely he would not have overseen; and 2 *Inst.* 190, holds the contrary, and the writ of mainprize to be repealed. 8. If this course may be taken in Chancery, it may as well be in term time as in vacation, and then to what purpose were all these contentions these last sixty years, about the right and remedy of *habeas corpus*, if the remedy by mainprize in Chancery were still extant, for that is much the better of the two?" (23)

(1) 2 *Inst.* 53. The passage intended by the marginal reference to the year book, "4 *Ed.* 4," seems to be fol. 20, 21. The Courts of Common Pleas and King's Bench being adjourned by reason of pestilence, it is there stated that the Court of Chancery was not adjourned, "*car le Chancerie est tout temps overt.*" See 2 *Swans.* p. 44.

(2) 4 *Inst.* 81, and see *Blackborough v. Davis*, 1 *P. W.* 43. *Anon.* 1 *P. W.* 476. *Iveson v. Harris*, 7 *Ves.* 257.

(3) *Montgomery v. Blair*, 2 *Schoales & Lefr.* 136. In *Ex parte Lynch*, July 25, 26, 1815, on a petition for a prohibition to the Prize Court, the *Vice Chancellor* in giving judgment said, "The first objection to this petition is, that the application is too late, the petitioner having had an opportunity to apply to a court of common law in term. Did this objection stand alone, I should feel great difficulty in refusing the writ, for it is one to which the subject has a right, and which the Court, a proper case being shewn, is bound to issue *ex debito justitiæ*. For that purpose this Court, through the whole year, exercises at least concurrent jurisdiction; and perhaps the application may with peculiar propriety be made here, as in the *officina brevium*." *MS. S. C. 1 Madd.* 15; *Coop.* 325.

(4) In the margin the following note occurs, "And it is to be noted that the act for abbreviation of Michaelmas Term (16 *Car.* 1, c. 6) passed in this very session, to which act the objection was made, and was very obvious, that the prisoners in vacation would lie a fortnight longer before they could come to move for their *habeas corpus*, so that the parliament could not choose but take notice of the inconvenience, yet provided not against it."

(5) "As this is a judgment, and by the practice of the *Petty Bag* no judgment can be given but in term time, let it be drawn up the next term." Lord *Hardwicke*, *Ex parte Armitage* and others, *Ambl.* 296. Some old authorities maintain, that, "as to the law proceedings, the King's Bench and Chancery are but one court. 10 *Ed.* 3, 59; 2 *Rolle, Rep.* 291, 349, cited by Sir *Robert Atkyns*, Inquiry into the Jurisdiction of the Chancery, p. 4. A similar expression occurs in some accounts of the argument and judgment in *Jeffreson v. Morton*, 1 *Sid.* 436, 437; 1 *Lev.* 283; 1 *Mod.* 29; 2 *Keb.* 529, 584, 587, 608, 621; 3 *Keb.* 25, 31, 33, 129, 243; 2 *Saund.* 23. See *Fraser v. Lloyd*, *Coop.* 187; 19 *Ves.* 317.

In *Bro. Abr. voc. Jurisdiction*, pl. 116, it is said, "*Nota que le Chauncery poet escrier al major de Calyce, et bre de error issera del Chauncery a Calyce de judgment done la, et le Chauncery poet tener ple sur scire facias et auters tiels bres queux aperteigne a eux, si bien extra terminum quam infra terminum. Novell Natura brevium de Fitzh.*" The reference in the margin to the Year Book 21 *H.* 7, 33, seems applicable only to writs of error directed to *Calais*. This passage in *Brooke* is cited by *Crompton on Courts*, 42 a.

(6) The following accurate summary of this controversy, so important in the history of our equitable jurisprudence, was prepared by Mr. *Hargrave* for the Life of Lord Chancellor *Ellesmere*, published in *Kippis's Biographia Britannica*. Some additional references, supplied by the Editor, are placed between brackets:—

"Whether the Chancery can relieve by subpoena after a judgment at law in the same matter, was the chief point in controversy between Lord Chancellor *Ellesmere* and Lord Chief Justice *Coke*. The latter resisted the equitable interpositions on various occasions. In one case, the King's Bench, whilst he presided over it, made a judgment absolute, and granted execution in spite of an injunction from Chancery. (*Cro. Jac.* 335.) In another case, he, and the other judges of the King's Bench, first bailed and afterwards discharged one, who had been committed for disobedience to a decree in Chancery, where that Court interposed after a judgment at law. (*Cro. Jac.* 343; [*Moor*, 838; 1 *Rolle, Rep.* 111, 219; 2 *Bulstr.* 301. For an account of the fraud practised by the plaintiff at law, which induced the Chancellor to interfere, see *Wilson's Life of James I.*, p. 94, 95.]) In a third case, where the defendant in Chancery, having been committed for contumacy in not answering, was brought by *habeas corpus* before the King's Bench, *Coke* held a language, which made it apparent, that he would have gone the same length, if it had been clear that the bill in Chancery was for the same matter as the judgment at law; and in this he was strongly seconded by Judge *Doderidge*. (3 *Bulstr.* 115; [1 *Rolle, Rep.* 277.]) The grounds on which Lord *Coke* thus proceeded are stated by himself, both in his third and fourth Institutes. (3 *Inst.* 122, and 4 *Inst.* 185.) Certain



also it is, that he did not act without at least the colour and semblance of precedents and authorities in his favour. In the reign of *Edward IV.*, *Hussey*, Chief Justice of the King's Bench, avowed that, if the party imprisoned by Chancery in a like case required it, he would have acted on the same line of conduct. (22 E. 4, 37.) In the reign of *Henry VIII.*, Sir *Thomas More*, whilst he was Lord Chancellor, joined the House of Lords in charging it as a crime against Cardinal *Wolsey*, that he had examined matters in Chancery after a judgment at law. (3 *Parl. Hist.* 42; [1 *New Parl. Hist.* 492-501; 4 *Inst.* 89, 95].) In the same reign even the most zealous advocates for the equitable jurisdiction of Chancery disavowed the right to interfere after a judgment at law, as is evident from the writings of the author of *The Doctor and Student*. ([See the tract concerning suits by subpoena, annexed to the later editions of that dialogue, and inserted in *Hargrave's Law Tracts*, p. 321, *et seq.*]) In the reign of *Elizabeth*, three indictments of *præmunire* on the statute of 27 *Edw.* 3, are stated to have been found against different persons for obtaining subpoenas after judgment at law; one in the 8 & 9 *Eliz.* whilst Sir *Nicholas Bacon* was Lord Keeper; a second in 27 *Eliz.* whilst Sir *Thomas Bromley* held the seals; and a third in 30 *Eliz.*, in which last instance it is represented that the Court of King's Bench, on exceptions taken, decided that the case was within the statute, though they quashed the indictment for mistake of a name. (3 *Inst.* 124.) These cases are also said to have been followed by another, of the 39 & 40 *Eliz.* in which, on a demurrer to a bill in Chancery, after judgment at law, there was a reference to all the judges of *England*, who are stated to have concurred in certifying that the demurrer was good. Sir *Moyle Finch's* case.\* Whether the weight of authorities, and of the reasoning independently of them, did, on the whole, preponderate for or against Lord *Coke*, is a point upon which it would be rash to pronounce, without a very close and accurate investigation. In the mean time, it must be confessed, that, without taking into account the high estimation of the venerable Lord *Ellesmere's* character, there is seemingly great presumption in favour of his side of the controversy; for it not only terminated with a decision against Lord *Coke*, but that decision, notwithstanding various attempts to unhinge it, still operates with full force. The decision against Lord *Coke* was in 1616, when the Attorney-General *Bacon*, the Solicitor-General, and the King's Serjeants, having certified in favour of Chancery on a case referred to them by the Crown, King *James* declared his approbation, and issued a rule for direction of Chancery accordingly.† Nor was this the full extent of Lord *Ellesmere's* victory; for Lord *Coke* was called to a severe account for his conduct in this strife about jurisdiction, and found it convenient to make a very humiliating submission. However, it appears by the third Institute, that Lord *Coke* considered the victory as obtained by undue means, and did not really relinquish his original notions on the subject. (3 *Inst.* 125.) Such was the effect of King *James's* decision in favour of equitable jurisdiction, that Lord *Coke*, did not live to see a revival of the attempts to check it. But within a few years after Lord *Coke's* death, the question of equitable jurisdiction was again stirred, and, as it seems, not wholly without success. In 17 *Cha.* 1, it is reported to have been agreed in the King's Bench, that a court of equity could not relieve after judgment at law. (*March's Rep.* 183. [This reference is incorrect; the case intended probably is p. 83, pl. 138, and see p. 54, pl. 81, 15 *Car.* 1.]) In 1655, the like question was moved against the equitable jurisdiction of the Exchequer, and a demurrer to a bill after judgment at law was there allowed. (*Morel v. Douglas*, *Hardr.* 23.) In 1658, another case was argued in the Exchequer on the same point: but no judgment appears to have been given. (*Harris v. Colliton*, *Hardr.* 120.) After the Restoration there occurred on this subject the two cases following; namely, *King v. Standish* (2 *Keb.* 402, 661, 787; 1 *Mod.* 59; 1 *Sid.* 463; 1 *Lev.* 241), and *King v. Welby* (Sir *Thomas Raym.* 227; 3 *Keb.* 221). The former was a case of demurrer on action of *præmunire* in the King's Bench. It began whilst *Kelynge* was Chief Justice; who, after argument, thought it a fit case for adjournment into the Exchequer Chamber. (1 *Mod.* 61.) But, afterwards, when Lord *Hale* was become Chief Justice, he is said to have held that the case was not within the statute of *præmunire*, on which nothing farther was done in the case. (1 *Lev.* 243.) In the latter case, a judgment at law has been pleaded to a bill in Chancery: and, on the plea's being over-ruled, a prohibition was moved for in the King's Bench, when Lord *Hale* recommended that it should be moved in Chancery

to have the plea set down again ; and he said, that, if it should be over-ruled again, then the Court would consider whether a prohibition should be granted. (*T. Raym.* 227.) Thus rested the dispute till 1695, when it was once more revived by Sir *Robert Atkyns*, who, almost immediately after resigning the office of Lord Chief Baron, published an elaborate treatise against the equitable jurisdiction of Chancery, in which he particularly insisted that it could not interpose after a judgment at law. This treatise he addressed to the Lords ; but, as far as appears at present, neither this nor a subsequent publication in 1699, by Sir *Robert* on the Jurisdiction of the Peers, in which he again inveighed against Chancery, produced the least effect : on the contrary, the jurisdiction of equity, as well after as before judgment, has been ever since exercised without controversy or interruption." ([Some valuable strictures on Sir *Edward Coke's* objections to the antiquity of the equitable jurisdiction of the Court of Chancery may be found in *Wooddeson's Lectures*, i. 176, *et seq.*])

(7) Lord *Nottingham* probably referred to the *habeas corpus* act, which originally passed the House of Commons in 1674 (*New Parliamentary History*, v. 4, p. 665), though it did not receive the royal assent till 1679 (*Id.* p. 1148).

(8) *Bac. Abr. Hab. Corpus*, B. ; *Com. Dig. Hab. Corpus*, A. In *Shephard's Abridgment*, it is stated that the *Latin* or legal part of the court of *Chancery* "consists in the granting of writs of *habeas corpus*, which no other court can grant in vacation time," &c. *Voce Court*, part I. p. 464.

(9) 1 P. W. 610. For copies of the entries in this and the following cases the Editor is indebted to the obliging attention of Mr. *Pensam* :—"Lord Chancellor *Parker*, 21 July 1719. *Ex parte James*.—Wife committed by commissioners for refusing to prove her husband a bankrupt. Lord Chancellor said he knew of no law to compel a wife so to do, and ordered the jailer forthwith to discharge her from the commissioners' warrant."

(10) Lord Chancellor. *Decimo tertio die Octobris* 1725, *Ex parte Thomas Brailsford et Robti Castell et Johi Rogers*.

Whereas *Thomas Brailsford* did, on the 11th day of *August* last past, prefer his petition to me, thereby setting forth, that a commission of bankruptcy issued against him the 4th day of *February* 1722, directed to sundry commissioners therein named ; that the petitioner was several times examined by them upon oath, touching the discovery of his estate and effects, and made a full discovery thereof, and delivered up the same, and that the petitioner apprehended he had complied in every respect, to the satisfaction of the said commissioners, yet the commissioners did, by their warrant dated 7th of *May* 1723, commit the petitioner to the prison of the Fleet, there to remain till the petitioner submitted to be examined, and there the petitioner hath ever since been a close prisoner ; that the petitioner was always ready to be further examined, as the said commissioners should require, and of such his submission and readiness gave notice to the said commissioners, and particularly by a letter dated 5th *March* last, but the said commissioners not taking any notice thereof, the petitioner applied by his petition to the late lords commissioners for the custody of the great seal, praying their lordships to direct the said commissioners, by some short day, to further examine the petitioner, and thereupon discharge the petitioner from his imprisonment, unless they should see good cause to the contrary, to be by them certified in writing to their lordships ; upon hearing of which petition, on the 7th of *April* last, their lordships ordered, that the commissioners or the major part of them, upon application to be made to them on behalf of the petitioner and notice of the said order, should appoint a time and place of meeting for the further examination of the petitioner, of which notice was to be given in the *London Gazette*, which was accordingly given, and appointed to be on the 5th day of *May* last, upon which day the commissioners adjourned the petitioner's further examination to the 7th of the same month, at which time the commissioners further examined the petitioner, and again adjourned to the 11th of *May*, when the commissioners finished the petitioner's examination ; and the petitioner, after having been examined, entreated the said commissioners to release him from his confinement ; whereupon the commissioners assured the petitioner they were ready so to do if the assignees thought fit ; and that the petitioner then represented to the commissioners, how hard it was that he should suffer imprisonment, notwithstanding he had fairly answered all the questions that had been propounded to him ; and the commissioners

thereto replied, they believed he had not concealed a groat from his creditors, and did not make any objection whatsoever against the petitioner's behaviour or examination, or that they were the least dissatisfied therein, but ordered the petitioner to withdraw, and after some short time the petitioner was again called in before the said commissioners, and then he was told by the said commissioners, that they could not release the petitioner, but that he must have a little patience, or to that effect, and expressed themselves sorry for the ill state of health the petitioner was then in, and which (as the petitioner believed) was occasioned by his confinement; that the petitioner had, ever since the 7th of *May* 1723, been confined within the walls of the said prison, and was thereby reduced to a languishing state of health, and without my interposition was like to be a prisoner for life, which was in danger of being shortened by such his imprisonment; the petitioner therefore prayed that I would order the said commissioners to discharge the petitioner from his said imprisonment, or that I would make such order as to me should seem meet. Whereupon I ordered all parties concerned, or their agents, to attend me on the matter of the said petition, the then next day of petitions, whereof notice was forthwith to be given; and whereas *Robert Castell* and *John Rogers*, assignees of the estate and effects of *Thomas Brailsford*, a bankrupt, and *Samuel Clark*, *Benjamin Bond*, *William Parkin*, *John Robinson*, *Samuel Prune*, and *Joseph Hall*, creditors of the said bankrupt, did on the said 11th day of *August* last past, prefer their petition to me, thereby setting forth, that upon the 4th of *February* 1722, a commission of bankruptcy was awarded against the said *Thomas Brailsford*, and the said *Brailsford* was several times examined before the major part of the commissioners in the said commission named; that it appeared upon such examinations that all the bankrupt's estate and effects whatsoever had been, upon the 3d and 4th of *January* preceding the said commission, assigned unto *Mr. George Brailsford* and *Mrs. Jane Perkins*, two of his near relations, and that on the 10th of *October* 1722, an account was stated between the said *Thomas* and *George*, and the balance thereof was the sum of £1000 to the said *George Brailsford*, and that on said 10th of *October* 1722, the said *Thomas* gave *George* his bond for payment of the said £1000, at the end of 6 or 12 months after the date thereof, and that before the time the said money became due on the said bond, the said *Thomas* confessed a judgment for £1000 on a *mutuatus* to the said *George Brailsford*, but the said *George* never delivered up or any ways cancelled the said bond, and that at the said time, the said *Thomas* assigned over several debts, and the lease of his house, to the said *George*, without any defeazance on the part of the said *George Brailsford*; but it did not appear by the books of the said bankrupt, that the sum of £1000 or any such sum was due from the said *Thomas* to the said *George Brailsford*; that the commissioners examined the said *Thomas Brailsford* touching the disposition of a sum of £1600 which he had received of the petitioner *Rogers* at one time, and about several other of his effects, of which he giving no satisfactory account, the commissioners committed him close prisoner to the *Fleet*; and upon the said bankrupt's application to the late *Lord Chancellor*, in *July* 1724, to be discharged from such commitment and to have his certificate allowed, his lordship, upon examination of the matter, approved of the commissioners' proceedings, and utterly refused to allow his certificate, or to discharge him from the commitment; in the mean time, the petitioners (the assignees), filed their bill in this court against the said *George* and *Thomas*, to be relieved against such judgment and assignments, and prayed a discovery when the bond for £1000, given by *Thomas* to *George* was payable, and to come to a fair account with the petitioners, to which bill the defendants *George* and *Thomas* put in their answer; and upon hearing counsel on bill and answer, the court granted an injunction to stay the defendant *George's* proceedings on his said judgment, and ordered the monies which the goods taken in execution amounted to, to be brought into court, where it remains; on the 8th of *December* last the cause came on to be heard before the then *Lord Chancellor*, who, as the petitioner apprehended, was fully of opinion that if such bond was not payable till after the warrant of attorney and execution taken by the said *George* (which by the bankrupt's depositions appeared it was not), that the said judgment and assignments were fraudulent, and ought to be set aside, and that it did not appear that the said balance of £1000 was really due to the said *George Brailsford*, and therefore directed the master, to whom the cause was referred, to look into the accounts between the said *Thomas* and *George*, and inquire into the said bond, from the said *Thomas*, for payment of £1000 to the

said *George*, and to state when the said £1000 was made payable, whether before or after the warrant of attorney to confess judgment from defendant *Thomas* to the defendant *George*, and that both sides should be examined on interrogatories, as by the said decree might appear; in *April* last the said *Thomas Brailsford* petitioned the Lords Commissioners, in order to his discharge, and to be further examined before the said commissioners, which examination their Lordships granted, and ordered that, at such his examination, he should have the sight of all his books and papers of accounts, and his depositions, before he gave in such his second examination; on the 7th of *May* last the commissioners attended him again with all his books, papers, and his former depositions, and then shewed him the depositions of said *George Brailsford*, on the 7th of *May* 1723, which related to the time of payment of the said bond to the said *George*, and to the assignment of his effects, and asked whether he could recollect any thing that varied from those depositions; and the said *Thomas* thereupon carefully perused the said depositions, and swore that such depositions were just and true as to every particular, and declared that he could not depart from such depositions, nor give any other answer to the said questions; that the petitioners, the assignees, on the 28th of *May* last, filed interrogatories in this Court for the examination of the said *Thomas Brailsford*, pursuant to the said decree, some of which were to the same effect with the questions asked him before the commissioners, a copy of which interrogatories was carried to him the same day, and all his books which related to his examination, and an exact copy of his depositions which were given before the commissioners, was left with him the same time for his examination, and the said *Thomas* declared again that he had no further occasion for his books, for that he had fully perused them, and that he would send his examination to a gentleman of credit at the bar to sign, and that it should be forthwith put in; that notwithstanding several applications had been made to the bankrupt, and several summons taken out before a master to whom the cause stood referred, the said *Thomas Brailsford* had not put in his examination, nor were the petitioners as they could find, likely to have the same; the petitioners upon inquiry found that such examination of the said *Thomas Brailsford* is prevented by the said defendant *George*, and has reason to suspect that the said *George* or his agents were endeavouring to persuade the said *Thomas Brailsford*, on his said examination, to conceal the truth of the said transactions, and that in case the said *Thomas* should be discharged from his commitment, neither any examination at all, or at least an insufficient one would be put in by the said *Thomas Brailsford*; that the said *Thomas Brailsford* was greatly under the influence of the said *George*, and the greatest part of the money received by the said *Thomas* of the petitioners was to pay bills of exchange, to the payment whereof the said *George*, and his partner at *Oporto*, would otherwise have been liable, and was received of the petitioners by bills drawn by the said *Thomas Brailsford* on the said *George*, and his partner at *Oporto*, and was, indeed, a contrivance of the said *George* to get his own bills paid with the petitioner's money. That the petitioners have been at a great expence in bringing and prosecuting the said suit, and hoped they should succeed, and that a fair examination (if the same could be had from the said bankrupt), would contribute thereto, but could not expect the same so long as he was under the influence and direction of the said *George* and his solicitor, and his examination was to be drawn for them and for their interest; they, therefore, prayed that the said bankrupt might be brought up and examined *viva voce* on the said interrogatories, before the said master, and that the said bankrupt might not be discharged till he had put in a full examination to the said interrogatories; and in case he should refuse to put in any answer thereto, that the petitioners might make use of his said depositions instead of such his examinations; or that I would make such other order as I should think fit: Whereupon I ordered all parties concerned, or their agents, to attend me on the matter of the said last-mentioned petition, the then next day of petition, at which time I had appointed the petition of the said bankrupt to be heard, whereof notice was forthwith to be given: Now this present 13th day of *October* 1725, both the said petitions coming on to be heard together, upon hearing of Mr. *Solicitor-General*, Mr. *Lutwyche* and Mr. *Green*, of counsel for the said *Thomas Brailsford* the bankrupt, and of Mr. *Attorney-General* and Mr. *Talbot*, of counsel for the said *Robert Castell* and *John Rogers*, and also of Mr. *Dowse* one of the commissioners in the said commission, and who signed the said warrant of commitment, and what

was alleged on both sides, I do order, that the commissioners in the said commission of bankrupt named, do discharge the said *Thomas Brailsford* from their said commitment to the prison of the Fleet, and by consent of the said counsel for the said *Thomas Brailsford*, I do further order, that at the charges of the said petitioners the assignees, he the said *Thomas Brailsford* the bankrupt, do attend the Master to whom the aforementioned cause stands referred, and be examined *viva voce* to the interrogatories filed in pursuance of the decree in the said cause.

KING, Chancellor.

Lord Chancellor King. September 7th, 1728. *Re Thomas Mace*.

Bankrupt's petition presented same day, stating that on 26th November 1726, commission had issued against petitioner, and petitioner's conformity; that on 3d February 1727, petitioner was taken up on commissioners' warrant of that date, on suspicion of concealment of his effects, and for prevaricating in his examination, as the warrant did mention, and made a close prisoner in the *King's Bench*, and had so remained ever since, stating also his great distress, and that no prosecution or proceeding whatever had been had against him respecting such concealment; and praying that a short day may be appointed for the commissioners to take his examination in prison, in order to his discharge.

Lord Chancellor ordered, that the commissioners should forthwith appoint a time to meet and further examine the petitioner, and reasonable notice should be given to the assignees; and if upon such further examination, the commissioners should be satisfied that the petitioner had made a full discovery, then they were to discharge him out of custody, so as that he might not be detained therein upon account of the offences for which they committed him.

Lord Chancellor King. December 1728. *Re said Thomas Mace*.

Further petition of said *Thomas Mace*, stating the order on his former petition; that the petitioner had caused the said three acting commissioners to be served with the said order, and had applied to them for a meeting, which they did refuse to appoint, alleging their power was determined by the demise of his late majesty; petitioner's creditors had not thought fit to renew the said commission, nor, as the petitioner did believe, ever would, and petitioner submitted he had been sufficiently punished by two years' imprisonment; and praying for relief and discharge out of custody. Upon reading said petition, and hearing counsel, and reading the affidavit of *Thomas Chatty*, as also said former order.

Lord Chancellor ordered that the petitioner be discharged out of said prison, so far as he is therein detained by virtue of said commissioners' warrant.

(11) 4 Ed. 4. "*Quant adjournement de terme est, le Chauncerie ne sera pas adjorne, car ceo cour est tous foits oert.*" 4 Ed. 4, 22" (23, 21), "*car home poit aver proces hors de ceo court a ascun temps, et le Chancelor hors de terme poit oier causes la.*" *Crompton on Courts*, 41 b, 42 a; 2 Swans. p. 20.

(12) *Vaugh.* 135; *T. Jones*, 13; *Freeman*, 1; 3 *Keble*, 322; 1 *Mod.* 119, 184; 6 *Howell's State Trials*, 999.

(13) "The cause of the imprisonment ought, by the return, to appear as specifically and certainly to the Judges of the return, as it did appear to the court or person authorized to commit, else the return is insufficient." *Vaugh.* 137.

(14) With reference to a similar practice in the Court of King's Bench Lord Chief Justice *Holt* said, "Let it be a rule for the future, that when one is brought up by *habeas corpus*, the return remain in Court, and a copy of it only be given to the marshal." 6 *Mod.* 180.

(15) In 1758, a bill passed the House of Commons for extending the provisions of 31 Car. 2, c. 2, in cases of commitment or detainer for criminal or supposed criminal matter, to all cases of imprisonment or restraint of liberty under any pretence whatever. A copy of the bill may be found in the *New Parliamentary History*, vol. xv. p. 871-874, and *Sir John Wilmot's Notes*, p. 77-79, n. *Dodson's Life of Sir Michael Foster*, p. 49-72, contains a very instructive view of the abuses of authority, which excited the interference of the Commons, and eventually occasioned an important amendment of the law; with doctrines highly honorable to the sagacity and integrity of that distinguished judge. On the second reading of the bill in the House of Lords, ten questions were put to the judges. The questions, and the substance of their answers, are contained in the *Lords' Journals*, vol. xxix. p. 331, 337-341, 344-347, and the remarkable protest of Lord *Temple* in p. 352.

353, and have been copied into the New Parliamentary History, vol. xv. p. 907-923. The valuable answers of Sir John Wilmot are preserved at large in his Notes, p. 77-129. The House of Lords rejected the bill, and ordered "that the Judges do prepare a bill, to extend the power of granting writs of *habeas corpus ad subjiciendum*, in vacation time, in cases not within the statute 31 Car. 2, c. 2, to all the Judges of His Majesty's Courts at *Westminster*, and to provide for the issuing of process in vacation time, to compel obedience to such writs; that in preparing such bill, the Judges do take into consideration, whether, in any and what cases, it may be proper to make provision, that the truth of the facts contained in the return to a writ of *habeas corpus* may be controverted by affidavits or traverse, and, so far as it shall appear to be proper, that clauses be inserted for that purpose; and that the Judges do lay such bill before this House in the beginning of the next session of Parliament." Lords' Journals, xxix. p. 353. A copy of the draft prepared by the Judges, which seems the original of Serjeant *Onslow's* act, 56 Geo. 3, c. 100, may be found in *Dodson's Life of Sir Michael Foster*, p. 68-72.

(16) 1 Bl. Comm. 350; *Lambard, Eirenarcha*, p. 12; *Bro. Abr. Peace*, pl. 12; but in *Jones's* case, 28 & 29 Car. 2, Sir Francis North, Chief Justice of the Common Pleas, said, that when he was not on the Bench he would take sureties as a justice of peace. 2 Mod. 199, and see *Bacon's Use of the Law, Works*, vol. iv. p. 88.

(17) "The principal times of session at the Exchequer were the two terms of *Easter* and *St. Michael*. At which times the process that issued *pro rege* was returnable, and many acts became necessary to be done there in consequence thereof. The Exchequer was also holden during the other two law terms, to wit of *St. Hilary* and of the *Trinity*. But it seemeth, that the Treasurer and Barons sometimes sat if there was occasion, at other times not comprised within the limits of the four terms above mentioned; and sometimes on Sundays." *Madox, History of the Exchequer*, ch. xx. p. 550. See some remarks on this passage in *Wooddeson's* Lect. i. 120, n. Dr. *Wooddeson* adds, "The Exchequer holds sittings for equity business, out of term; at which also a matter relating to the revenue may be discussed." *Ibid.*

(18) That doctrine was adopted in *Pedley's* case, *Leach's Crown Cases*, 325, and over-ruled in *Nowlan's* case, 6 T. R. 118; 11 Ves. 511. *Taylor's* case, 8 Ves. 328; *Ex parte Oliver*, 2 Ves. & Bea. 244; 1 Rose, 407. *Ex parte Cassidy*, 2 Rose, 217; 19 Ves. 324.

(19) 5 Geo. 2, c. 30, s. 18. *Ex parte Cassidy*, 2 Rose, 217; 19 Ves. 324. *Ex parte Page*, 1 Barn. & Ald. 568.

(20) *Ex parte Oliver*, 2 Ves. & Bea. 244; 1 Rose, 407. *Coombe's* case, 2 Rose, 396. *Brown's* case, 2 Rose, 400. *Ex parte Hiams*, 18 Ves. 237. *Ex parte Cassidy*, 2 Rose, 217; 19 Ves. 324.

(21) "Nota, the writ *de odio et atia* was also repealed by 28 E. 3; but because it was given by *Mag. Charta*, c. 26, so it is revived by 42 E. 3, which repeals all laws against *Mag. Charta*."

(22) *Hale's Summary of the Pleas of the Crown*, 104; in his larger treatise, however, Lord *Hale* mentions some exceptions. *History of the Pleas of the Crown*, ii. 141-143.

(23) "Nota, the statute of 5 H. 4, c. 10, enacts, That none be imprisoned by any justice of peace but in the county gaol, to the end they might have their trial at the next gaol delivery, or sessions of the peace; so not extended to imprisonment by superior judges; but 2 Inst. 43, *contra*, some say it extends to all other judges and justices, for two reasons: 1. *Quia* act declaratory: 2. *Quia ratio legis est generalis*: Nota, he does not say it is his own opinion; *et nota ibidem*, he mentions the writ *de bono et malo*, which was a writ that lay to the justices of gaol-delivery, to command them to deliver the gaol of A. B.; in which writ there is always a clause, *si A. B. captus et detentus in gaolo pro morte C. D. et non per aliquod speciale mandatum nostrum, tunc deliberetis, &c.*; which exception shows that with such as were committed *per speciale mandatum*, the gaol-delivery justices had nothing to do. *Et nota*, the statute 5 H. 4, c. 10, cannot extend to all imprisonments, for it saves to the lords and others who have gaols, their franchises. 9 Co. 119, *Sanchar's* case; and the preamble shows the grievance, *viz.* that constables of castles being justices of peace, used to imprison men in their castles; so this statute not meant of all kind of imprisonment."

\* 3 *Inst.* 124. [And see *Cary, Rep.* 4 ; 2 *Leon.* 115, 116 ; 3 *Leon.* 18 ; *Dal.* 81 ; *Moor.* 916 ; 2 *Brownl.* 97 ; *Godb.* 244 ; 1 *Rolle, Rep.* 71, 72, 252 ; 2 *Bulstr.* 194, 284 ; 3 *Bulstr.* 118, 120 ; *Cro. Car.* 595, 596 ; *Style*, 27 ; *Crompton on Courts*, 41 b. A case in the Common Pleas, 2 *Car.* 1, in opposition to these authorities, proposes the doctrine which has eventually prevailed. "*Si judgment soiet done in un action al common ley, le Chancellour ne poet alter ou medle ove le judgment, mes il poet procede versus le person pur corrupt conscience, quia il prender advantage del ley encounter conscience.*" *Littleton's Rep.* 37.]

† [The proceedings on this reference may be found in the argument on the Jurisdiction of the Court of Chancery, annexed to the first volume of *Reports in Chancery* (reprinted with corrections, in 1 *Collectanea Juridica*, 23 *et seq.*, and in *Cary's Reports*, p. 163 *et seq.*), and further particulars of the controversy in *Bacon's Works*, vol. v. p. 375, 385, 415 *et seq.* For some strictures on the prerogative exercised by *James* in this instance, see *Sir Robert Atkyns, Inquiry into the Jurisdiction of the Chancery in Causes of Equity*, p. 46, 47.]

[92] WALTER v. HODGE. *Rolls.* June 29, July 1, 6, 21, [1818].

[S. C. 1 Wils. Ch. 445. See *Ashworth v. Outram*, 1877, 5 Ch. D. 930.]

A gift by a husband to his wife, either as a *donatio mortis causa*, or as a *donatio inter vivos* to her separate use, must be established by evidence beyond suspicion : a claim of that nature negatived. A defendant by her answer having claimed a gift from her husband as an absolute *donatio inter vivos* to her separate use, whether evidence can be received to establish it as a *donatio mortis causa*, *quære*.

The decree in this cause, dated the 14th of May 1816, declared that the will of *R. P. Hodge* ought to be established, and the trusts thereof carried into execution, and directed a reference to the Master to take the usual account of the testator's personal estate not specifically bequeathed, against the Defendants, *Martha Hodge*, *Edward Dudley*, and *Thomas Hudson*, his executrix and executors.

An order of the 22d of March 1817, on the application of the Defendant *Martha Hodge*, directed that the Master should be at liberty to make a separate report at her expense, as to the personal estate of the testator, possessed by her.

By his separate report of the 8th of May 1817, the Master charged the Defendant *Martha Hodge*, with receipts to the amount of £337, 18s. 7d.

To this report the Plaintiff excepted, on the ground that the Master had not charged the Defendant *Martha Hodge*, with the sum of £600, being the amount of sundry bank-notes, belonging to the testator at the time of his decease, and possessed by her.

The evidence on the subject of the exception, consisted of the answer of *Martha Hodge* to the original bill, and the deposition of *Alice Mason*.

By her answer the Defendant stated, that the testator, some short time before his death, gave to her a book [93] containing bank-notes to the amount, in the whole, of £600 or thereabout, but she could not recollect the exact amount ; and the testator at the time he gave the bank-notes to the Defendant, informed her they were for her own private use, and that he gave them to her to be at her own disposal, or used expressions to that effect : the answer also stated, that during the life-time of the testator the Defendant expended in various ways some part of the bank-notes, and at the time of his death some of them remained in her possession ; and that she considered such bank-notes as her own separate property, and expended them for her own private use, and was wholly ignorant that they legally were the property of the testator at the time of his death.

*Alice Mason*, the niece of *Martha Hodge*, deposed, that she, being upon a visit at the house of the testator, about eleven days prior to his death, saw him take out of his coat-pocket, and deliver into the hands of the Defendant *Martha Hodge*, a black leather note-case, containing some Bank of England notes, but the amount thereof she did not know ; that the testator, when he so delivered the note-case, and Bank of England notes, told *Martha Hodge*, in the hearing of the witness, that if any thing should happen to him, the contents of the note-case were hers, or expressed himself to that effect ; that she could depose that the contents of

the note-case consisted of Bank of *England* notes, by reason that upon *Martha Hodge* opening the note-case, almost immediately afterwards, to put in other Bank of *England* notes, the witness saw some Bank of *England* notes in the note-case ; that the testator, on the day on which he delivered the note-case, and the first-mentioned Bank of *England* notes, to *Martha Hodge*, had been to the Bank of *England* for the purpose of selling out, and [94] the witness believed that he did sell out, some part of his property in the public funds ; and it being then a rainy day, and the testator being wet with the rain, he took his coat off and delivered it to the witness, immediately after he had delivered the note-case, and first-mentioned Bank of *England* notes, to the Defendant *Martha Hodge* ; that instantly after he had so delivered his coat to the witness, he took some Bank of *England* notes, but the amount thereof she did not know, out of his said coat pocket, and delivered the same to the defendant *Martha Hodge*, at the same time saying to her, in the hearing of the witness, "These" (meaning the Bank of *England* notes), "are to be yours also," or expressed himself to that or the like effect ; and the Defendant *Martha Hodge* thereupon, in the presence of the witness, opened the note-case, and put the Bank of *England* notes therein. The witness also stated, that the testator was not at the time when he so delivered the note-case and Bank of *England* notes to the Defendant *Martha Hodge* in good health, but was then and for some time previous thereto had been in an indifferent state of health ; nevertheless, as appeared to the witness, and as she believed, the testator was in his perfect senses and knew what he was doing, and was not from illness, or any other cause, insensible, or incapable of distinguishing what he did ; and that she understood from the expressions addressed by the testator to the Defendant *Martha Hodge*, at the time he so delivered the note-case and the Bank of *England* notes to her, that he intended that the Defendant *Martha Hodge* should keep the note-case, and all the Bank of *England* notes, for her own use in case of his death.

Mr. *Hart* and Mr. *Wingfield*, in support of the exception. There is no evidence that the gift was made [95] in contemplation of death. It is therefore a mere *donatio inter vivos*, and void as an immediate gift by a husband to his wife for her separate use.

Mr. *Bell*, Mr. *Shadwell*, and Mr. *Girdlestone*, for the report.—

The gift is a *donatio mortis causa*. *Justinian Inst. lib. 2, tit. 7. Bracton, lib. 2, c. 26.*(1) It is not ne[96]-cessary that such a gift should be made in *extremis* ; the donor died on the eleventh day after the transaction, and his expression "in case any thing should happen to him," refers the gift explicitly to the probability of his approaching decease. *Hill v. Chapman* (2 Bro. C. C. 612), *Ward v. Turner* (2 Ves. Sen. 431).

*July 1.* The *Master of the Rolls* [Sir Thomas Plumer]. I collect from the proceedings in this case, that the Plaintiffs were not able to prove the receipt of these notes by Mrs. *Hodge* except from her answer, and were therefore under the necessity of reading it : the decree is drawn up on reading the answer. All the passages which it contains, therefore, must be taken, as well those in her favour, as those against her. The question of the validity of the gift depends on the account given by the Defendant in her answer, and by the witness *Alice Mason*, in her deposition. There is no other material evidence.

The account which the Defendant has given is, that it was an absolute gift to take effect immediately : not a word is introduced to make it a conditional gift, depending on the testator's living or not living, and postponing the enjoyment till after his death. It is expressed to be a present absolute gift, vesting immediately, over which she had an instant right of disposition, and of which she did in part dispose during the life of the testator. This statement in the answer differs materially from the deposition of *Alice Mason*. One re[97]-presents the whole of the gift to consist of the book containing £600, as one entire gift ; the other represents two distinct gifts, with an interval, during which the testator took off his great coat, and afterwards delivered notes not contained in any book. A more material variation is, that *Alice Mason* introduces words which make the gift conditional, that is, "in case any thing should happen to him" ; qualifying it not as an absolute gift in all events, but only, for so the expression must be understood, in case of his death. The question is, whether from the accounts so given, the master's report has drawn the right conclusion ?



On principle, it is quite clear, that a claimant insisting on a parol gift of this nature, not contained in any will as a legacy, must establish a clear and satisfactory case. If the claim rested only on the account given by Mrs. *Hodge*, it is an absolute gift from a husband to his wife during coverture, without the interposition of trustees; handing over property which she was to apply to her separate use, and which she considered herself at liberty so to apply immediately. There is great difficulty in establishing such a transaction.

But the gift is claimed as a *donatio mortis causa*; a claim which seems to be advanced subsequently to the answer; for that contains not a word intimating that the wife understood the gift to be conditional, which is essential to a gift *mortis causa*; but on the contrary she claims it as an absolute gift, and accordingly disposes of some part of it. A witness has however been examined in the cause, and one difficulty is, whether it is competent to the Defendant to prove a case at variance with the statement in her answer? The conditional gift described in the deposition, is a totally different case [98] from the absolute gift claimed in the pleadings. *In limine* therefore occurs the difficulty of receiving the evidence of *Alice Mason* without a basis laid for it in the pleadings. How that can be permitted I do not immediately see. But what is the account which she has given? Her evidence, if taken alone, cannot possibly sustain this claim. She proves only the delivery of some notes, she knows not the amount; she says there were two separate and distinct gifts. Supposing the second gift postponed the right to the notes till the event of death, and gave it only in that event, the question would be whether this falls within the authorities on the subject of donations *mortis causa*.

I have looked through the cases on that subject, which are not numerous. That which approaches nearest to the present is *Lawson v. Lawson* (1 P. W. 441); and the next is *Miller v. Miller* (3 P. W. 356). That part of the decision in *Lawson v. Lawson*, on which Lord *Hardwicke* has remarked (2 Ves. Sen. 441) that he felt some difficulty in understanding it, is explained by a reference to the registrar's book, in the subsequent case of *Tait v. Hilbert* (2 Ves. Jun. 120). The whole doctrine on the subject of donations *mortis causa* has been discussed by Lord *Hardwicke* in *Ward v. Turner* (2 Ves. Sen. 431); in which he determined that the subject of the gift must be delivered by the donor; saying, that was what distinguished it from a legacy, which is delivered by the representative. In the next place, the gift must be conditional; that is, depending on the event of death. The three sorts of donations *mortis causa*, and the difficulties concerning the definition, are completely explained in *Tait v. Hilbert*, by Lord *Loughborough*, who examined the civil law, and gives the true definition. (The *Master of the Rolls* here read several passages from the judgment. 2 Ves. Jun. 119, 120.)

Many conditions, you observe, accompany donations *mortis causa*; if the donor recovers, if he repents his gift, if the donee dies before him: the property is not vested absolutely till after death. The Lord Chancellor negatived the claim in that case, considering it as a gift to take effect immediately, and therefore not a conditional donation *mortis causa*.

It becomes the Court to recollect the principles stated by Lord *Hardwicke* in *Ward v. Turner* (2 Ves. Sen. 431), who laments that the statute of frauds, which imposes rigorous restrictions on nuncupative wills, had not abolished gifts of this nature; to consider to what perjury such gifts may afford occasion, and how nearly they amount to an evasion of the statutory precautions against nuncupative wills. It is quite evident that if too much facility is afforded to donations *mortis causa*, a door is opened to elude the statute. Lord *Hardwicke* seems to think one witness not sufficient, remarking that the Roman law required five witnesses (an innovation of *Justinian. Cod. lib. 8, tit. 59, l. 4*); afterward he says, if the case depended at all on the question of fact, he should not venture to determine it, but send it to an issue. In the result he decided not on the fact but on the law, being quite clear that there was not a sufficient delivery.

*Hill v. Chapman* (2 Bro. C. C. 612) has not carried the doctrine farther: The Lord Chancellor there acted upon the report of the Master as to the fact, concerning which there [100] seems not to have been any doubt, and the law followed. To prove the fact the authorities appear not to require a plurality of witnesses, but only that the proof be satisfactory; nor is it necessary that the donation should be in

the last illness ; it is sufficient if made in contemplation of death, and on the conditions stated.

To apply these doctrines to the present case. It is evident that, as stated by the Defendant in her answer, the gift possesses none of the essential requisites of a donation *mortis causa*. It had no reference to death ; certainly it is not necessary that there should be in words a reference to death, circumstances may supply it ; as when a man, an hour before his decease, made a gift the better to provide for his wife : but here a person who had been in a situation to sell stock, returning without being visited by any illness at that time, takes bank-notes out of his pocket, and gives them to his wife, for her own use. What is there to render this a donation *mortis causa* ? Not a single circumstance which characterises these gifts, except the *traditio*, occurs in this account.

The deposition of *Alice Mason* is too vague to prove any thing, stating no amount, but only the delivery of some notes inclosed in a case. It describes, indeed, a conditional gift, but wants a fixed quantum ; and it differs in material circumstances from the Defendant's statement. All the minutiae of such transactions are to be examined ; the effect depends on every word and minute act.

In such a case, which as a precedent requires much caution, I cannot say that I am satisfied that the party has properly established her claim. The utmost would [101] be, what was suggested by Lord *Hardwicke*, and done in *Blount v. Burrow* (4 Bro. C. C. 72 ; 1 Ves. Jun. 546), to send it to a jury. But my difficulty is, whether I ought to receive the evidence, considering what was put in issue by the answer ? I cannot overcome that. As that point however was not spoken to, I will not preclude the Bar from an opportunity of urging what further occurs. It seems to me that if that objection cannot be removed, the exception must be allowed. (2)

[102] July 6. On this day the question was argued whether the transaction amounted to an immediate gift by the husband to the separate use of his wife.

[103] Mr. *Bell*, Mr. *Shadwell*, and Mr. *Girdlestone*, for Mrs. *Hodge*, insisted that a wife may take from the gift of her husband, property to her separate use, without the interposition of trustees ; and that in this case the delivery of the notes manifested an intention in the deceased to divest himself of all interest in them, and transfer them to his wife for her own exclusive benefit. *Maclean v. Longlands* (5 Ves. 71). *Graham v. Londonderry* (3 Atk. 393). *Lucas v. Lucas* (1 Atk. 270). *Slanning v. Style* (3 P. W. 334). *Lee v. Prieaux* (3 Bro. C. C. 381).

Mr. *Hart*, and Mr. *Wingfield*, opposed the claim, on grounds fully stated in the judgment.

[104] July 21. The *Master of the Rolls* [Sir Thomas Plumer]. After examining the cases cited on the last argument, in which gifts by a husband to his wife have been established in this Court, I am not able to satisfy myself that I ought to change the opinion which I have already pronounced. Here is no sufficient evidence of gift. I will shortly notice the authorities, in order that it may be clearly understood, that in negating this claim, I do not negative the proposition that, in equity, a gift by a husband to his wife may, under circumstances, be valid, but proceed solely on the insufficiency of the evidence.

In *Maclean v. Longlands* (5 Ves. 71), the Court was of opinion, that the evidence was not sufficient even for sending the question to an issue ; but if no gift could in any circumstances be valid, it would have been unnecessary to inquire into evidence. The *Master of the Rolls* there states the general doctrine thus : " The only point upon which I entertain any doubt, is as to the gift, but I do not think there is sufficient ground to direct an issue. Nothing less would do than a clear irrevocable gift either to some person as a trustee, or by some clear and distinct act of his, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife."

Such is the general doctrine stated in one of the latest cases on this subject : I forbear to advert to others which determine no more than this, that a wife may in this Court acquire property to her separate use during her coverture, and that her husband may be a trustee for her ; as in the instance of gifts by stran-[105]gers, of which *Lee v. Prieaux* (3 Bro. C. C. 381), is an example. In *Lucas v. Lucas* (1 Atk. 270), Lord *Hardwicke* says, " In this court gifts between husband and wife have often been supported, though the law does not allow the property to pass." (1 Atk. 271.) On another occasion, the same judge refers more particularly to the

case of the "Countess Cowper before Sir Joseph Jekyll, in which several trinkets were given her by Lord Cowper in his lifetime, and determined to be her separate estate." (3 Atk. 393.)

The case of *Slanning v. Style* (3 P. W. 334) arose on savings of the wife's pin-money, which her husband had borrowed; and the Court thought that by the permission of her husband, she had acquired it to her separate use, and declared her a creditor on his assets.

In *Rich v. Cockell* (9 Ves. 369), Lord Eldon, not carrying the doctrine farther than the preceding authorities, represents it as "perfectly settled, that a husband may in this Court be a trustee for the separate use of his wife." (3)

The cases mentioned in the former argument, certainly appear to have proceeded on a contrary supposition. In *Miller v. Miller* (3 P. W. 356), Sir Joseph Jekyll says, "The gift [106] of £600 contained in the bank-notes was a *donatio causa mortis*, which operates as such though made to a wife, for it is in nature of a legacy" (3 P. W. 357); and in *Lawson v. Lawson* (1 P. W. 441), the Master of the Rolls observed that "the delivery of the purse was good; and must operate as a *donatio causa mortis*, *ut res magis valeat, &c.*, because otherwise one could not give to his own wife." (1 P. W. 442.)

It is unnecessary to cite many of the texts which establish that, by the common law, a husband or wife cannot give to each other without the intervention of trustees. "A man," says Littleton, "may not grant, nor give, his tenements to his wife, during the coverture, for that his wife and he be but one person in the law, &c." (Sect. 168.) Upon which Lord Coke's commentary is, "This opinion is clear, for by no conveyance of the common law, a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife." (Co. Litt. 112 a.) All the cases in this Court proceed on the ground of exceptions introduced here; as the cases of *paraphernalia*, trinkets, or savings of pin-money. In the single case of £1000 South Sea annuities, transferred by the husband into the name of his wife in his life-time, the Court thought that so decisive an act, as amounted to an agreement by the husband that the property should become hers. (*Lucas v. Lucas*, 1 Atk. 270.) That seems to come under the description stated by Lord Alvanley (5 Ves. 79); it is an act; a clear and distinct act, by which the husband divested himself of his property.

The single question, therefore, in applying this doctrine to a particular subject, would be, whether the [107] claimant had satisfactorily established a clear distinct act of the husband, by which he divested himself of the property, and agreed to hold it as trustee for his wife? In this case the claim, as Mrs. Hodge in her answer states it, is most suspicious; the claim of a widow, setting up, after the death of her husband, a gift by parol, without the intervention of any third person. The Court expects satisfactory evidence of an act constituting a transfer of the property, and sufficient transmutation of possession. Here the possession is not changed, the possession of the wife is the possession of the husband. It would be a considerable question whether, proposed in this way, without any distinct act, such a claim could be good; but that is not the point here. The claim is distinctly contradicted by the deposition of *Alice Mason*, who was present, and states that it was not an immediate absolute gift, but expressly limited to take effect only in case of any thing happening to the husband. The Defendant and the witness directly contradict each other, one stating a gift absolute and immediate, the other postponing it till death; to which is the Court to give credit? Can it be said that here is that satisfactory evidence which should induce the Court, as a precedent, to establish, after the death of the husband, a gift by parol in his life? I cannot say that the gift is proved to my satisfaction; and the exception must be allowed.

(1) "Est autem inter alias donationes donatio mortis causa, quæ morte confirmatur, cujus tres sunt species, una cum quis nullo præsentis mortis periculi metu conteritur, sed sola cogitatione mortalitatis donat: alia, cum quis imminente periculo mortis commotus, ita donat, ut statim fiat accipientis; tertia, ut si quis commotus periculo, non dat sic ut statim fiat accipientis, sed tunc demum, cum mors fuerit insequuta. Et mortis causa donatio potest esse multiplex, ut si quis contemplatione, vel suspitione mortis, alicui dat, cujus modi donationes sæpe fiunt ab ægrotantibus, vel ab eis qui in aciem sunt ituri, vel per mare navigaturi, vel

peregre profecturi, et in se tacitam habent conditionem, ut hujusmodi donationes revocentur, si ægrotus convalescerit, si miles ab acie redierit, si nauta a navigatione, et peregrinus a peregrinatione. Et donationes quæ sic fiunt propter mortis suspicionem, morte testatoris confirmantur, et sic fiunt, ut siquid humanitus contigerit de testatore, habeat is, cui legatum est, legatum, si autem convalescat, retineat, vel rehabeat legatum, vel si prius moriatur ille cui legatum est. Et si duo, qui sibi invicem mortis causa donaverint pariter decesserint, neutrius hæres repetet, quia neuter alterum supervixit. Et est re vera talis donatio mortis causa, cum testator, rem legatam se ipsum magis habere voluerit, quam eum cui legata fuerit, et eum, cui legata est, magis quam hæredem suum. Si autem sic donetur mortis causa, ut nullo casu revocetur: causa donandi, magis est quam mortis causa donatio, et ideo perinde haberi debet, sicut alia quævis inter vivos donatio, et ideo inter viros et uxores non valet. Mortis causa donare licet, non tantum infirmæ valetudinis causa, sed periculi, et propinquæ mortis, ab hoste vel a prædonibus, vel ob hominis potentis crudelitatem, vel odium, aut causa navigationis, vel peregrinationis imminente, aut si quis fuerit per insidiosa loca iturus, hæc enim omnia instans periculum demonstravit." Fol. 60 a. This passage is compiled chiefly from the authorities in the Civil Law. *Inst. lib. 2, tit. 7; Dig. lib. 39, tit. 6.*

(2) To constitute a *donatio mortis causa*, or gift in contemplation of death, the transaction must first possess the requisites of a gift. "By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or an actual delivery of the thing to the donee." *Irons v. Smallpiece*, 2 Barn. & Ald. 552. *Hooper v. Goodwin*, 1 Swans. 485. A *donatio mortis causa* therefore requires delivery; and the greater part of the cases have occurred on the question, what constitutes a sufficient delivery? *Drury v. Smith*, 1 P. W. 404. *Lawson v. Lawson*, 1 P. W. 441; 2 Ves. Jun. 120, 121. *Miller v. Miller*, 3 P. W. 356. *Hedges v. Hedges*, *Prec. in Cha.* 269; *Gilb. Rep. in Eq.* 12. *Hill v. Chapman*, 2 Bro. C. C. 612. *Ward v. Turner*, 2 Ves. Sen. 431. *Jones v. Selby*, *Prec. in Cha.* 300. *Hassel v. Tynte*, *Amb.* 318. *Smith v. Smith*, 2 Str. 955. *Blount v. Burrow*, 4 Bro. C. C. 72; 1 Ves. Jun. 546. *Tate v. Hilbert*, 4 Bro. C. C. 286; 2 Ves. Jun. 111. *Hawkins v. Blewitt*, 2 Esp. 663. *Shanley v. Harvey*, 2 Eden, 126. *Bunn v. Markham*, 7 Taunt. 224. *Gardner v. Parker*, 3 Madd. 184, and see *Johnson v. Smith*, 1 Ves. Sen. 314.

Thus, money in the public funds will not pass by parol expressions of gift in contemplation of death, accompanied with delivery of the receipts for the price of the stock; *Ward v. Turner*, 2 Ves. Sen. 431, but expressions of gift and delivery of a bond, constitute a valid donation. *Snellgrave v. Bailey*, 3 Atk. 214. *Gardner v. Parker*, 3 Madd. 184.

The peculiar inducement and circumstances of the gift, annex to it certain qualifications, which may be in general comprehended within the description of the incidents of a legacy, to which the gift is analogous. *Dig. lib. 39, tit. 6, l. 15, 37; 3 P. W. 357.*

It is revocable therefore by the donor, *Dig. lib. 39, tit. 6, l. 167*, and revoked by the death of the donee during his life, *Dig. lib. 39, tit. 6, l. 23*, and subject to the claims of creditors. *Dig. lib. 35, tit. 2, l. 66, s. 1; Dig. lib. 39, tit. 6, l. 17. Smith v. Casen*, 1 P. W. 406. *Tate v. Hilbert*, 4 Bro. C. C. 293; 1 Ves. Jun. 120; but on the death of the donor the property vests absolutely in the donee; and no probate is required, nor is it the subject of ecclesiastical jurisdiction. *Ashton v. Dawson*, *Sel. Ca. in Cha.* 14. *Lawson v. Lawson*, 1 P. W. 441. *Miller v. Miller*, 3 P. W. 356. *Ward v. Turner*, 2 Ves. Sen. 440. *Thompson v. Hodgson*, 2 Str. 777.

The following description well explains the nature of these gifts: a *donatio mortis causa*, "is where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will, but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him." Lord Cowper, *Prec. in Cha.* 269, 270; *Gilb. Rep. in Equity*, 13; and see *Thorold v. Thorold*, 1 Phill. 1.

The genuine definition of *donatio mortis causa*, in the civil law, from which both the doctrine and the denomination are borrowed, may be found in the Institute, *Inst. lib. ii. tit. 7*, cited by Lord Loughborough, 2 Ves. Sen. 119, 120.

The subject has been perplexed by an inaccurate enumeration imputed to an ancient jurist. "Julianus libro septimodecimo Digestorum tres esse species mortis causa donationum ait: Unam, cum quis nullo præsentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus, ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus, non sic det, ut statim fiat accipientis: sec tunc demum, cum mors fuerit insecuta." *Dig. lib. 39, tit. 6, l. 2.* *Swinburne*, who translates this passage (which is adopted by *Bracton*, 2 *Swans*. 86, n.), remarks that the first two species are mere donations *inter vivos*; on *Wills*, part i. s. vii: and the inaccuracy has been censured by the *Civilians*; *Dig. lib. 36, tit. 6, l. 27, 42.* It is the last species alone which derives any peculiar properties from its connection with the prospect of death. The whole question is very ably reviewed by Lord *Loughborough*. 2 *Ves. Jun.* 118–120. Some of the remarks imputed to Lord *Hardwicke*, 2 *Ves.* 439, 440, seem deficient in precision.

Before the statute of frauds, 29 *Car. 2, c. 3, s. 19, 20, 21*, parol expressions of an intention to give in the event of death, even though, not being accompanied by delivery, insufficient to constitute a *donatio mortis causa*, might have been valid as a nuncupative will. The earliest cases in our courts of law or equity, on the subject of these donations are subsequent to that act.

(3) 9 *Ves.* 375. See *Harvey v. Harvey*, 1 *P. W.* 125; 2 *Vern.* 659. *Bennet v. Davis*, 2 *P. W.* 316. *Rolfe v. Budder*, *Bunb.* 187. *Tyrrell v. Hope*, 2 *Atk.* 558. *Darley v. Darley*, 3 *Atk.* 399; 3 *Bro. C. C.* 383, 384. *Davidson v. Atkinson*, 5 *T. R.* 434. *Lamb v. Milnes*, 5 *Ves.* 517. *Hartley v. Hurle*, 5 *Ves.* 545; 18 *Ves.* 434. *Parker v. Brooke*, 9 *Ves.* 583. *Johnes v. Lockhart*, cited 1 *Madd.* 207, corrected, 3 *Bro. C. C.* ed. *Belt*, 383, n. *Adamson v. Armitage*, *Coop.* 283. *Ex parte Ray*, 1 *Madd.* 199.

[108] *DAVIS v. The Duke of, MARLBOROUGH.* Jan. 15, 29, March 4, June 22, 1818; April 3, 6, 8, 29, May 27, June 10, August 5, 9, Nov. 12, 1819.

[S. C. 2 *Wils. Ch.* 130. See *O'Rorke v. Bolingbroke*, 1877, 2 *App. Cas.* 822; *Fry v. Lane*, 1888, 40 *Ch. D.* 320.]

Receiver of rents of estates conveyed to secure an annuity, discharged on acceptance of the price of the annuity with interest, deducting the past payments.

The subsequent proceedings in this cause, require a fuller statement of the annuity deed of the 21st of *March* 1811, under which the Plaintiff claimed, than was thought necessary on the former application (reported 1 *Swans.* 74). By that deed, made between the Defendant the Duke of *Marlborough*, then Marquess of *Blandford*, of the first part, the Plaintiff of the second part, *Robert Eden*, of the third part, and *Robert Wilby*, of the fourth part, after reciting the acts of parliament, and a lease, dated the 21st of *December* 1808, by which the late Duke of *Marlborough* demised to the present Duke, the manor of *White Knights* in *Berkshire*, for twenty-one years, at a rent of six shillings and eight pence, without impeachment of waste, and the will of *Sarah* Duchess of *Marlborough*, dated the 11th of *August* 1744, whereby she bequeathed *Marlborough* house, of which she was then in possession, under a lease from the Crown, for the term of 50 years, in trust, first for *John Spencer*, and after his decease, for *George* late Duke of *Marlborough*, for so much of the term as he should live; and after his decease, in trust for such son of his body as should first attain the age of 21 years, his executors, &c., and the testatrix directed her executors to renew the lease as often as there should be occasion during the continuance of the trust, and that such renewed leases should be upon the same trusts; and after reciting that she was possessed, under another lease from the Crown, of certain lands adjoining to the said mansion, for a term then unexpired, she gave the same to her executors, in trust for the owner for the time being of the mansion, and to be enjoyed with the same; and, further reciting that the leases had, since the death [109] of the testatrix, been renewed by the late Duke of *Marlborough*, by letters patent, dated the 6th of *June* 1785, for the terms of 50 years, and 31 years respectively; and that the Marquess of *Blandford*, as eldest son and heir apparent of the late Duke, having then, many years since, attained the age of 21 years, would, by virtue of the acts of parliament, upon the death of his father,

become entitled to the manors, mansions, &c., therein comprised, and also to the pension of £5000, and that he was, by virtue of the will and letters patent, absolutely entitled to *Marlborough* House, subject to the life interest of the late Duke; and reciting that he had agreed with the Plaintiff for the absolute sale to him of an annuity of £155, during the term of 99 years, if the Marquess should so long live, for the price of £999, and on the treaty for the sale of the annuity, it was agreed that all costs and charges of preparing and perfecting the securities for the same, and for enrolling a memorial thereof, should be paid by the Marquess; and that in pursuance and part performance of the agreement, the Plaintiff had that day, in his own person, paid the sum of £999 in notes of the Bank of *England*, into the hands of the Marquess; and that in pursuance and part performance of the agreement on the part of the Marquess, it was intended that he should, immediately after the sealing and delivering the indenture, execute a warrant of attorney bearing even date therewith, to confess a judgment against him in the Court of King's Bench, in an action of debt, at the suit of the Plaintiff, for the sum of £1998, besides costs of suit; and it was intended and agreed that judgment should be forthwith entered up thereon accordingly; it was witnessed, That in consideration of the aforesaid sum of £999 the Marquess granted to the Plaintiff an annuity of £155 for the term of 99 years, to commence from the day before the date of the deed, if the Marquess should so long live, charged upon and pay-[110]-able, after the decease of the late Duke, out of the honor, manor, mansion, lands, hereditaments, and premises comprised in the acts of parliament of the 3d and 5th years of *Queen Ann*, respectively, and the pension of £5000, and to be thenceforth charged upon and payable out of the manor, mansion, &c., of *White Knights*, comprised in the lease of the 21st of *December* 1808, and subject to the life interest of the late Duke therein, to be charged upon and payable out of *Marlborough* House, and the appurtenances comprised in the will of *Sarah* Duchess of *Marlborough*; to be payable quarterly, the first quarterly payment to be made on the 21st of *June* then next, and a proportional part in case of the death of the Marquess on any other than a day of payment.

The Marquess, for himself, his heirs, executors, and administrators, granted and agreed with the Plaintiff, his executors, &c., that if the annuity should be in arrear for twenty-one days, it should be lawful for the Plaintiff to enter into and distrain upon all the premises charged with the annuity, and to sell and dispose of the distresses there taken, or otherwise to demean therein according to law, in like manner as in distresses taken for rents reserved by lease, to the intent that the Plaintiff, his executors, &c., might be fully paid and satisfied the annuity so in arrear, and all costs and expenses occasioned by the non-payment; and also, that in case the annuity should be in arrear for thirty-one days, it should, although no legal demand should have been made thereof, be lawful for the Plaintiff, his executors, &c., to enter into, and hold, all the premises charged with the annuity, and to receive the rents and profits for his own use, until he should, therewith or otherwise, be fully paid the annuity due at the time of every such entry, and which should afterwards accrue due during his pos-[111]-session of the premises, together with all costs and expenses which he should sustain by reason of the non-payment thereof, such possession when taken to be without impeachment of waste.

In the deed were inserted covenants by the Marquess with the Plaintiff, for the payment of the annuity; that he would, at the request of the Plaintiff, appear in person, as often as there should be occasion, upon notice, at any office of insurance, or to any underwriters within the cities of *London* or *Westminster*, or send notice of his place of abode, and if necessary, certificates of his being living, and of the state of his health, in order that the Plaintiff might insure the Marquess's life, for any sum not exceeding £999; and that, in case the Marquess should on any occasion leave this kingdom, or do any other act whereby the Plaintiff should be put to any extra expense in insuring the Marquess's life, he would pay to the Plaintiff such sums as should be defrayed in such extra insurance, and it should be lawful for the Plaintiff to receive such sums out of the premises charged with the annuity. The deed contained a demise by the Marquess for securing the payment of the annuity (at the appointment of the Plaintiff), to the Defendant *Eden*, of the manor of *Woodstock*, *Blenheim* House, and all the premises comprised in the letters patent of the 5th of *May*, in the 4th year of *Ann*, to hold to *Eden*, his executors, &c., from the decease of the late Duke, for the term of 500 years, if the Marquess should so long live;

and an assignment by the Marquess to *Eden*, his executors, &c., of the manor of *White Knights*, and all the premises comprised in the lease of the 21st of *December* 1808, and all woods, underwoods, trees, and plantations then standing or growing thereon, and also *Marlborough House*, and all the premises comprised in the will of *Sarah Duchess of Marlborough*, to hold the premises [112] comprised in the lease of the 21st of *December* 1808, for the residue of the term of 21 years, subject to the rent and to eight annuities ; and to hold *Marlborough House*, and the other premises, for the residue of the terms of 50 years, and 31 years, then unexpired, and for any terms which might be created by any renewed leases.

It was declared that *Eden*, his executors, &c., should be possessed of the premises, upon trust, to permit the Marquess to receive the rents until the annuity should be in arrear by the space of 50 days, and as often as it should be in arrear for that time, out of the rents and profits, or by demising, mortgaging, or selling the premises, or any of them, for all or any part of the several terms thereby granted and assigned, then subsisting, or which might be created by any renewed leases, or by bringing actions against the tenants or occupiers of the premises, for the recovery of the rents and profits thereof, or by felling timber, or cutting underwood, or by sale of fixtures and other things in and about the premises, or by more than one, or by all, of the ways and means aforesaid, or by such other ways or means as to him or them should seem meet, to raise such sums of money as would be sufficient, or as he or they should think proper or expedient to raise, for paying to the Plaintiff, the annuity in arrear, and all costs and expenses which the Plaintiff and *Eden*, or either of them, might sustain, by reason of the non-payment thereof, or otherwise in the execution of the trusts ; and to pay the surplus of the money so raised to the Marquess. It was also agreed and declared, that if the annuity should be in arrear by the space of three calendar months (whether or not payment should afterwards be made and accepted of the arrears of the annuity, before any sale or mortgage should be made under the present [113] power), it should be lawful for *Eden*, his executors, &c., and he was authorised and required, in case the same should be directed by the Plaintiff, his executors, &c., by writing, absolutely to sell and dispose of all the manor, mansion-houses, and other premises comprised in the terms of years created by the recited lease or letters patent, or any renewed term which might be created, and also to sell and dispose of the timber and underwood growing thereon, and the fixtures and other things in and about *White Knights*, or to mortgage the same premises, or any part thereof, for any sums whatsoever, and that it should be lawful for *Eden*, his executors, &c., to enter into, make, and execute, all such covenants, contracts, agreements, assignments, assurances, acts, deeds, matters and things, which he should deem reasonable ; and that all such contracts, agreements, &c., which should be entered into or executed by *Eden*, his executors, &c., by virtue thereof, should and might be entered into and executed, either with or without the concurrence of the Marquess, his executors, &c., and should, whether he should or should not join therein, or assent thereto, be, to all intents and purposes, completely valid and effectual, and bind him, his executors, &c., and all persons claiming under or in trust for him : and that the receipts in writing of *Eden*, his executors, &c., for any sums payable to him in the execution of the trusts, should be good and effectual discharges for the same ; and that the person to whom the same should be given, should not afterwards be accountable for any loss, misapplication, or non-application, or be in any wise obliged to see to the application, of the money.

It was then declared, that *Eden*, his executors, &c., should stand possessed of the money raised by such sale or mortgage, upon trust, first to pay and redeem the [114] eight prior annuities previously recited, and to pay all sums due to persons claiming under two indentures of the 23d of *July* 1806, and the 1st of *June* 1808 ; and also to pay and satisfy all annuitants, judgment creditors, and other incumbrances affecting the premises ; and out of the residue to reimburse himself the costs and expenses to be incurred in the execution of the trusts, and invest the surplus in his name, in the purchase of stock or public funds, or at interest on government or real securities, and out of the interest, dividends, and annual produce, or the principal, in case such interest, dividends, and annual produce, should be insufficient, to pay the annuity of £155, and all arrears and future payments thereof ; and subject thereto, should stand possessed of the trust-moneys in trust for the Marquess.

The Marquess also assigned to *Eden* the pension of £5000, to hold from the decease

of the late Duke, for the life of the Marquess, upon trust, to secure the annuity of £155; and for that purpose the Marquess appointed *Eden* his attorney, to demand and receive the pension from the commissioners of the post-office, and to use all other means for the recovery of the same; and the Marquess and *Eden* appointed *Withy* their receiver and attorney, to collect and receive the rents and profits of all the premises thereby demised and assigned, with various powers and a salary, upon trust to secure the annuity; but it was provided that the receiver was not to act unless the annuity should be in arrear for six calendar months.

The deed contained covenants by the Marquess, that the recited lease and letters patent were good and subsisting; that he had power to grant, demise, and assign, the estates, with the timber, and the pension; and that he would, at his own expense, on the request of [115] *Eden*, execute farther assurances of the estates, and the timber, underwood, and fixtures, during the residue of the terms then unexpired, and also for any farther terms, not exceeding 500 years, which the Marquess might, by the death of the late Duke or otherwise, be enabled to grant therein. The deed contained a proviso that the Marquess might repurchase the annuity, on giving seven days' notice to the Plaintiff, and paying the arrears, and all expenses occasioned by non-payment, and the sum of £1037, 15s.

The memorial stated, that the sum of £999, the consideration of the annuity, was paid to the Marquess, out of which he immediately paid the costs of preparing and perfecting the several securities, and of preparing and enrolling a memorial, pursuant to an agreement made upon the treaty for the purchase of the annuity.

The order pronounced on the motion for a receiver before answer, reported 1 *Swans*. 74, was as follows: "His Lordship doth order that it be referred to Mr. *Jekyll*, one, &c., to appoint a proper person to be receiver of the rents and profits of the capital mansion-house called *Blenheim* House, and the park called *Woodstock* Park, and all other the estates and premises to the Defendant the Duke of *Marlborough* belonging, and mentioned and comprised in three acts of parliament in the pleadings mentioned, of the 3d and 5th years of the reign of her late Majesty Queen *Anne*, chapters 6, 3, and 4; but the appointment of the said receiver is not to affect prior incumbrancers upon the said estates and premises, who may think proper to take possession of the said estates and premises, by virtue of the said securities respectively; and it is ordered that the said Master do also allow to such person, so to be appointed, a salary for his care and pains therein, he first giving security [116] to be allowed of by the said Master, and taken before a Master extraordinary in the country, if there shall be occasion, duly and annually to account for and pay what he shall so receive, as this Court has hereby directed, and shall hereafter direct; and the Defendant, the Duke of *Marlborough*, is to deliver up the possession of the said estates and premises to the said receiver but subject as hereinafter mentioned; and the tenants of the said estates and premises are also to attorn and pay their rents in arrear and growing due to such receiver, who is to be at liberty to let and set the said estates, with the approbation of the said Master, as there shall be occasion, but subject also as hereinafter mentioned; that is to say, that this order is not to affect or extend to the rents and profits of any part of the said estates and premises, to which any person or persons are entitled, under any execution or executions executed, nor to require the tenants of such parts of the said estates and premises to attorn, nor to require the Defendant the Duke of *Marlborough* to deliver possession of any part of the said estates and premises, which he may hold as tenant under any person or persons claiming such part by virtue of any execution or executions executed; and it is ordered that the said Master do inquire what incumbrances there are affecting the said estates and premises, and also into the priorities thereof respectively; for the better discovery whereof the parties are to produce before the Master, upon oath, all deeds, &c., and to be examined upon interrogatories as the said Master shall direct; and it is ordered that the person so to be appointed receiver as aforesaid, do, out of the rents and profits so to be received by him, keep down the interest and payments in respect of the said incumbrances, according to their priorities, and pay the balances thereof, which shall be from time to time reported due from him, into the bank, with the privity of the accountant-general, to be there placed to the credit [117] of this cause, subject to the farther order of this Court; and his Lordship doth not think fit to make any order as to the appointment of a receiver of the



pension of £5000 in the pleadings mentioned." 5th *March* 1818. Reg. Lib. A. 1817, fol. 873.

By amendment under an order dated the 7th of *March* 1818, the judgment creditors were made defendants. The amended bill prayed an account of the arrears of the annuity ; that the amount might be raised, and the future payments secured, by sale or mortgage of the estates and premises comprised in the indenture of 21st *March* 1811, for the terms thereby assigned, or for any further or renewed term or interest therein since acquired by the Duke of *Marlborough*, or in trust for him, or by felling timber, or cutting underwood, or sale of fixtures thereon, or otherwise, and out of the pension of £5000 ; a reference to inquire what incumbrances affected the estates, and their priorities, and what was due thereon respectively ; that the plaintiff's annuity might be decreed to be paid according to its priority, and in preference to the alleged mortgage, to the defendants mortgagees ; and that the judgments obtained by the other Defendants against the Duke, might be declared void against the Plaintiff, and the other creditors of the Duke, and that the defendants might be decreed to deliver up possession of the estates recovered by such judgments, and that an account might be taken of the rents and profits of the estates comprised in the indenture of *March* 1811, received by the said Defendants, and that the same might be applied in payment of the plaintiff's annuity, and of the other incumbrances affecting the estates, according to their priorities ; that a receiver might be appointed to collect the rents and profits of the estates and the pension ; and that in the meantime the Duke be restrained by injunction from felling timber, or cutting underwood [118] or selling fixtures upon the premises comprised in the indenture of *March* 1811.

*June* 22. On this day the plaintiff moved, that the order for the receiver might be varied, and extended to the judgment creditors.

Mr. *Hart* and Mr. *Seton*, in support of the motion.

Mr. *Bell* and Mr. *Roupell*, against the motion.

The Lord Chancellor [Eldon]. The former order proceeds on the principle of not affecting the rights of parties not before the Court. The judgment creditors are now defendants ; it appears that their judgments are subsequent to the plaintiffs' annuity ; and other debts may be suggested. It will be sufficient to expunge so much of the order as excepts them from its operation. I cannot order a judgment creditor in possession to attorn.

Mr. *Bell* and Mr. *Roupell* then applied that Mr. *Withy* might be declared at liberty to propose himself as receiver ; on the ground that, in the annuity deed, it had been agreed by the Plaintiff and the Duke, that he should hold that office.

The Lord Chancellor [Eldon]. A receiver appointed by the Court, is appointed on behalf of all parties, not of the Plaintiff, or of one Defendant only. (*Hutchinson v. Lord Massareene*, 2 Ball & Beat. 55.) I see no reason for releasing Mr. *Withy* from any difficulties which prevent his appointment.

[119] The following order was pronounced. " 23d *June* 1818, His Lordship doth order that so much of the order made in this cause appointing a receiver, bearing date the 5th day of *March* last, as directs that such order is not to effect or extend to the rents and profits of any part of the said estates and premises to which any person or persons are entitled, under any execution or executions executed, nor to require the tenants of such parts of the said estates and premises, to attorn, nor to require the Defendant the Duke of *Marlborough* to deliver possession of any part of the said estates and premises, which he may hold, as tenant under any person or persons claiming such parts, by virtue of any execution or executions executed, be expunged ; and it is ordered that the Defendant the Duke of *Marlborough* be restrained by the injunction of this Court, from felling timber, or cutting underwood, or selling fixtures, upon the estates and premises comprised in the indenture of the 21st day of *March* 1811, in the pleadings of this cause mentioned, until the farther order of this Court." Reg. Lib. A. 1817, fol. 1537-1539.

The answer of the Duke submitted, whether, according to the acts of parliament, the estates and pension comprised therein could be assigned or charged with the payment of any sums of money ; and whether the Plaintiff ought to recover his annuity, the whole consideration not having been paid to the Duke, inasmuch as £87, 11s. were claimed thereout by the solicitor of the Plaintiff, for preparing the securities for the annuity ; and, offering to pay to the Plaintiff the principal

money advanced, with interest, farther submitted whether an account ought not to be taken of the principal actually [120] advanced and paid by the Plaintiff to the Duke, and the interest due thereon, and credit to be given to the Duke for the money he had paid, and interest thereon, and what had been levied by distress. The answer also stated, that persons by whom judgments had been entered up against the Duke were his *bona fide* creditors; and declared his intention to fell timber, and cut underwood, and sell fixtures, on the premises comprised in the indenture of the 21st of March 1811.

April 3, 1819. On this day, the Duke having previously given notice of a motion to discharge the receiver, the Plaintiff moved that it might be referred to the master to cause a survey to be made, under the direction of the receiver, of such timber and other trees, and also the underwood standing on the estate at *Blenheim* and *Woodstock* Park, comprised in the acts of parliament, not ornamental to, or shelter for, the mansion called *Blenheim* House, as was fit and proper to be felled, for the purpose of having the same felled and sold, under the direction of the Court, to satisfy to the Plaintiff the money due to him, pursuant to the authority given to him for that purpose by the indenture of the 21st of March 1811.

Mr. *Hart* and Mr. *Seton*, in support of the motion, insisted, that notwithstanding the restraint imposed by the acts of parliament on his right of alienation, the Duke was entitled to fell timber on the estates. The Court has already decided that over the estates, the Duke possesses a power of alienation as against himself (2 *Swans*. 74); the restraint on alienation to the prejudice of his successors is analogous to the restraint imposed by [121] the statute (11 *H.* 7, c. 20) on women seised of lands *ex provisione viri*; and it is settled both at law and in equity, that such tenants are not impeachable of waste, and that timber felled by them is their own absolute property. (*Williams v. Williams*, 15 *Ves.* 419; 12 *East*, 209.)

Sir *Arthur Pigott*, Mr. *Wray*, and Mr. *Hampson*, for the Duke, in opposition to the motion. The order sought is not necessarily consequential on the appointment of a receiver; and before the Court proceeds farther in execution of the annuity deed on which the plaintiff's claim is founded, it will require the obvious objections to its validity to be removed. It is now the rule of this Court, that a party who seeks its interposition to enforce the contract of an heir apparent dealing for his expectancy, shall establish the adequacy of the consideration, and the general fairness of the transaction. The Duke has assigned his reversionary interest to secure an annuity of £155 commencing immediately, and continuing during his life, for a sum of £999. His answer states legal objections to the validity of the grant. *Peacock v. Evans* (16 *Ves.* 512). *Gowland v. De Faria* (17 *Ves.* 20).

The Lord Chancellor [Eldon]. Omitting at present the consideration of the particular policy of the acts of parliament, relative to these estates, this case may be compared to the common case of a marriage settlement, in which the first taker is made tenant for life without impeachment of waste, and with powers of leasing, from the operation of which are excepted the mansion-house and park. It has never been held that such an exception exempts the mansion from execution either at law or in equity, during [122] the life of the tenant for life. More special words are required to protect the life-estate from the rights of creditors.

After reading the deed under which the Plaintiff claims, I feel a strong inclination not to interfere in this case, if I can avoid it. The nature of that deed has not yet been sufficiently unfolded in argument. Supposing that I was right in appointing a receiver, a question remains, whether in such a state of the cause, more particularly, regard being had to the nature of this deed, the Court will, *per saltum*, enable any one to cut down timber, prior to a decree?

The deed, after reciting the acts of parliament, a lease of December 1808, and the will of *Sarah* Duchess of *Marlborough*, recites the title of the Defendant then *Marquess of Blandford* as "eldest son and heir apparent" (in that very character he contracts), of "*George Duke of Marlborough*." I do not mean to speak positively, but as far as I recollect, the mature age of an heir apparent dealing for his reversion is not a circumstance that divests him of the benefit of the principle which prevails in a court of equity, that parties dealing with him for his expectancy, must show that the transaction is unexceptionable. (*Vide* 2 *Swans*. 143.) The consideration of the annuity was little more than six years' purchase. All the expenses were to be paid by the *Marquess*; and he executes a warrant of attorney which, though as

a peer in his own right during the life of his father, his person was protected, would authorise execution against all his property real or personal, even not comprised in the deed. The annuity is charged on the estates only from the decease of the then Duke of *Marlborough*, nor [123] was it in the power of the Marquess to charge them sooner, but the first payment is to be made on the 21st of *June* ensuing the date of the deed; so that the Marquess contracted a personal obligation to pay the annuity from that day, even during the life of the Duke, the estate being chargeable only, as alone it could be charged, from the Duke's death. There is then a covenant or agreement, always to be found in these annuity deeds, that if the annuity should be in arrear for 21 days, the Plaintiff may distrain on the premises charged. That clause is in terms, a covenant by which the present Duke of *Marlborough*, there being no qualification limiting the entry only to the period after the death of the late Duke, would have been liable in damages, if the Plaintiff could not have entered during the life of the late Duke. The covenant, authorising entry and receipt of rents, is also unqualified, unless, which the Court would labour to do, it can be qualified by construction; but, in terms, neither the power of entry to distrain, nor the power of entry for perception of rents and profits, is qualified by restriction to the period after the death of the late duke. Then follows a personal covenant for payment of the annuity, and for appearance at insurance-offices, to enable the Plaintiff to insure the Duke's life, and for payment of the increased expenses of insurance consequent on his going abroad.

The annuity is next secured by a demise to *Eden*, a demise which, undoubtedly, in general words, includes woods; but one question to be considered here will be, whether, as by that demise the lessee is not unimpeachable of waste, he could touch the woods at all? It is worthy of consideration whether, under a demise of all lands, woods, tenements, &c., without words ex-[124]pressly protecting the lessee from impeachment of waste, the lessee has any estate which entitles him to cut timber? It is a question of law whether, if the estate is granted not without impeachment of waste, the declaration of trust can so alter the estate as to give a right to cut timber by virtue of the estate? The title created by the demise, whatever it may be, is on the trust the declaration of which follows; and the question would be, whether, if there is a declaration of trust which authorises the lessee to cut timber, which his interest in the estate would not authorise, that can amount to more than agreement that the lessee shall enter and cut timber? And whether this Court will execute that agreement? And farther, whether it will give a power of entry for that purpose prior to the decree? The declaration of trust in this deed requires particular attention from a court of equity. (See the clause, 2 *Swans*. 112-114.)

With reference to this declaration it is to be considered, as I before mentioned, whether by virtue of a demise which is itself not unimpeachable of waste, there is any power to cut timber, or whether that power being given by agreement, contained in a declaration of trust, the power rests in any thing but agreement? Whether it arises from interest in the estate, without any such declaration; or arising out of the agreement, beyond what would arise from the nature of the estate, it amounts to any thing more than covenant and agreement? Other powers are given in the event of an arrear of the annuity during three months (*vide* 2 *Swans*. 110); most extensive powers; though I do not mean to say that, in that respect, this deed proceeds beyond annuity deeds in general; which is nearly impossible. *Eden* is then directed to stand possessed of the money raised by the [125] means provided, in trust to pay eight annuities mentioned, and all persons claiming under two deeds referred to; so that there may be many annuitants and judgment creditors not there specified, and for that reason not parties, and, with respect to whom, therefore, there must be inquiry.

The result of these powers appears to be, that in the event of the arrear of the annuity for a specified period, it was competent to *Eden* to sell all these estates, for the terms comprised in the deed, to convert them into money, and after satisfaction of the incumbrances, to invest the surplus in stock; and thus to give to the Duke of *Marlborough* a personal interest in that fund, as contradistinguished from the real interest which he had in some of these estates, and in the timber.

There follow, an assignment of the pension of £5000 on the same trust; a proviso for redemption; and an appointment of Mr. *Withy* as receiver and attorney, with very large powers.

One of the first questions, in such a case will be, whether it is so clear, on any motion that can be made in a court of equity, considering the parties to this instrument, and its provisions, that there must finally be a decree to carry it into execution, that the Court will anticipate, by giving before decree, the relief which, if the Plaintiff is entitled to relief, may then be given? Or, considering all the provisions made by the grantor, and for persons who are not parties, and the fact that the demise not only authorises the trustee to strip the estate of all timber, but when entry is made under the term, the entry is not to continue merely until the arrears of the annuity are paid, but gives an unlimited [126] power over the whole property, to sell it absolutely, and convert it into a pecuniary interest, or to keep possession of it, subject to the interests which that possession would create; whether it is so clear that the Plaintiff will eventually be entitled to relief, that when there is nothing more than yet appears to enable the Court to decide, it would be fit now to give the relief which the Plaintiff seeks, even if it would be fit that on a decree relief should be given? The case certainly must be considered in that view.

The present motion raises two questions; whether the receiver is the person whom the Court will entrust with this duty in relation to the timber? And, a question in effect preliminary to the former, whether the receiver should be continued? If he is not continued, he cannot be the proper person. The fittest motion, therefore, to be first heard, is that for discharging the receiver.

In appointing the receiver I proceeded on these grounds. Looking at these several acts of parliament, it did not occur to me that the pension act bore much on the other acts. I might be too hasty in that opinion. The first Duke was at one time tenant in fee of this property; in order to settle it on his posterity, and with large aids from the public (a circumstance material in reference to the policy imputable to the acts), the first Duke reduced himself to the condition of tenant for life without impeachment of waste, and it appeared to me therefore, that, he might cut all timber which a tenant for life without impeachment of waste might cut; and I thought it impossible to hold that what a tenant for life might do, could not be done by a tenant in tail under the same settlement. With [127] respect to the leasing powers, I reasoned in this way, considering this as the settlement of an estate not public property. It is familiar that the estates of the first nobility in the kingdom are limited to them for life, with powers of leasing of all natures required, but with an express exception from those general powers, declaring that they shall not be at liberty to lease, beyond a very limited time, any of the mansion-houses or parks; but the only inference that I have ever known drawn, in the administration of justice, from the existence of such a limitation of the power is, that a lease which exceeds the power is void; I never knew that it was not competent to the tenant for life by deed to charge his life estate in those premises which were excepted from his general leasing powers, or that he could protect them against execution. No one ever contended that, because those portions of the property were exempted from the leasing powers they were, therefore, protected from the claims of creditors. A tenant for life without more, possesses a power of leasing arising out of his estate, and determining, therefore, with his life. The leasing powers in a common settlement, prescribing a limited term, rent, &c., will not affect the power incident to the estate of the tenant for life, to lease during his life, as he pleases.

In this case there have been executions against the life-estate of the Duke of *Marlborough*; if so, then by analogy, this Court will put a receiver in possession, where the claim is equitable not legal; and if in the acts of parliament there is sufficient to prevent the application of the law in the manner which I now state, it had escaped me. If there were two judgment creditors who, under the opinion of the Court of King's Bench, had each of them extended a moiety of *Blenheim* House, and by their judgments could obtain possession, it appeared to me that either that Court was wrong, or *Blenheim* House must be subject to be taken by the Duke's creditors in equity as well as at law; there could be no more reason why it should not be taken under an equitable, than under a legal, charge. The case must be argued on the ground that there is no distinction in principle, supposing no objection to arise to the claim of the equitable creditor from the nature of his contract, as a dealing with an heir apparent.

April 6. Sir Arthur Piggot, Mr. Wray, and Mr. Hampson, in support of the motion to discharge the receiver.

The Duke is himself not entitled to fell timber. On an information and bill filed by the Attorney-General, and persons having reversionary interests in the estates, against the Duke, the Vice-Chancellor has granted an injunction to restrain the Duke from cutting timber, on the principle that the power to commit waste, though incident to the estate of a tenant in tail, would be inconsistent with the intention the legislature has declared for the security of this property. (*The Attorney General v. The Duke of Marlborough*, 3 Madd. 498.) By the express provisions of the act, the Duke cannot bar the descent; by the judicial construction of those provisions, he cannot commit waste; upon what principle can the receiver, the agent of this annuitant, claim rights which, even if so disposed, the Duke could not execute? The effect of this order will be to place the receiver in possession of the estate, which the legislature has expressly provided for the enjoyment of the Duke and his posterity. If the tenor of the acts of parliament had [129] been fully stated to the court, no receiver would have been appointed. (*Note*: In addition to the statutes cited on the former argument, the counsel for the Duke now referred to stat. 1 Geo. 1, stat. 2, c. 12, s. 34.) It is true, that at the date of the limitation of the estates by those acts, the fee simple had been already conveyed to the Duke of Marlborough, by a former grant from the crown, and in the creation of those limitations, therefore, the estate moved from him; but at that time, the mansion of *Blenheim*, with its magnificent fixtures and gardens was not in existence; the mansion was built and the gardens were formed by the national bounty; in these consists the value of the property; and they were the gift of the crown and parliament, designed for the personal enjoyment of the Duke and his posterity, the possession of which should be inseparably annexed to the descent of the title.

If this estate descended to an heir female of the Duke, her husband would not be tenant by the curtesy, nor would a Duchess dowager be entitled to dower.

The estate was conferred and embellished as a durable monument of the achievements of the Duke; and the crown, representing the public, is interested in its preservation, by analogy to the legal principle which protects the right of the heir in monuments erected to the honour of his ancestor, even against the owner of the ground on which they stand. (*Co. Litt.* fol. 18 *b*, and the cases cited in the notes.)

The Lord Chancellor [Eldon]. To what extent is that argument urged? Neither the receiver nor any creditor could dismantle the property, [130] or exercise over it any other power than the Duke possessed.

For the motion to discharge the receiver,

The Duke is not at liberty so to alien the estate as to exclude himself from residing there.

Mr. Hart and Mr. Seton for the Plaintiff, Mr. Wetherell and Mr. Tinney for prior incumbrancers, against the motion to discharge the receiver.

The contract is not a dealing with an heir for his expectancy; it is not reversionary, but immediate. A present personal security cannot be vitiated by the provision of a future auxiliary fund, when the grantor shall obtain by possession. At least the judgment is valid; it was never pretended that a judgment is void because the person against whom it has been entered happens to be an expectant heir. The principles established by *Gowland v. De Faria* (17 Ves. 20), and the cases of that class, are confined to sales, and have never been extended to mere securities. The principle of those decisions only imposes an obligation to prove the fairness of the transaction; the plaintiff has given that proof. In all those instances, the whole contract has been rescinded; but here only part of the property assigned was reversionary; can the court rescind the whole contract, in order to protect a part of the property? At the utmost, the Duke can be relieved against the deed only on payment of principal, interest, and costs. If ever the court would interpose by the appointment of a receiver before a decree, it is in a case like this, in which the owner of the estate, who contends that he possesses no power of alienation, has undertaken to [131] alien it, and has given possession to judgment creditors; and here denying his right to grant an authority to cut timber, has pledged himself, by an appeal from the judgment of the Vice-Chancellor, to assert that right.

The deeds under which the incumbrancers prior to the Plaintiff claim, provide for them the same remedies by sale of timber and otherwise, to which the Plaintiff is

entitled, and no objection therefore arises from those benefits reserved by the Plaintiff's annuity-deed to persons not parties to it, for whom they were already secured.

The licence to cut timber gives the same right as if the term had been expressly created without impeachment of waste. At common law a lessee for years was entitled to commit waste; since the statute of *Marlebridge*, which restrains his right, the proper mode of exempting him from the restriction in the statute, is a licence.<sup>(1)</sup> In *Comyn's Digest* (*Waste* (c. 5)) it is distinctly stated, on the authority of a case in *W. Jones* (*Bray v. Tracy*, *W. Jones*, 51. See *Nudigate's case*, *Moor*, 72 *Dal.* 72, and *Gill v. Pindor*, *Cary*, 90), that "if tenant for life without impeachment, leases for years, waste does not lie against the lessee for years; for his estate is derived from him who was dispunishable."

[132] The *Lord Chancellor* [Eldon]. The question whether the Duke can alien *Blenheim* House, must be the same at law and in equity. When I found that judgment creditors had extended it by *elegits*, I felt a difficulty in denying a like relief to equitable creditors. It may be a question whether those who assert that there is neither legal nor equitable right to take possession of this property, should not make application to the Court which has issued those executions? but while courts of law hold, that *Blenheim* House may be taken on legal execution, courts of equity cannot consistently hold, that it is not to be taken on equitable execution. With respect to waste, the first Duke of *Marlborough* was tenant for life, expressly without impeachment of waste; and it would be very difficult to contend that those who succeed him, being tenants in tail, have a less right; but the power of alienation over this estate must depend on the legal construction of the acts of parliament, and ought to be determined in a court of law. On the policy of those acts, this must be argued as a case in which the legislature, intending wholly to prevent alienation, has forbidden some modes of alienation, and made no mention of others. That is a singularity in this question.

*April 8.* The *Lord Chancellor* [Eldon]. If this case is to be decided on that policy, which is acknowledged only in courts of equity, the policy extending a peculiar protection to heirs, it is purely a question of equity; if, on the other hand, it is to be decided on the construction of the acts of parliament, and it is insisted that under that construction no creditors can lay hold of *Blenheim* House, even during the [133] life of the Duke, so as to exclude him, and prevent his excluding them if he thinks proper, that is a legal question; and the difficulty under which the Duke there labours, is, that the case is presented to me, when two judgment creditors, by virtue of their judgments, have taken possession of the house and park.

No motion is made in the cause to which the Attorney-General is a party, but the point at issue is simply this, whether I ought to discharge the receiver? That depends first, on the question whether he ought to have been appointed, regard being had to the nature of the plaintiff's claim and the nature of the Duke's estate? If the nature of the estate is to be considered as to the question whether an equitable execution can be levied, if I may use that expression, against the house and park, that may be properly argued here on principles peculiar to a court of equity; but the question on the meaning of the acts of parliament is a legal question, and I have no concern with that except to take the opinion of a court of law, unless there are equitable grounds for protecting the Duke, not as heir apparent, but as Duke of *Marlborough*. The construction of the acts must be the same in courts of law and equity, but there may be a peculiar principle which this Court will apply to the acts, though it agrees in the construction with the court of law.

The point at law arises on this very deed; for the question would be, whether any estate passed at law by virtue of the demise? If it is determinable with the Duke's life, still the point would arise, because it is contended that the Duke cannot exclude himself from the possession of the estate. The question is, whether these statutes, by imposing express restraints on alienation, have destroyed all the implied incidents of the [134] life-estate? It has been insisted before me, that the Duke could not, by his own act put into possession of these estates, any person whom he could not remove at his pleasure.—A strong proposition.

It is argued also, that the receiver ought to be discharged, because if this were the case of an ordinary tenant for life, not under the restraints which affect the Duke, the deed is such as this Court would not enforce. There is another view in

which I put it, that if the receiver is appointed at all, it must be because *Eden* or the Plaintiff (which is the same thing), has an estate created for 500 years, if the Duke should so long live; but if, according to the true intent and meaning of the acts, the Duke could not demise the estates, as by this deed he has attempted to demise them, his incapacity must exist at law, as well as in equity, and ought to be established before the receiver is discharged.

It has been decided in this court, that the grantor of an annuity void by the annuity act, may come here, and have the annuity deed delivered up, without repaying the consideration-money, though that is recoverable at law; (9) but he cannot obtain relief on those terms, after he has, by his bill or answer, submitted to repay the consideration, as in Doctor *Battine's* case; the annuitant then is entitled to be repaid, not under his judgment, but under the grantor's submission.

When this case originally came before me, I collected that the annuity was granted to the Plaintiff for the life of the Duke of *Marlborough*, and could not be charged on the estate of the late Duke, of which he was tenant in tail, so as to enforce immediate payment [135] out of *Blenheim* House, but might be so charged on *White Knights*. Accordingly, the annuity is granted to issue out of *White Knights*, from the date of the deed, and out of *Blenheim* House from the death of the late duke. It was stated to me, according to the uncontroverted fact, that two creditors had, under *elegits*, extended moieties of *Blenheim* House and Park; and were then in possession; the question then made was, whether this annuity could be considered as well charged on the different subjects on which the deed purported to charge it? Independently on the effect of other parts of the instruments, and of the acts of parliament, it is impossible to say, that it could not be charged on *White Knights* immediately, and on *Blenheim* House, from the death of the late Duke, unless prevented by the principle of policy applied by this court to persons in the situation of expectant heirs. The question was in some measure discussed, whether the Duke of *Marlborough* could charge the property with an annuity for his life?

I considered it thus; the acts had made the first Duke tenant for life, without impeachment of waste, and the succeeding Dukes tenants in tail (I am aware of the difficulties in reference to tenancy by curtesy and in dower), and had expressly restrained the Duke from granting leases beyond twenty-one years, and expressly excluded from that power, *Blenheim* House and the Park of *Woodstock*. (2) The first Duke, being tenant for [136] life without impeachment of waste, it was clear, independently on the question of equitable waste, might cut timber; and it was difficult to contend that a tenant in tail under the act, had not equal powers with a tenant for life without impeachment of waste; it was clear too, that unless there was something in the act which required me to put on it a construction different from that which prevails in the ordinary cases of settlements of great estates, the leasing power in which, and the exclusion of the mansion-house and park, are almost in words embodied in this act, it would be quite a new idea that, because the tenants for life could not make a lease to bind those who succeed them, except in the terms prescribed, and could not lease the mansion-house or other excluded places, beyond their own lives, it was to be contended, from an instrument of such a nature, that the rights which a tenant for life had, as incident to his estate, were not existing, though not affected by the terms of the instrument. The ordinary rules are applicable to estates granted by the crown itself, for the maintenance of dignities, with reversion in the crown, which therefore cannot be barred. I never heard that persons to whom such grants have been made, have not, during their lives, the usual incidents to their estates; or that their creditors could not take them in execution. It had escaped me if the pension-act, which I read, bore on this question. When, therefore, it has been argued, not only that we are to look to, the policy of this court with regard to expectant heirs, but that these acts are [137] to be construed at law and in equity, with reference to a peculiar purpose of the legislature, that is a question the determination of which, I have considered, must probably be the same at law and in equity; and if the present motion is to turn on the point, whether the Duke of *Marlborough* can grant these incumbrances by virtue of his estate, supposing it to be an estate for life without impeachment of waste, or whether the incidents to an estate for life are taken away, as well as the other restraints imposed, it would be the duty of this court first to hear the decision of a court of law. If that question was decided, another circumstance requiring

observation is, the difficulty attending the policy of the acts (in addition to the protection with which we surround expectant heirs in this court), on the argument that the legislature in passing them, contemplated restraints beyond that variety which they have specified; that, the legislature having considered what acts tenants in tail might, and what they might not, perform, and therefore what restraints should be imposed, and having expressly imposed some restraints, the court is called on to say, what restraints are to be implied, from statutes thus expressly imposing some, and not imposing others. On that question I shall observe only, that it furnishes a great deal of argument.

Another point requires more consideration; namely, whether, without advertising to the acts of parliament, this is a case in which the court should have granted a receiver? The rule I take to be, that the court will on motion appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior estates: in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceedings to obtain possession, [138] if they think proper; (3) and with regard to persons having prior equitable estates, the court takes care in appointing a receiver not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers; permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors. Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill, will be given when a decree is pronounced, the Court will not expose parties claiming that relief, to the danger of losing the rents by not appointing a receiver of an estate, on which it is admitted they cannot enter. (4) The question then will be, whether, considering the provisions of this deed, the Court, in the present stage of the cause, is to interpose by the appointment of a receiver? That may be put thus, whether it is sufficiently clear that the Court will, on the hearing, lend its aid to a plaintiff such as the present?

The grant of the annuity first recognizes in the Duke, then Marquess of *Blandford*, the character to which this Court applies, what it calls its policy, that is, the [139] character of eldest son and heir at law. Beyond doubt he is dealing for his expectancy and reversion, because he is dealing for what the legislature endeavoured to annex to the dignities of which he was expectant heir. Feeling, as I profess to feel, that in many cases those who obtain relief from their annuities, have really taken as much advantage of the annuitants as those annuitants have taken of them, I must still admit it to be clearly established, that, if a person has dealt with an heir apparent, for interests of which he is not in present possession, this court extends to the heir the benefit of this principle, with reference to those so dealing with him, that it does not rest on him to shew that the bargain was unreasonable and improvident, but on them to shew that it was reasonable. (5) The mere fact that [140] the annuity was bought at six years' purchase, cannot render the grant improvident: many annuities purchased [141] at that price, have not been set aside. Whatever may be the estimated value in the tables, where, I understand, [142] fifteen years' purchase are allowed, I believe that six years have been considered. to use an expression which, [143] though it should never have come into this court, cannot now be thrown out of it, as the market-price of an annuity. (See 5 *Ves.* 616; 6 *Ves.* 274.)

According to the decisions in this court, I do not think that years make much difference in the protection afforded to an expectant heir. (*Wiseman v. Beak*, 2 *Vern.* 121; 2 *Freem.* 111. *Barney v. Tyson*, 2 *Vent.* 359. *Twisleton v. Griffith*, 1 *P. W.* 310. *Gould v. Oakden*, 4 *Bro. P. C.* ed. *Toml.* 198; *Wightw.* 28, and the judgment of Lord *Nottingham* (see note 5).)

The Duke, in his answer, has offered to repay the consideration money, but I think that I must now look at the case as if the Plaintiff declined to receive it. If there is a question whether the Duke has not the incidents belonging to an estate for life, that arises precisely under this deed, because, if he has not, the demise and [144] charge are bad; if he has, independently on the other objections, they are good.

On the former occasion I determined not to appoint a receiver of the pension, because the appointment would have been useless. The pension is payable only into the hands of the Duke, and the receipt of the receiver would not be a sufficient discharge. If the policy of these acts operates to the extent which has been con-



tended for, it would be impossible for the annuitant to put in execution the power of distress, against any part of the property within their protection.

With reference to heirs apparent dealing for their expectancies, it is too late to urge in this court, that the grantee may insure or omit to insure the grantor's life; Lord *Thurlow* in one case said, that insurance might now be made with so much ease and certainty, that he would always pay attention to the circumstance, whether it was to be made at the expense of the party granting the annuity. Here it is to be made at the Duke's expense; at least in case, by his leaving the country, or other acts, it becomes necessary to pay a larger premium than if he appeared personally at the insurance-offices, those increased expenses are to be sustained by him.

If the Court is to consider whether the Plaintiff can take timber by virtue of the demise and covenant, a considerable question will arise; but the doctrine stated from *Comyns's Digest* is very material; because the question would be, whether, if the estate of the Marquess of *Blandford* was not subject to impeachment of waste, and he demised for years not expressly declaring that the lessee should not be subject to impeachment of waste, but with a declaration of trust, amounting to a [145] licence to fell timber, the lessee would be authorised to fell? (6) But the doctrine of that case is to be observed [146] on with a distinction; for this question must be considered with reference to the peculiar estate of the Duke [147] of *Marlborough*, and to what might raise a doubt between a future Marquess of *Blandford* on the subject of [148] felling timber, the Duke being not tenant for life, but tenant in tail, subject to such restraints as the policy [149] of the acts may be understood to impose on him; and with this distinction too, that *White Knights* is granted, [150] as it is held, not subject to impeachment of waste. I think it due to the argument to say, that if the policy [151] of the acts raises no objection, much of the difficulty in my mind is removed.

[152] None of the previous annuitants are parties to this deed; and this, therefore, is not the instrument that can inform the Court who ought to be the receiver. If Mr. [153] *Withy* is receiver under the deed, he will be bound to satisfy all the annuitants, according to the trusts of the deed; whereas if a receiver is appointed in the Master's Office, the Master will have the opportunity of declaring who should or should not be paid. A receiver under the deed, must act according to the terms of the deed; a receiver appointed by the Court, acts according to the determination of the Master on the priorities of the annuitants; and the fact that such a question is to be submitted to the Master, deserves regard, when we are considering whether a receiver should be appointed.

The covenants for title are not to be considered, in that view only, by a court of equity; because, when the Duke of *Marlborough* granted this charge on property, with respect to part of which, it was doubtful whether he could, and with respect to part clear, under the acts, that he could not, charge it, to make him enter into absolute covenants, as if he had been owner in fee simple, is a circumstance which a court of equity cannot overlook, considering the Duke's liability to answer in damages, the breach of these impossible engagements, and the extent of his previous incumbrances. If there had been an arrear of the annuity, *White Knights* might have been sold at the end of three months; a right of entry for perception of rents and profits accrues at the end of twenty-one days; after six months a receiver is to be appointed, not removeable; if he ceases to act another may be substituted, without the concurrence of the Duke, at an expense not exceeding one shilling in the pound, on the amount of receipts: if that means, on the rents of all the estates, the charge would be equal to five or six times the amount of the annuity which the deed was to secure.

It has been argued that in this case it cannot indeed be denied that the Duke has been dealing for his ex-[154]-pectations, and is clothed with the character of an expectant heir; but that it is a present grant of an annuity, charged not immediately on estates in expectation, but in part on estates in possession.

The case has a singularity in that respect; but the grantor, appearing on the instrument, to be in the situation of an expectant heir, and in a situation in which his personal security is scarcely worth having, and the bulk of the securities being expectant property, I should certainly hesitate long before I lay it down as a principle, that if an heir apparent, dealing substantially for his expectations, is dealing also for a present obligation, which it is hardly possible that he should discharge,

or throwing in a present possession worth but a small proportion of the whole, he is not entitled to the protection given to heirs apparent, dealing for their expectations. Such a proposition would lead to most enormous mischief and go far to destroy the principle itself.

Under these circumstances, remembering on the one hand, the nature of the grant, and by whom it is made, and not forgetting on the other hand, that all parties are entitled to the utmost judicial consideration, it appears to me very doubtful whether I can support the receiver. Certainly, until the decree, I shall go no farther; but on that point I reserve final decision.

April 29. The Lord Chancellor [Eldon]. The ground of the first application was simply this, that the estates were in the hands of judgment creditors, and that the Plaintiff although he had an interest, which if it had been a legal estate, would have entitled him to [155] eject those creditors, could not by proceeding at law, obtain possession, and therefore was in the ordinary situation of a creditor with an equitable security, applying to this Court in order to have execution, if I may use that word, given here; and if the case is clear, there is no doubt that the Court will, on motion, grant a receiver, without prejudice to prior incumbrancers. The circumstances of the principal part of this property with reference to the effect of certain acts of parliament, I certainly did not much take into consideration; because finding that judgment creditors were in possession of *Blenheim House* and *Woodstock Park*, I thought it extremely clear that if they could have execution, equitable creditors must be entitled to a remedy, against the property; on that point I shall say only that if this Court is ever to decide the question, whether, let the Duke of *Marlborough* have what right he may to the timber, his estate does not include all the incidents of a life estate with regard to other persons, that question should be addressed in the first instance to a court of law.

The ground of the application to discharge the receiver is quite distinct. Whatever may be the principle of the protection, if any, given to the *Blenheim* estate, I apprehend that it would not extend to *Marlborough House* and *White Knights*; for the reasons before assigned, I do not see how creditors can obtain the pension; but it is now contended, with regard to all the property, supposing it of the same nature, that the receiver ought not to be appointed before decree. The order for a receiver in this case does not rest on the same ground as the order in Doctor *Battine's* case. There the application for a receiver was made by an annuitant; the receiver was appointed; Doctor *Battine* afterwards filed a bill, stating that the annuity deed was [156] void, the memorial being defective (I must take it for granted in this case that the memorial is good; since no objection has been suggested), and by the prayer of his bill, enabled the Court to say, what it could not otherwise have said, that the original purchase-money of the annuity was a lien on the estate, even if the annuity was void. (7)

[157] It has been decided here, first by Lord *Loughborough* that since courts of law have held (and I remember when it was a subject of great doubt), that if an annuity is bad, the annuitant may recover what he paid, deducting what he has received. (8) though the principle of this Court is not to give relief to those who will not do equity, yet on a bill by the grantor to have an annuity deed delivered up as void under the statute, he is entitled to that relief without accounting for the consideration paid for the annuity, leaving the annuitant to proceed at law. (9) Doctor *Battine*, in the case to which [158] I before alluded, took himself out of that rule by his bill. The Duke of *Marlborough* has here by his answer, [159] offered to take the account on the basis of payment and receipt; but I wish to see the answer in order to know [160] whether he has so submitted as to make the price of the annuity a charge on the estate or only a personal [161] charge on himself; and I reserve my opinion on the other parts of the case till I have seen the answer; be-[162]-cause, if the submission authorises me to fix the price as a charge on the estate, no objection can arise to [163] suffering the estate to remain in the hands of the receiver, till the demand so shaped has been satisfied. If the submission does not charge the estate, the question will be, whether this deed is so oppressive that a court of equity will not, in the first instance, interfere in its aid? It is now the practice of every day, to appoint a receiver on motion; but that practice may not be applied where there is fair matter of doubt, having regard to the fact that the grantor is within the privilege attending the character of heir expectant (as to which age makes

no difference), and having regard to the comprehension of the deed with respect to the subjects of the grant, and to all its provisions, whether the deed may not be considered, as in its nature so oppressive, that, aided by the policy which belongs to heirs expectant, the Court should not in the first instance say, that if the Plaintiff is to have execution, it must be by decree. I am aware that during my whole time considerable doubt has been entertained, whether that policy with regard to expectant heirs, ought to have been adopted; and although Lord *Thurlow* repeatedly laid it down, that this Court does shield heirs expectant to the extent of declaring a bargain oppressive in their case, which would not be so in other cases, and imposes an obligation on the parties dealing with them to show that the bargain was fair, yet he seldom applied that doctrine without complaining that he was deserting the principle itself, because the parties dealing with the heir expectant insured themselves against that practice, and therefore the heir made a worse bargain; but he certainly, like his predecessors, adhered to the doctrine, though not very ancient. It is not the duty of a Judge in equity to vary rules, or to say that rules are not to be considered as fully settled here as in a court of law.

[164] I desire to be understood as expressing no opinion with respect to the incidents belonging to the estate of the Duke of *Marlborough*, or his right to fell timber; but confine myself simply to the question, whether, if this were the property of any other heir expectant, the Court would, in the present stage of the cause, grant a receiver.

May 27. On this day the question was argued whether the grant of the annuity was void under the annuity-act (17 *Geo. 3, c. 26*).

Mr. *Wray* and Mr. *Hampson* for the Duke of *Marlborough*. The memorial is insufficient in not specifying the amount deducted from the consideration, for the costs of preparing the securities. The policy of the act requires that the amount actually received shall appear on the memorial. *Bolton v. Williams* (2 *Ves. Jun.* 138; 4 *Bro. C. C.* 297), *Fenner v. Evans* (1 *T. R.* 267), *Broomhead v. Eyre* (5 *T. R.* 597). The retainer of these expenses in exoneration of the grantee, is a part of the original agreement for the grant of the annuity, and therefore a deduction from the actual amount of the consideration, not an application of the consideration in payment of a pre-existing debt: in that respect this case is distinguishable from *Monys v. Leake* (8 *T. R.* 411).

Mr. *Hart* for the plaintiff. The principle on which Lord *Rosslyn* decided the *Duke of Bolton v. Williams* was, that, *prima facie*, the [165] purchaser was bound to pay the expense of preparing the deeds, as the securities of his title; and that payment by the grantor was an effectual deduction from the price of the annuity. The soundness of that principle is questionable; the expense of mortgages is always defrayed by the mortgagor. *Monys v. Leake* decides this case in terms.

The Lord Chancellor [Eldon]. The last case seems to me decisive of the present, if an affidavit can be made that the Duke received the whole consideration money. Lord *Kenyon*'s earlier decisions followed Lord *Loughborough*'s first decision; and I believe that, as has been suggested, Lord *Loughborough* had a notion that the grantees ought to pay the expenses. The latter decision of Lord *Kenyon*, who seems desirous to retreat from his former doctrine, proceeds expressly on this fact, that the whole money was paid to the grantor, and that out of it he paid the expenses of preparing the securities, as expenses of his annuity; but Lord *Kenyon*'s reasoning does not proceed to this extent, that if payment of the difference only, deducting the charge, had been made, he would have supported that; though I do not see how he could have stopped.

June 10. The Lord Chancellor [Eldon]. The principle on which the Court appoints a receiver, I may state to be this, that where a plaintiff, in his bill, represents that he has only an equitable estate, which, consequently, does not entitle him to recover at law, if it be clear that he has that equitable estate, on which he may recover in equity, the Court will appoint a receiver, not disturbing prior beneficial interests. It is now insisted that the receiver should be discharged, on the [166] ground that this deed is such as a court of equity will not enforce: not by decree on hearing; *a fortiori* not on motion. The validity of the memorial is also questioned; and it is clear that, without a good memorial, this deed, as an annuity-deed, would be void; the rule of the Court being settled that such a deed, if not good as an annuity-deed, gives no lien on the estate for the price paid for the annuity, although that may be

recovered at law, accounting for what has been received. (*Duke of Bolton v. Williams*, 2 Ves. Jun. 142, 156. *Jones v. Harris*, 9 Ves. 496. *Ex parte Wright*, 19 Ves. 255. *Angell v. Hadden*, 2 Merr. 169. *Vide 3 Swans*. 157.)

The case therefore resolves itself into these questions, whether the memorial is good? and if it is, whether this deed is so oppressive in its nature, that the Court will not act on it? I think that the objections to the memorial cannot be sustained. I must, therefore, take this to be a valid annuity-deed, and the question is, will this Court refuse to act on it, considering it as an oppressive deed, and recollecting that the Duke executed it in the situation of an heir apparent dealing for his expectations? It strikes me as, in some instances, extremely oppressive, but then we return exactly to the same result. No one can come into a court of equity, to be relieved against an oppressive deed, even in the character of heir apparent dealing for his expectations, except on tender of the purchase-money and interest; and when the Duke attacks this deed, not as invalid under the annuity-act, but as evidence of a bargain which ought not to have been made with an heir apparent, he cannot be heard on any other terms. The consequence is, that till that amount is offered, and either accepted or refused, the question whether the receiver shall be discharged is pre-[167]-mature. To the extent of that amount, considering this as a mere deed, not as an annuity-deed, I think there is a lien.

August 5. A tender of the amount due to the Plaintiff having been accepted, the judgment of the Court was now prayed.

The Lord Chancellor [Eldon]. I am of opinion that the receiver must be discharged. If the Duke had tendered, and the Plaintiff refused to accept, what would be found due on an account taken of the accruing payments of the annuity on one side, and the price and interest on the other, I think that would authorise me to discharge the receiver.

Mr. Hart asked for costs, but the Lord Chancellor refused them.

August 9. Mr. Tinney for three Defendants, creditors of the Duke, applied to be heard against the order for discharging the receiver, insisting that two of the Defendants had annuities prior to the Plaintiff's, and were, therefore, more interested than the Plaintiff in the appointment of a receiver; that they had also the legal estate, of the advantage of which they had been deprived by the order for a receiver, and as a substitute, they were entitled to the benefit of that order; that the direction to the Master to state priorities, was founded on the prayer of the bill: at least that the Defendants were entitled to a like tender with the Plaintiff.

[168] The Lord Chancellor [Eldon]. I apprehend that with the right of the Plaintiff to have the receiver, must fall the rights of the other parties. It would be most extraordinary, if, because a receiver has been appointed on behalf of the Plaintiff, any Defendant is entitled to have a receiver appointed on his behalf. My decided opinion is, that the order for a receiver must be discharged, and that all falls together. The Defendants may file a bill, but the appointment of a receiver would not have affected their legal estate.

The order, dated the 9th of August 1819, after stating the substance of the bill, the order of the 5th of March 1818, the suggestion in the answer of the Duke of the invalidity of the annuity, and the offer to pay what remained due to the Plaintiff, proceeded thus; "That it appears by the affidavit of *R. Broome*, that he called at the house of *Mr. R. Withy*, the solicitor for the Plaintiff in this cause, on the 19th day of June 1819, and tendered to him the sum of £600 in bank of England notes, in satisfaction of what remained due to the said Plaintiff, in pursuance of the offer made by the said Defendant in his answer to the Plaintiff's bill filed in this cause, which he the said *R. B.* believes, reckoning interest at £5 per cent. up to the 21st day of June 1819, amounted to £572, 17s. 3d., and that after some conversation with the said *R. B.*, in which he the said *R. B.* insisted that such tender was made upon the terms before mentioned, the said *R. W.* accepted the said sum of £600. It was therefore prayed that the bill filed in this cause, may be dismissed upon such terms as to costs, to be taxed by the Master, as this Court shall direct; or otherwise, that the sum of £600 [169] paid to and accepted by the solicitor on the 19th day of June last, be returned to the said Defendant, or his solicitor, with interest thereon, from the time the Plaintiff received the same, up to the time of repayment, at and after the rate of £5 per centum per annum. Whereupon, and upon hearing, &c., His Lordship doth order. that the order bearing date the 5th day of March 1818, appointing

*E. R. Mores* receiver of the rents and profits of the estates in question in this cause, be discharged." (Reg. Lib. A. 1818, fol. 1939.)

Nov. 12. Mr. *Hart*, for the Plaintiff, proposed to vary the order discharging the receiver, by inserting a declaration, that the sum tendered by the Duke was accepted, without prejudice to any question between the parties.

Mr. *Wray* for the Duke, insisted that the sum must be understood to be accepted, as it was tendered by the answer, in satisfaction of the Plaintiff's claim.

The Lord Chancellor [Eldon]. I can make no declaration that the money was received without prejudice, though it was my intention to have said something on that subject. I meant that the receipt should, in this sense, be without prejudice, namely, that the receipt should itself be a fact, which would on the hearing raise a question in the cause, which would not have arisen if the receipt had not passed. I did not mean that the fact of the receipt should not be considered, when the merits of the case came to be discussed on the hearing. I have no objection to the Plaintiffs repaying the money, and reinstating the cause in precisely the same situation as [170] before the receipt, the receiver being restored, subject to the question whether he should be continued. The receiver must have his costs.

(1) The words of the statute are, "Item firmarii tempore firmarum suarum, vastum vel exilium non facient de boscis, domibus vel hominibus, nec de aliquibus ad tenementa quæ habent ad firmam spectantibus, nisi specialem inde habuerint concessionem, sive conventionis mentionem, adeo quod hoc facere possint," c. 23. *Vide post*, note (6).

(2) "Be it further enacted, &c. That the said Duke of *Marlborough*, and after his decease, the said Duchess of *Marlborough*, shall have full power and authority, by deed indented, to make any lease or leases in possession, of all or any of the said manors, hundred, messuages, lands, tenements, and hereditaments aforesaid (other than and except the house called *Blenheim*, and the park of *Woodstock*), for any number of years, not exceeding one-and-twenty years, or for any number of years determinable upon one, two, or three lives, reserving the best and most improved rent that can then be had for the same, without taking any fine." 5 *Anne*, c. 3, s. 4.

(3) But they must first obtain the leave of the Court, *Bryan v. Cormick*, 1 *Cox*, 422. *Anon.* 6 *Ves.* 287. *Angel v. Smith*, 9 *Ves.* 335. *Brooks v. Greathead*, 1 *Jac. & Walk.* 176. *Gresley v. Adderley*, 1 *Swans.* 579.

(4) In this case the receiver was appointed before answer. The earlier instances of the appointment of a receiver before answer seem to have proceeded on the ground of fraud, and danger to the property; *Vann v. Barnett*, 2 *Bro. C. C.* 158. *Hugonin v. Basley*, 13 *Ves.* 105. *Middleton v. Dodswell*, 13 *Ves.* 266. *Lloyd v. Passingham*, 16 *Ves.* 59. *Scott v. Becker*, 4 *Price*, 346; and see *Jervis v. White*, 6 *Ves.* 738; but in later cases the Court has granted that prompt relief to a party possessing a clear equitable title, by analogy to the ejectment of a legal incumbrancer; *Duckworth v. Trafford*, 18 *Ves.* 283. *Metcalfe v. Pulvertoft*, 1 *Ves. & Bea.* 180; and see *Maguire v. Allen*, 1 *Ball & Beat.* 75.

(5) The general result of the cases seems to be, that expectant heirs dealing for their expectancy, are entitled, for mere inadequacy of price, to have the contract rescinded, upon terms of redemption; *Knott v. Hill*, 1 *Vern.* 167; 2 *Vern.* 27; 2 *Ca. in Cha.* 120; 2 *Cox.* 80. *Barney v. Beak*, 2 *Ca. in Cha.* 136. *Batty v. Lloyd*, 1 *Vern.* 141. *Wiseman v. Beake*, 2 *Vern.* 121; 2 *Freem.* 111. *Barney v. Tyson*, 2 *Vent.* 359. *Berney v. Pitt*, 2 *Vern.* 14; 2 *Rep. in Cha.* 396; 1 *P. W.* 312. *Twisleton v. Griffith*, 1 *P. W.* 310. *Dews v. Brandt*, *Sel. Ca. in Cha.* 7; discredited arg. 1 *Bro. C. C.* 7. *Cole v. Gibbons*, 3 *P. W.* 290. *Curwyn v. Milner*, 3 *P. W.* 293, n. *Barnardiston v. Lingood*, 2 *Atk.* 133. *Earl of Chesterfield v. Janssen*, 2 *Ves. Sen.* 125; 1 *Atk.* 301; 1 *Wils.* 286. *Baugh v. Price*, 1 *Wils.* 320. *Gould v. Oakden*, 4 *Bro. P. C.* ed. Toml. 198. *Gwynne v. Heaton*, 1 *Bro. C. C.* 1. *Peacock v. Evans*, 16 *Ves.* 512. *Gowland v. de Faria*, 17 *Ves.* 20, compromised on appeal; *Sugden Law of Vendors*, 231, n. k. *Roche v. O'Brien*, 1 *Ball & Beatty*, 330. *Darley v. Singleton*, *Wightw.* 25. *Bowes v. Heaps*, 3 *Ves. & Bea.* 117; and see *Varnee's case*, 2 *Freem.* 63. *Brooke v. Gally*, 2 *Atk.* 34. *Freeman v. Bishop*, 2 *Atk.* 39; *Barnard.* 15. *Evans v. Cheshire, Belt, Supplement*, 300. *Coles v. Trecothick*, 9 *Ves.* 234, 246, the proof of adequacy lying on the purchaser. *Gowland v. de*

*Faria*, 17 Ves. 20. *Shelly v. Nash*, 3 Madd. 236. *Bernal v. Marquess of Donegal*, 3 Dow. 151.

This doctrine appears to be founded in part on the policy of maintaining parental authority, and preventing the waste of family estates, 1 P. W. 312, 313; 3 P. W. 293; 1 Wils. 323; 2 Ves. Sen. 144, 155, *et seq.*; *Barnard*. 6; 1 Bro. C. C. 9, 10, purposes which the civil law pursued by the *Senatus consultum Macedonianum*, Dig. lib. xiv. tit. 6, and for which, in the earlier periods of our jurisprudence, the court of Star Chamber seems to have assumed penal jurisdiction, see the dictum of Lord Nottingham, *infra*; n. cit. 2 Ves. Sen. 139; and *Hudson's Treatise*; 2 Coll. Jur. 111, and in part on the equity of protecting against the designs of that calculating rapacity which the law constantly discountenances, the distress frequently incident to the owners of profitable reversions and the improvidence with which men are commonly disposed to sacrifice the future to the present. 2 Atk. 135; *Barnard*. 341, 343; 2 Ves. Sen. 149, 155, *et seq.*; 1 Atk. 346, 353; 1 Wils. 323; 3 Ves. & Bea. 119.

The latter principle seems to comprehend every description of persons dealing for a reversionary interest; but it may be doubted whether, the course of decision authorises so extensive a conclusion; and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir. The reversionary interests, the sale of which has been rescinded for mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor, in every case except the following: in *Wiseman v. Beake*. *Cole v. Gibbons* (on the original transaction in which, unconfirmed, Lord Talbot considered the plaintiff entitled to relief), *Barnardiston v. Lingood*, and *Bowes v. Heaps*, they were expectant on the decease of the reversioner's uncle; and, in *Gould v. Oakden*, on the decease of his wife's father. But in all these cases the sale had been transacted while the vendor was in distress. In *Nicholls v. Gould*, 2 Ves. Sen. 422. *Reg. Lib. B.* 1751, fol. 523, Lord Hardwicke refused to rescind the sale of a reversionary interest on the ground of inadequacy of price alone; and see *Griffith v. Spratley*, 1 Cox. 383; 2 Bro. C. C. 179, n. *Montesquieu v. Sandys*, 18 Ves. 302. In *Henley v. Aze*, 2 Bro. C. C. 17, a bill filed to set aside the assignment of a portion of a reversionary interest, expectant on the decease of the plaintiff's uncle, was dismissed on the ground of the adequacy of the consideration; but it appears from the registrar's book, that an inquiry on that subject had been directed by consent. The plaintiff, being entitled under the will of *Robert Henley* to an estate tail, expectant on the decease of his uncle without issue, in estates to be purchased with a fund of £28,245, 9s. 2d. 3 per cent. stock, the produce of other estates sold under an act of parliament, in consideration of an annuity of £200, payable during the joint lives of the plaintiff and his uncle, on 7th April 1773, executed a bond and an assignment of the whole or a sufficient part of the fund for securing to the defendant £6000, payable on the death of the uncle without issue. The uncle died in April 1779, and in April 1780, the bill was filed to set aside the bond and assignment, on paying to the defendant what was a fair price for the grant of the annuity, and the plaintiff obtained an injunction to restrain proceedings on the bond. On 13th March 1781, it was ordered that the plaintiff should, in a week from that time, transfer £1800 3 per cents. to the Accountant-General in trust in the cause, and should be restrained from receiving any part of the £28,245, 9s. 2d. until further order, that the injunction should be continued to the hearing; and that the plaintiff should invest the £28,245, 9s. 2d. in a purchase of lands. On 13th Dec. 1783, upon the application of the defendants, alleging that no proceedings had been had under the order, and that the parties were desirous that the transactions relating to the annuity might be referred to one of the Masters, to state whether the sum of £6000 was a fair price, the plaintiffs consenting, the lords commissioners ordered a reference to inquire and state to the Court, whether the sum of £6000, secured to be paid in manner, and at the time, and upon the contingencies, mentioned in the bond and indenture, was at the time of the grant, a fair price for the annuity, and the injunction was continued until the report. *Reg. Lib. A.* 1783, fol. 107. 28th July 1785. The exception taken by the Plaintiff to the Master's report was overruled. *Reg. Lib. A.* 1784, fol. 701. 10th October 1785, upon the petition of the defendant, the cause was ordered to be set down, on further decisions. *Reg. Lib. A.* 1784, fol. 675. In Hilary Term 1786, the bill was dismissed, 2 Bro. C. C. 17; but no entry of the dismissal appears in the register.

It has been decided that the rule is not applicable to sales of reversionary interests

by auction, *Shelly v. Nash*, 3 *Madd.* 232; and specific performance has been decreed of an agreement by an heir, on the marriage of his daughter, to settle one-third of such real estates as should descend to him at the death of his father. *Hobson v. Trevor*, 2 *P. W.* 191; 10 *Mod.* 507; but see *Carleton v. Leighton*, 3 *Mer.* 667; *Harwood v. Tooke*, cit. 1 *Madd. Princ. and Pract. of Chanc.* 549.

The following note of an early case on this subject (one branch of which has been reported under the names of *Berney v. Pitt*, 1 *P. Wms.* 142), is copied from Lord Nottingham's Manuscripts. *Vide* 1 *Swans.* 83.

"9 Feb. 33 Car. 2, 1680. *Berney* was drawn into several securities, for money to be paid after his father's death, who then was infirm and kept alive by art, by some of which securities he was to pay five for one; and by this means was involved in debt to the value of £50,000 or £60,000; in all which he appeared to be circumvented and beset, most of the money pretended to be borrowed being raised by the delivery of wares at excessive prices in parcels of wine, hemp, cambric, jewels, which could never be sold for a quarter of the price at which they were delivered; but the plaintiff's necessities for money being increased by having his creditors under-hand procured to fall upon him, he was willing to make up money upon any terms, and gave statutes and judgments of great penalties; against which he now prayed relief by bill. 1. I made him pay the principal money borrowed, before I would grant an injunction till hearing. 2. At the hearing, I relieved him against all the rest, notwithstanding he were of full age at the time, for this infamous kind of trade and circumvention ought by all means to be suppressed; the Star Chamber used to punish it, and this Court did always relieve against it. No family can be safe if this be suffered. *Fairclough, Smith, Beak, Mason, Tyson, Pargiter*, were Defendants; but Mr. *George Pitt* prevailed, and the bill against him was dismissed, though he gained above three for one; for it was in the time of the father's health, three years before his death, without any circumvention or practice, and upon express agreement to lose the principal if the son died in the life of his father, which differed it from all the other cases."

(6) "If I lease for life, and afterwards grant to the tenant that he shall not be impeached for waste, he cannot plead that in bar, but shall have an action of covenant." *Fineux*, Chief Justice, 21 *H.* 7, 31, and see *Dalton v. Gill, Cary*, 90. The important question discussed, but not decided, in the text, depends on the nature of the rights enjoyed by the tenant of a particular estate, without impeachment of waste; rights concerning which much difference of opinion has occurred.

By the common law no prohibition of waste could be maintained against a tenant for life or for years, deriving his interest from the act of the lessor, *Reg. Brev. 72*; 21 *H.* 6, 38, 21 *H.* 8, 6, *Bro. Abr. Waste*, 88, 139. *F. N. B.* 55. *Doctor and Student*. l. ii. ch. 1, 2. *Co. Litt.* 54 a; 4 *Co.* 62; 2 *Inst.* 145, 299. *Bacon's Works*, vol. iv. p. 224, that remedy being confined to persons who derived their interest from the act of law, namely, tenant in dower, guardian, and, according to some authorities, tenant by the curtesy.

But it seems that during the continuance of the particular estate, timber on the land demised, was, as annexed to the inheritance, the property of the lessor, or person entitled in remainder. *Co. Litt.* 57 a, n. 2. *Herlakenden's Case*, 4 *Co.* 62. *Paget's Case*, 5 *Co.* 76. *Liffords' Case*, 11 *Co.* 46. *Bowle's Case*, 11 *Co.* 79; 1 *Rol. Rep.* 177; 3 *Lev.* 209, the tenant having a limited interest in it for the enjoyment of its shelter and produce. 10 *H.* 7, 2; *Bro. Abr. Waste*, 143, and the authorities last cited. And timber, therefore, severed from the land by the waste of a tenant for life or years, was, at common law, the property of the owner of the inheritance.

Thus in *Berry v. Heard*, *W. Jones*, 255; *Cro. Car.* 242 (the report of this case in *Palm.* 327, seems imperfect), trees having been felled on an estate demised for years, the majority of the judges of the Court of King's Bench, on an action of trover by the lessor, held that at common law, the lessor might have seized the trees (see the quotation from *Bracton, infra*), and that the statute of *Gloucester* had not deprived him of his common law right, but had added a new optional remedy, by action; and see *Udal v. Udal*, *Aleyn*, 81; 2 *Roll. Abr.* 119, and Lord *Bacon's* elaborate argument on the case of impeachment of waste, in the Exchequer Chamber, *Works*, vol. iv. p. 212-232. Some expressions, however, in *Doctor and Student*, lib. ii. c. 1, appear to imply an opinion, that the property in trees severed by waste, was acquired by the tenant.

The privilege of *estovers* incident by the common law, to the estate of a tenant for life or years, *Bracton*, fol. 217 a. *infra*; *Bro. Abr. Waste*, pl. 89, 112, 130; *Dyer*, 19 b. *Co. Litt.* 41 b, affords a confirmation of the doctrine, that timber severed by waste was not the property of the tenant; the express recognition of a qualified, seems an implied negative of an absolute, right.

The statute of *Marlebridge*, 52 Hen. 3, c. 23. prohibited "*firmarii*" from committing waste, "*nisi specialem inde habuerint concessionem*," under the penalty of restitution to the party, and fine to the king. The statute of *Gloucester*, 6 Ed. 1, c. 5, authorised the issuing a writ of waste against tenants by the curtesy, or in other manner of life, or for years, or tenants in dower, and inflicted on a tenant committing waste, the forfeiture of the place wasted, and treble damages.

It seems, therefore, that before these statutes, a clause declaring a lease for life or years to be without impeachment of waste, might have been in use. *Bowles' Case*, 11 Co. 81 b; and its effect would have been to transfer to the lessee the property in timber severed. *Ibid.* After the statutes the clause became effectual for another purpose, namely, as a licence of the lessor to protect the lessee from the penalties incurred by waste.

This doctrine, however, is opposed by considerable authorities; by the express opinion of Lord *Hardwicke*, that "at common law, the clause, *without impeachment of waste*, only exempted tenant for life from the penalty of the statute, the recovery of treble value and place wasted; not giving the property of the thing wasted"; *Aston v. Aston*, 1 Ves. Sen. 265, and by the very learned and ingenious argument of his illustrious predecessor, already cited, *Bacon's Works*, vol. iv. p. 212-232; but the weight of reasoning and authority seems decidedly with Lord *Coke*: and it is now clearly settled, notwithstanding the doubts which have at different times prevailed, *Fitz. Abr. Waste*, pl. 8, citing 27 H. 6. *Dyer* 184, pl. 63. *St. Leger's Case*, cited *Moor*, 327. *Finch v. Finch*, cited 4 Co. 63 a (probably the same case, see 6 Co. 63). *Herlakenden's Case*, 4 Co. 62. *Abrahall v. Bubb*, 2 Freem. 53; 2 Show. 69; 1 Ves. Sen. 265. *Bishop of London v. Web*, 1 P. W. 528, that since the statutes of *Marlebridge* and *Gloucester*, the clause without impeachment of waste, not merely affords a protection from the penalties which those statutes impose, but authorises a tenant for life or years, to convert to his own use, timber severed from the estate. *Co. Litt.* 220 a. *Bowles Case*, 11 Co. 82 b, 83 b; 1 Roll. Rep. 177; *Hob.* 132. *Secheverel v. Dale*, Poph. 193. *Latch.* 163, 268. *Pyne v. Dor*, 6 T. R. 55; 3 Atk. 216. *Williams v. Williams*, 15 Ves. 425. *Burgess v. Lamb*, 16 Ves. 185. See *Partridge v. Powlett*, Ca. Temp. *Hardwicke*, 254.

The precise effect of that clause is to give "a power to the lessee which will produce an interest in him if he executes his power during the privity of his estate." *Bowles Case*, 11 Co. 79; but it gives a power only, not an interest, until severance, according to the distinction expressed by two of the judges. 1 Roll. Rep. 182, and *Poole's Case*, *Salk.* 368. *Rep. Temp. Holt*, 66; and the reasoning of Lord *Bacon*, *Works*, vol. iv. p. 225; but see *Anon. Mos.* 237, 238.

The doctrine that an action of waste could not be maintained against a tenant for life at common law, has been questioned by a learned writer (*Reeves' History* i. 386, ii. 73, 74, 148, n.) on the authority of a passage in *Bracton*; lib. iv. c. 18, fol. 306 b, but it seems extremely doubtful whether that passage is inconsistent with the doctrine. The general expression *tenens ad vitam suam tantum*, may be understood, construing *secundum subjectam materiam*, of that particular class of tenants for life who were then subject to an action of waste; and it is evident that Lord *Coke* did not understand the words in their larger sense, since he repeatedly cites the passage as an authority for the disputed doctrine. An earlier chapter of *Bracton* contains a remarkable declaration of the right of a tenant for life to reasonable *estovers*, in contradistinction to waste, and the right of the owner of the inheritance to prevent the commission of waste, by personal interference.—"Et eodem modo si quis vastum fecerit vel distructionem in tenemento quod tenet ad vitam suam, in eo quod modum excedit et rationem, cum tantum concedatur ei rationabile *estoverium* et non vastum, facit transgressionem. Et si talis impediatur per aliquem cujus interfuerit, sicut parens vel amicus, ille tenens assisam non habebit. Intentio enim talis liberabit a disseysina, quia in eo quod tenens abutitur male utendo, et debitum usum in modum debitum excedendo, non poterit dicere quod disseysitus est, quia tantum rationabilis usus ei conceditur. Et si per aliquod tempus forte



abusus fuerit ultra modum, talis seysina nulla erit, quia non est seysina quæ trahit ad abusum, sed præsumptio injuriosa. Et ideo causa et intentio liberat impediens; sed hoc per assisam in modum juratæ captam declarari oportebit, scilicet utrum sit ibi vastum vel rationabile estoverium. *Lib. iv. c. 34, fol. 217 a.*

The two following cases on the right of a tenant for life to timber, are extracted from Mr. *Merivale's* notes.

*Wolf v. Hill. Rolls. July 3, 1806. [See 3 Swans. 699 (App.).]*

By deeds, and fine, an estate was limited to the use of trustees and their heirs during the joint lives of *Walter Hill* and *Clarissa* his wife, without impeachment of waste, in trust that the said trustees shall and do, in the first place, by and out of the rents, issues, and profits of the said premises, which shall from time to time come to their or any of their hands, bear, pay, and defray, all expenses and repairs, and all taxes, charges, assessments, and outgoings, relating to the same, or any of them, and, in the next place, upon trust, after such deductions for repairs and other outgoings as aforesaid, by and out of the same rents, issues, and profits, during the joint lives of the said *Walter Hill* and *Clarissa* his wife, to raise the clear yearly sum of £80 by way of pin-money, and pay the same to the separate use of the said *Clarissa Hill*; and, subject and without prejudice to the same yearly sum, to pay the clear residue and surplus of the same rents, issues, and profits, unto the said *Walter Hill* and his assigns, or to authorize and empower him and them to receive and take the same, during the natural lives of himself and the said *Clarissa* his wife, to and for his and their own use and benefit, with remainder to *Walter Hill* and his assigns for his life, without impeachment of waste, with remainders over.

Power to trustees to sell with consent of husband and wife. Money to be laid out in land to the same uses.

*Hill* built a house worth £3000, being an improvement, and cut down timber that sold for £270. He and his wife then consented to sell, and the estate was sold. The timber standing was valued at £350.

*Alexander* doubted his right to either.

A bill was filed, and his Honor was clear that *Hill* was entitled to the £270, and not to the £350.

*Alexander* and *J. L. Williams*, for plaintiff.

*Shadwell* for defendant. (*Countess of Plymouth v. Archer*, 1 Bro. C. C. 159; 16 Ves. 180.)

Sir Samuel Egerton Bridges, Plaintiff, and William Stephens and Caroline his Wife, Defendants. June 20–22, 1816; Feb. 28, 1817.

By settlement made, 12th of November 1785, on the marriage of the Reverend *Edward Timewell Bridges*, and the Defendant Mrs. *Stephens*, then *Caroline Fairfield*, spinster; reciting a mortgage of certain premises therein mentioned, dated the 10th of February 1720, for a term of 1000 years, without impeachment of waste, which had then become vested in *Jemima Bridges* and *William Hammond* as tenants in common; the said *Jemima Bridges* and *William Hammond* assigned to the Plaintiff, and another, one moiety of the premises for the then residue of the term, in trust (immediately from and after the solemnization of the marriage) for *Jemima Bridges*, for so many years of the term as she should happen to live, and after her death, in trust for *E. T. Bridges*, for so many years thereof as he should live, and after their respective deceases, in trust for the Defendant *Caroline*, for so many years thereof as she should live; and after the death of the survivor of the said *Jemima Bridges*, *E. T. Bridges*, and the said Defendant, then in trust for the children of the marriage as therein mentioned; and for want of such issue, in trust for the said *E. T. Bridges*, his executors, &c. (Note: From the statement in the Registrar's book it seems that the settlement contained no express declaration that the successive life estates should not be subject to impeachment of waste.)

The marriage took place, but there was no issue, and *E. T. Bridges* died intestate in 1807, upon whose death his widow the Defendant *Caroline*, took out administration, and by virtue thereof became entitled to the reversionary interest in the term expectant on the death of the survivor of herself and *Jemima Bridges*. On the 11th of May 1808, she offered this reversionary interest for sale in two lots, when the Plaintiff became the purchaser for £2600, of lot 1, which was described

in the particulars as "an undivided moiety of a valuable estate called *Denslead Wood, &c.*, held under mortgage for the remainder of a term of 1000 years, commencing from the 10th of *February* 1720, but subject to the life-interest of two ladies, one in her 80th, the other in her 46th year"; paid the deposit, and signed a memorandum of agreement, whereby he acknowledged himself to have purchased the reversion of the said estate described as lot 1, and agreed to pay the remainder of his money and complete the purchase on having a good title.

In *Hilary* term 1809, the Defendant *Caroline* (the widow) filed a bill for a specific performance. In 1811, *Jemima Bridges* died, whereupon she became entitled, as tenant for life in possession. In *October* 1812, she married the other Defendant, and on the 18th of *May* 1814, filed a bill of revivor and supplement, to which the Plaintiff had appeared and put in his answer but no decree had been made.

The present bill was afterwards filed by the Plaintiff, pending that suit, alledging that the premises of which he so became purchaser were almost all woodland, the value of which depended on the timber thereon, and that if the same were cut down, the land would be of very inconsiderable value, though, while it remained in its present state, the cutting of the underwood afforded a considerable profit to the tenant for life, but that the Defendants, insisting that, under the indenture of the 12th of *November* 1785, the defendant *Caroline* was unimpeachable of waste, and that the Defendants were entitled to cut down and fell timber at their pleasure, had actually felled, and threatened to fell, considerable quantities; therefore praying an injunction from felling, cutting, or grubbing up any timber or other trees, and from committing any other waste on the premises, and offering thereupon, and upon having a good title made, specifically to perform the agreement.

To this bill the Defendants put in an answer, insisting on their right to cut timber, and admitting that they had cut timber accordingly, but in a due and husbandlike manner, and according to the custom of the country.

A motion was now made on the part of the Defendants, to dissolve the injunction, which had been obtained previous to the coming in of the answer. (*Note* : Injunction granted till answer or farther order, Reg. Lib. A, 1815, fol. 742.)

Mr. *Bell* and Mr. *Treslove*, in support of the motion, cited *Speer v. Cawter*, 17 Ves. 216. *Chamberlaine v. Dummer*, 3 Bro. C. C. 549.

Sir *S. Romilly* and Mr. *Garratt*, for the Plaintiff, cited *Farrant v. Lee, Amb.* 105 (see 3 *Wooddeson Lect.* 404, n. f), under the name of *Farrant v. Lovel*, 3 Atk. 723. *Perrot v. Perrot*, 3 Atk. 94. *Powlett v. The Duchess of Bolton*, 3 Ves. 374. *Wickham v. Wickham*, *Coop.* 288.

*February* 28, 1817. "His Lordship doth order, that the injunction granted in this case be dissolved; and his Lordship doth declare that the Defendant *Caroline Stephens*, who is entitled to a present interest for life in the estate comprised in the respective terms mentioned in the pleadings in this cause, is entitled, as between herself and the persons claiming in remainder, to cut down and apply for her own benefit, such timber as is fit and proper to be cut, in the course of a due and husbandlike management of the woods in question; and it is ordered that it be referred to Mr. *Thompson*, one, &c., to inquire what timber upon the premises in the pleadings mentioned, is now fit and proper to be cut and felled in the course of a due and husbandlike management of the said woods; and it is ordered that the said Master do state the same, with his opinion thereon, to the Court; and after the said Master shall have made his report, such further order shall be made as shall be just."

Reg. Lib. A. 1816, fol. 757.

(*Note* : Since this note was prepared, the editor has been honoured with a communication of Lord *Nottingham's* manuscripts (*vide* 2 *Swans.* 83); they contain a report of *Abrahall v. Bubb*, (11) and of an earlier case, *Skelton v. Skelton*, (10) which will be found particularly valuable. *Freeman*, in his report of the former, seems to have confounded the two cases.)

(7) *Bazzelgetti v. Battine. Battine v. Bazzelgetti.*

The bill in the first cause stated, a grant of an annuity in *July* 1796, by the plaintiff to the defendant, and an agreement that as soon as the defendant should become possessed of certain estates of which he was then in expectation, he should

convey them for securing the payment of the annuity, and that the defendant had become entitled to the estates, and was in possession of them, but refused to complete the security, and concealed the particulars of the estates; a demurrer and plea having been over-ruled the defendant filed an answer, admitting the annuity to be in arrear, and that by the death of his father in Nov. 1812, he became entitled to certain freehold estates, the particulars of which he set forth in a schedule, and submitting whether the plaintiff was entitled to the relief sought. A receiver having been appointed (Reg. Lib. A. 1815, fol. 901), the defendant filed a cross bill, alleging that the grant of the annuity was void, and praying that upon payment of the price of the annuity and interest, after deduction of the past payments, the securities might be delivered up. Upon a motion by the plaintiff in the cross cause to discharge the receiver, the Lord Chancellor (4th Feb. 1818), expressed an opinion, that even admitting the validity of the objections to the annuity, the frame of Dr. Battine's bill, which prayed the delivery of the securities, not absolutely, but on terms of redemption, gave to the court a jurisdiction which it would not otherwise have had, and entitled the annuitant to continue the receiver on the estates, for the purpose of working out the payment.

On 19th Feb. 1821, these causes were heard before Chief Baron Richards, sitting for the Master of the Rolls, when the grant of the annuity was declared void, and the bill in the first cause dismissed.

(8) *Shove v. Webb*, 1 T. R. 732. *Hicks v. Hicks*, 3 East, 12. *Scurfield v. Gowland*, 6 East, 241. *Waters v. Sir William Mansell*, 3 Taunt. 56; and see *Stratton v. Rastall*, 2 T. R. 366, and 19 Ves. 132, 133. Criticisms on these judgments, by Lord Eldon, may be found in 7 Ves. 23, 9 Ves. 492, and by Sir James Mansfield, in 1 Taunt. 522. Courts of law cannot order annuity deeds void under the statute to be delivered up; but they set aside the warrant of attorney and judgment, over which they possess a summary authority, *Dalmar v. Barnard*, 7 T. R. 248. *Appleby v. Smith*, 3 Anstr. 865. *Steelman v. Purchase*, 6 T. R. 737. *Ex parte Ansell*, 1 Bos. & Pull. 66, n.; and see *Crauford v. Caines*, 2 H. Bl. 438; 2 Ves. Jun. 154; 7 Ves. 18; 10 Ves. 218.

(9) The principle of relief is, that the annuitant has no right to retain deeds which are void, but that the grantor is interested in obtaining the delivery of them, because though void, they may be used to his prejudice, and form, in the technical phrase, a cloud on some of his title. Being void for all purposes, the deeds cannot, as evidence of the contract under which they were executed, impose on the delivery terms of redemption, or create a lien on the property. The following are the leading cases from which the doctrine is to be collected.

Duke of Bolton v. Williams, 4 Bro. C. C. 297; 2 Ves. Jun. 138. *Byne v. Vivian*, 5 Ves. 604. *Bromley v. Holland*, 7 Ves. 3; *Coop.* 9. *Jones v. Harris*, 9 Ves. 496. *Underhill v. Horwood*, 10 Ves. 218. *Ex parte Wright*, 19 Ves. 255. *Angel v. Hadden*, 2 Mer. 169. If the grantor, by his bill or answer, submits to account for the price paid by the annuity, the payments in respect of the annuity, will be set off: *Bromley v. Holland*, *ubi supra*, *Hoffman v. Cooke*, 5 Ves. 623. If those payments exceed the amount of the price of the annuity with interest, the grantee must refund the balance. *Byne v. Vivian*, 5 Ves. 604. *Holbrook v. Sharpey*, 19 Ves. 131, but see 7 Ves. 24.

On the general jurisdiction of courts of equity to compel the delivery of void instruments, which has been the subject of contradictory opinions, and even decisions, see, in addition to the preceding cases, *Ryan v. Mackmath*, 3 Bro. C. C. 15. *Pierce v. Webb*, 3 Bro. C. C. ed. Bell, 16, n. *Newman v. Milner*, 2 Ves. Jun. 483. *Franco v. Bolton*, 3 Ves. 368 (with the criticism of Lord Eldon, 7 Ves. 19). *Mason v. Gardner*, 4 Bro. C. C. 436. *Sowerby v. Warder*, 2 Cox. 264. *Scott v. Nesbit*, 2 Bro. C. C. 640; 2 Cox. 183. *Lisle v. Liddel*, 3 Anstr. 649. *Duff v. Atkinson*, 8 Ves. 577. *Jackman v. Mitchell*, 13 Ves. 581. *Hayward v. Dimsdale*, 17 Ves. 111. *Jones v. Frost*, 3 Madd. 1; *Redesdale* on Pleadings, 104, n. c.; 13 Ves. 298; 1 V. & B. 244. *Ex parte Scrivener*, 3 Ves. & Bea. 14.

In *Bromley v. Holland*, Lord Eldon remarks, that "in the case of *Hanington v. Du Chastel*, where Lord Thurlow granted an injunction against a bond for the purchase of an office, taking notice of the alteration of the law of pleading, he is made to intimate, that the jurisdiction of this court might not be necessary, if the defence could be made at law. That I take to be a mistake; for I am quite sure,

Lord *Thurlow's* opinion was, that courts of law, properly, if you please, taking upon themselves to do that by new forms of pleading, which they had never before done, as dispensing with *profert*, or permitting the averment of a consideration not in the body of the deed, could not destroy the ancient jurisdiction of this court in matters of that nature. That unquestionably was his opinion." 7 *Ves.* 19. Mr. *Vesey* refers to *Atkinson v. Leonard*, 3 *Bro. C. C.* 218. The following account of *Hanington v. Du Chastel* (of which the printed reports, 1 *Bro. C. C.* 124; 2 *Dick.* 581; 3 *Wooddeson*, sect. 459, n. are extremely imperfect), is extracted from a manuscript in the possession of the Editor.

In chancery, *Michaelmas* term, 1781. In 1760, *J. Hanington* was house-steward to the late Earl of *Rochford*, who was at that time groom of the stole to King *George* 2d; the place of one of the pages of the back stairs, which place was in the appointment or recommendation of the Earl, as groom of the stole, becoming vacant, the Earl, being desirous of providing for *Jean St. Feriol*, who was a foreigner, and therefore incapable of holding the place, but who had been tutor to the Earl, entered into an agreement with *J. Hanington* to give the place to him upon condition (amongst other things), of his securing an annuity of £100 to *St. Feriol*; accordingly *J. H.* executed a bond, dated 10th *June* 1760, in the penalty of £600, conditioned for the payment of an annuity of £100 to *St. Feriol*, provided *J. H.* should enjoy the place during the life of *St. Feriol*, but if the place should be taken away then to be void. *J. H.* had the place, and for some time paid the annuity to *St. Feriol*, who died 16th *May* 1776, leaving defendant *Du Chastel* his executor. The defendant having brought an action, and obtained a verdict against *J. H.* on the bond for the arrears of the annuity due at the death of *St. Feriol*, this bill was filed by *J. H.* against *Du Chastel*, praying that the bond might be declared void, and be delivered up to be cancelled, and an injunction to stay execution at law.

On motion to dissolve the injunction, it was contended on the part of the Plaintiff, that this was a proper subject for the interference of a court of equity. The profits of the place were not sufficient, or more than sufficient, to pay the several annuities; but, independent of that circumstance, this court will set aside this sort of contract upon general political principles. In this case a court of law could not relieve; Lord *Rochford* not being the obligee of the bond, the case did not come within the st. of 5 & 6 *Ed.* 6th, c. 16. The cases cited were *Law v. Law*, *Forrester*, 140. (3 *P. W.* 391.) *Gray v. Hesketh*, *Burn's Ecc. law* (vol. 3, p. 354-356), *Debenham v. Ox*, 1 *Vesey*, 276. *Godolphin v. Tudor*, *Salk.* 468. *Rez v. Vaughan*, *Hawk. P. C.* 168. *Sir Thomas Raymond*, 400. (The reference is incorrect. 4 *Burr.* 2494.)

On the part of the Defendants, it was argued; that this matter was not proper for a court of equity; the whole transaction might have been set out upon plea; this court never gives relief for mispleading at law. If this was *turpis contractus*, a court of law would relieve. It does not come under any of the heads of which a court of equity takes cognizance, namely, fraud, trust, accident, and account. A distinction was also taken by *Graham*, between offices of a public nature, and offices relating to the king in his private capacity; and he argued that the office of a page of the back stairs being of the latter kind, it was not within the mischief intended to be prevented by st. *Ed.* 6th, and that the bond was not objectionable on political principles.

The Lord Chancellor [*Thurlow*]. Here are two questions. 1. Whether this contract is to be relieved? 2. Where? As to the first, it matters not whether the office be of a public or private nature. It may be equally contrary to the policy of the law. It is a public concern that private injuries should be redressed. This is the foundation of the decision in this court between guardians and wards. The multiplying private injuries makes them public. If a private manager of an estate enter into an agreement, and thereby break trust with his master, the agreement is corrupt. I think, therefore, that no distinction can be made between public and private servants. Besides which, the law has not said, that the grooms, pages, &c., about the king, are merely menial servants. On the contrary they are entitled to privilege, and therefore clearly distinguished from private servants. This contract is therefore to be relieved.

Secondly, Where? This Court does not apply equity to a case within the pro-

vince of a court of law ; but the jurisdiction of the courts of law has not always been clearly ascertained. The case of *Dowing v. Chapman* was then considered as a doubtful case. This case comes clearly under the head of fraud. I cannot refuse relief in this Court in a case which has never been relieved in a court of law, though I think it would be relieved there ; many cases would be wrong if relief was to be refused under that circumstance. Injunction granted.

Feb. 5, 1783. The cause came on to be heard. (*Reg. Lib. A. 1782, fol. 260.*) Lord Chancellor, First, Can a Plaintiff come into a court of equity, and recover a bond which he had entered into under these circumstances ? There has been some difference of opinion on the subject ; but I profess I cannot admit the distinction between *malum prohibitum* and *malum in se*, when applied to a contract in a country where the laws have prohibited the thing contracted to be done. The obligation to abide by the laws of the land is part of the duty of a citizen, and therefore I cannot see the difference. (See *Cannan v. Bryce*, 3 *Barn. & Ald.* 183.) It is impossible to bring the cases to any other point than this ; that the encouragement of the contract is contrary to the good of the public, as prescribed by law ; and therefore the good of the public requires to put an end to such contract, otherwise it would be an unequivocal declaration of law that the party shall have all the benefit of the contract ; for the law approves what it refuses to rescind, and this must be the fundamental principle of all the cases, that it is a transaction on a foundation which ought not to have been the basis of a civil contract. If so, this is a proper place for relief. Secondly, Whether this is *turpis causa* ? I will not allow myself to go into invective upon the present occasion. Lord Rochford might have been led into an error ; he had many very valuable and amiable qualities ; indeed there are many reasons to prevent my speaking severely on this occasion. As to what has been said on the statute of 5 & 6 *Edw. 6.* it goes more to a legislative than a judicial proceeding. When the law is made, it is no more a subject of inquiry whether what the law has ordained is proper or not ; nor need I go into the nature of offices ;—but what I am to determine upon merely is, whether if one person be authorised to recommend or appoint another person to an office, under a third person, he can, without the privity of the third person, and for a private consideration of his own, recommend or appoint such other person to such office ? Between private persons, I should think it would be a breach of the confidence reposed on him. But I do not mean to leave a service about the crown in the same situation as a private service. The laws have never considered the servants about the crown, whether menial or other, as private persons. Here, then, we must consider expressly the case of servants about the crown. It does not now seem to be contended that the bond would have been good, if it had been given to Lord Rochford himself : now, if the contract itself was wrong, how can I make the difference ? The danger of making the distinction is great. It would perhaps have made the point stronger, and it would have looked more ugly ; but taking it as a dry maxim, or as to the policy of the law, it becomes the same thing. Therefore, the injunction must be perpetual.

In addition to the authorities referred to on the former occasion, were cited, *Co. Litt.* 234 a. *Lawrence v. Braiser*, 1 *Cha. Ca.* 72. *Berrisford v. Done*, 1 *Vern.* 98. *Symonds v. Gibson*, 2 *Vern.* 308. *Blankland v. Debby*, *Ch. Just. Holt.* (Probably *Blankard v. Galdy*, *Rep. Temp. Holt*, 341 ; 4 *Mod.* 222 ; *Salk.* 411 ; *Comb.* 228.)

(10) Skelton v. Skelton. 16 Nov. 29, *Car.* 2, 1677.

The bill was exhibited against a jointress to stay *maresme* in felling timber, and notwithstanding the defendant's answer, who claimed the inheritance by a deed which the plaintiff controverted, an injunction was obtained until hearing ; and now, at the hearing, she proved herself to be a jointress in tail ; and it was urged by Mr. Attorney, that the defendant being a jointress within the statute of 11 *H. 7.* which restrains all power of alienation by fine or discontinuance, she ought likewise to be restrained in equity from committing waste, which is also in disherison of the heir. But this I would by no means allow, that equity should enlarge the restraints or the disabilities introduced by act of parliament ; and as to the granting of injunctions to stay waste, I took a distinction where the tenant hath only *impunitatem*, and where he hath *jus in arboribus*. If the tenant have

only a bare indemnity, or exemption from an action if he committed waste, there it is fit he should be restrained by injunction from committing it; but if he have a right in the thing itself, when it is wasted and cut down, there it is no way reasonable that he should be restrained: as, for example, if there be tenant for life, the remainder for life, the reversion in fee; here the tenant for life has no right nor power to fell *timber* or commit waste; yet if he do so he cannot be punished for it in an action of waste, during the life of him in the remainder for life; for that intervening remainder is an impediment to the action; so it is most just to grant an injunction to stay waste; and so it was ruled in the Chancery by advice of judges, *P. 41 El. Sir F. Moor*, 554, pl. 748; and *Egerton, C.*, said he had seen a precedent of such an injunction, 5 *R. 2*, and so it had been done before, *temp. E. 6, Vandemot v. Eyr*: and with [171] this agrees 16 *Jac. B. R. 1 Roll. 377, pl. 13, per curiam*. And the reason of this is most convincing; for when such a tenant for life hath cut down the trees, he in the remainder in fee may take them away, notwithstanding the mean remainder for life, or he may have a trover and conversion against the tenant for life, if he remove them; which shows that such tenant for life hath no property in the trees; it were, *ergo*, most absurd to put the reversioner to recover damages for his inheritance in the trees, or to seize them as chattels, when they may better be preserved to him in specie, by granting an injunction to stay the felling of them. And upon the like reason it may seem that tenant after possibility may be restrained by injunction from committing waste, for so if he fell trees the reversioner may have a trover and conversion, as was held 24 *Car. 1, B. R. Udal v. Udal's case, p. Rolle et curiam*; and yet *temp. E. R. placita parliament, Ryley, Appendix, 653*. *Kirbroke* petitions "*quod breve de waste poet giser versus Roger son frere*" (against *Maud*, the widow of *Roger*) "*tenant in tail, apres possibilite; Response, ley nest mye uncore ordein en ce cas.*" Probably this was before 21 *Ed. 3*, for in 21 *Ed. 3, Rot. Parl. n. 46*, the commons petition for a general law, that tenant after possibility might be liable to an action of waste, as being in effect but tenant for life, yet could not obtain it; but this serves only to keep the tenant after possibility in a state of impunity, if he commit waste, not to give him a right to commit it. On the other side, if there be tenant for life, with an express charge to hold without impeachment of waste, he is not to be restrained by injunction, for he hath more than a bare impunity, viz. a right in the trees to fell them; *a fortiori*, in the case in question, no restraint can be put upon a jointress in tail who hath the inheritance; and yet all this notwithstanding, he that hath a lawful power and liberty to commit waste may be restrained by Chancery from using this power, when the waste which he is about to do is signally *contra bonum publicum*. V. 19 *Car. 1, B. R. 1 Roll. 380, T. 3*, though a lease for years was made without impeachment of waste by the Bishop of *Winchester*, yet when the lessee for years, towards the end of his term, was about to cut up all the trees, an injunction was awarded by the advice of all the Judges, *pro bono publico*, and in favour of the church, [172] whereof the King is patron, notwithstanding the agreement of the parties. [*Bishop of Winchester v. Wolgar*, 3 *Swans. 492, n.*] But in my Lord of *Orford's* case, where the Earl was tenant for life without impeachment of waste, the reversion in fee to the co-heirs of the Lady *Banning*, and the Earl was about to pull down a house near *Colchester*, no injunction could be obtained, but the co-heirs and Sergeant *Peck*, who was a purchaser from one of them, were fain to compound with the Earl. So it seems there is some discretionary latitude in these cases; but that which is more remarkable is, that he who hath a power to commit waste may sometimes be restrained from the exercise of that power, when it tends only to a private damage; as for example, the Lady *Evelyn* was tenant for life in jointure, remainder to Sir *John Evelyn*, her eldest son, for life, without impeachment of waste, with several remainders over; the jointress let the land to a tenant at will; Sir *John Evelyn* enters by consent of the undertenant, and cuts down trees; resolved, though no injunction had lain against Sir *John Evelyn* if his remainder had fallen into possession, yet now it does; for although the licence of tenant at will to enter excuse the entry from being a trespass, yet no possession by such entry can enable him to cut down the trees presently, for the jointress hath right during her life to the shade and the mast; and to reasonable booties; *ideoque* Lord *Bridgman, Custos*, awarded an injunction during the life of the jointress. 1 *Dec. 1670. 22 Car. 2, Lord Nottingham's MSS.* "This court sees no colour of cause to give the said plaintiff any relief in this court, and doth therefore think fit and

order that the matter of the said plaintiff's bill be from henceforth clearly and absolutely dismissed out of this court; and it is hereby referred to Sir J. F., &c., to tax the said defendants their moderate costs of this suit." *Reg. Lib. B.* 1677, fol. 33.

(11)

Abrahall v. Bubb. 1 July, 31 Car. 2, 1679.

The bill supposed the defendant's wife to be tenant in tail after possibility, by the provision of a former husband, and prayed she might be restrained from committing waste; the defendant demurred; yet I ordered him presently to answer *quoad* the house and trees about it, *pro bono publico*; but the next morning I ordered him to [173] answer the whole bill, upon the reason of the case, *Skelton v. Skelton*, because tenant after possibility has only *impunitatem*, not *jus in arboribus*, for he in reversion may have a trover when they are felled.

27 May, 32 Car. 2, 1680. The importunity of the parties being great, I restrained only mischievous waste, which might deface the seat, but gave way that trees marked out by the ancestor for payment of his debts might be felled; yet I continued in the same opinion, that where he in the reversion might have a trover for the trees when felled, there the court ought to grant an injunction to stay the felling, and that I took to be this case; and I observed that the opinion that tenant after possibility is punishable of waste, was an addition to Mr. *Littleton*, and no part of the original text; but, however, it is one thing to have impunity, and another to claim right in the trees; the very act of the party who grants an estate without impeachment of waste, has not always been understood to transfer a property in the trees, as may appear by *Herlakenden's* case; and so at this day, the usual form of conveyances is, after the words without impeachment of waste, to add a clause, and with full power and authority to do and to commit waste, which shows that this is taken to be somewhat more than the former words do necessarily imply; and the case is put in my Lord *Dyer*, where an estate without impeachment of waste was granted upon condition not to commit voluntary waste, and held to be a good condition, and consistent with the grant. If the act of the party be so tenderly construed to prevent waste, the act of the law ought to be bounded with more circumspection. But hereafter, when any such case shall happen again, it may be fit to direct that a trover and conversion be brought for felling some oaks, which shall be admitted to be cut; and as the law shall be judged in a trover, accordingly to grant or deny a perpetual injunction, and in the mean time to stay waste. Lord Nottingham's MSS.

[174] RICHARD CUDDINGTON, Plaintiff; ROBERT WITHY, JOHN DYMOKE, Clerk, ANN OSBORN, RICHARD OSBORN, GEORGE Lord Bishop of LINCOLN, and THOMAS HENRY EWBANK, Defendants. *Rolls.* July 4, 1818.

A sequestrator being in possession of a rectory, under a sequestration issued by a creditor of the rector, a second creditor having obtained a subsequent sequestration, is entitled to an account in equity against the first sequestrator, and payment of the surplus after satisfaction of the first creditor; nor are prior incumbrancers who have not obtained sequestration necessary parties to the suit.

The bill stated, that *Dymoke* being indebted to the Plaintiff in the sum of £181, 12s. for goods sold, gave a bill of exchange, accepted by *Thomas Banks*, for that sum, which not being paid, the Plaintiff brought an action against *Dymoke* and *Banks*, which was compromised on their executing a warrant of an attorney, dated the 23d of November 1811, authorising judgment to be entered against them, or either of them, for £600, with a defeasance indorsed, declaring that the warrant of attorney was given for securing payment to the Plaintiff of £297 (being the amount of the principal of the debt and interest, and the costs of the action), with interest and costs, &c.; that payment not being made on the 30th of April 1812, the Plaintiff caused judgment to be entered up against *Dymoke* and *Banks*, and a writ of *fiery facias* to be issued against *Dymoke*, indorsed to levy £307, 4s. 2d.; that the sheriff made a return that *Dymoke* was a beneficed clerk, having no lay fee, nor any goods nor chattels in his bailiwick, whereof he could cause the debt or damages to be levied, but was the rector of certain rectories in the county of *Lincoln*, having glebe and glebe lands and tithes belonging thereto of great value; that upon the return

made by the sheriff, the Plaintiff obtained from the Defendant, the Bishop of *Lincoln*, a writ of sequestration, dated the 10th of *July* 1812, authorising and requiring certain persons named by the Plaintiff, to sequester the fruits, tithes, &c., of the rectories, and to [175] render a true account, &c., when required, but subject and without prejudice to two former sequestrations, granted on the 26th of *November* 1811, the Plaintiff, together with a surety, entering into a bond in the penalty of £1200 to the Bishop, for faithfully collecting and accounting, &c., and causing the cures of the churches to be duly supplied in divine offices and other requisites; that the two former sequestrations were issued, one at the suit of the Defendant *Ann Osborn* to levy £126, and the other at the suit of the Defendant *Richard Osborn* to levy £89, and were respectively directed to the Defendant *Robert Withy*, as the sequestrator; that *Withy* entered on the rectories, and into the receipt of the tithes and emoluments, and had ever since continued in possession; and that the whole debt remained due to the Plaintiff.

The bill prayed, an account of what was due to the Defendants *Ann Osborn* and *Richard Osborn* for principal, interest, and expenses of the writs of sequestration, and of the tithes and profits of the rectories received by the Defendant *Withy* as such sequestrator, or by his order, &c., and of the application thereof; and that the surplus of the money so received, after satisfying the prior sequestrations, or a competent part of such money, might be paid to the Plaintiff, in satisfaction of his debt, or that the writs of sequestration of *November* 1811, might be discharged, and that the Plaintiff or his sequestrator might be let into the possession or receipt of the tithes or profits of the rectories.

*Ann Osborn* and *Richard Osborn*, by their answer, stated, that the sequestrations of the 26th of *November* 1811, were issued not for the purpose of levying the sums mentioned in the bill, but to levy the whole of the fruits, tithes, &c., of the rectories, and, after supplying [176] the cures with divine offices, &c., to account for the surplus to the Bishop of *Lincoln*; that by two indentures of the 7th of *December* 1808. *Dymoke* granted to *Ann Osborn*, in consideration of £700, an annuity of £126, and to *Richard Osborn*, in consideration of £494, an annuity of £89, both annuities being charged upon the rectories, &c., and payable during the joint lives of *Dymoke* and *T. C. B.*, and *Dymoke* executed two warrants of attorney to confess judgment for £1400 and £988 respectively; that the annuities being in arrear, the Defendants caused the two sequestrations to be issued, and *Withy*, as their agent, was appointed sequestrator; and *Withy* and the Defendants executed bonds to the Bishop of *Lincoln*, conditioned for *Withy* duly collecting and accounting; admitted that *Withy* collected considerable sums, but not more than sufficient, as the Defendants believed, to pay the sums for which the writs of sequestration issued, or, at least, other incumbrances prior to the date of the Plaintiff's; and submitted that if there were any surplus, after payment of the annuities to the Defendants, and the prior incumbrances, the Defendants and *Withy* were required by their bonds to account for the same to the Bishop of *Lincoln*, or his Vicar-General on his behalf. Their answer also stated proceedings in two suits instituted by *Dymoke* against them respectively, to impeach their security.

*Withy's* answer was to the same effect; and, stating that he was merely a trustee, submitted that the prior incumbrancers, the annual demands of whom exceeded the annual value of the livings, were necessary parties.

The Bishop of *Lincoln*, admitting the sequestrations, professed to be a stranger to the other matters in question, and hoped that the Court would give proper order for the supply of the churches in divine offices, &c.

[177] Sir *Samuel Romilly* and Mr. *Roupe* for the Plaintiff. The Plaintiff, a judgment creditor who has obtained sequestration, is entitled to an account of the surplus in the hands of the prior sequestrator, after satisfaction of the arrears and growing payments due to the creditors who obtained the first sequestration. The prior incumbrancers (supposing their incumbrancers proved in the cause) who have not made their claim effectual against the estate, are not entitled to a preference over subsequent incumbrancers issuing sequestration. Some of the alleged incumbrancers are anterior to those of the *Osborns*; and if the objection is valid, the sequestrator has not been justified in applying his receipts to the discharge of their annuities.

Mr. *Hart* and Mr. *Selton* for the Defendants. After the purpose of the first



sequestration is satisfied, the subsequent creditor must apply in the bishop's court for an account against the sequestrator. In its legal sense, the first sequestration, authorising a levy to the amount for which judgment has been confessed, is not satisfied. A creditor seeking equitable relief against property subject to specific incumbrances, can obtain it only on the principal of redemption. The sequestrator submits whether the Court can authorise payment to the Plaintiff in the absence of prior incumbrancers, and without affording to them an opportunity to assert their rights.

The *Master of the Rolls* [Sir Thomas Plumer]. I apprehend that this fund must be paid among the persons who have taken out sequestration ; the Court knows not the existence of incumbrances which the parties have not followed with execution, and made [178] available. The surplus in the hands of the sequestrator would, before the second sequestration, have been payable to *Dymoke*. The incumbrances are not proved in the cause ; supposing their existence, the creditors have not rendered, their securities effectual. Are they to stand by and protect the surplus for ever, not taking it themselves, but preventing its being paid to all those who have used due diligence ? I presume that the churches are provided for under the original sequestration ; that is always a primary object. The Plaintiff is entitled to an account against the sequestrator.

His Honor doth order and decree, that it be referred to Sir *John Simeon*, Baronet, one, &c., to take an account of what is due to the Defendants, *Ann Osborn* and *Richard Osborn*, for the arrears of the annuity payable to them in the pleadings mentioned, and the costs and expenses of the two writs of sequestration issued by them, as in the bill stated ; and it is ordered, that the said Master do also take an account of the tithes, rents, and profits of the rectories in the pleadings mentioned, come to the hands of the Defendant *Robert Withy*, as such sequestrator as aforesaid, or to the hands of any other person or persons by his order, or for his use, and of the application thereof ; and it is ordered, that the said Master do also take an account of the principal and interest due to the Plaintiff, upon the judgment obtained by him against the Defendant *John Dymoke*, in the bill mentioned, and the costs due to the Plaintiff upon the writ of sequestration issued by him, as in the bill mentioned ; and it is ordered, that the said Master do tax the Defendant, *Robert Withy*, his reasonable costs, charges, and expences, necessarily and properly incurred as sequestrator, and all parties their costs of this suit ; and it is ordered, that out of the money in [179] the hands of the said Defendant, *Robert Withy*, in respect of such tithes, rents, and profits as aforesaid, the said *Robert Withy* be at liberty to retain what shall be so taxed for his costs, and also for the costs of the Defendants, *Ann Osborn* and *Richard Osborn* as aforesaid ; and it is ordered, that he do thereout also pay unto the Plaintiff, and the several other Defendants, their costs of this suit ; and it is ordered, that the said *Robert Withy* do pay the surplus money which shall remain in his hands, on account of such tithes, rents, and profits as aforesaid (if any) after such several payments as aforesaid, in satisfaction of what shall be reported due to the Plaintiff, under the direction hereinbefore given, in case the same shall be sufficient for that purpose ; but in case the same shall not be sufficient for that purpose, then it is ordered that the same be paid in part satisfaction thereof, so far as the same will extend ; and in that case, it is ordered that the said Defendant, *Robert Withy*, do out of all and every the quarterly payments of the tithes, rents, and profits of the said rectories, which shall from time to time come to his hands, after keeping down the two annuities or yearly sums of £126 and £89, in the pleadings mentioned, pay the balance of such tithes, rents, and profits as aforesaid unto the Plaintiff, until the whole of the principal, interest, and costs which shall be so reported due to him under the directions hereinbefore given, shall be fully paid and satisfied ; and it is ordered, that the said Defendant *Robert Withy*, do pass his accounts annually before the said Master, until the debt due to the Plaintiffs shall be reported to be fully paid and satisfied ; with the usual directions for taking the accounts, and liberty to apply.

(Reg. Lib. A. 1817, fol. 1769.)(1)

(1) See *Jones v. Barrett*, Bunb. 192. *Errington v. Howard*, Amb. 485. " If the sequestrators being called [180] thereunto by the ecclesiastical court, delay to give

an account, the judge useth to deliver to the party grieved the bond given, with a warrant of attorney to sue for the penalty thereof to his own use at the common law." *Watson*, Clergyman's Law, c. 30, p. 308.

LLOYD v. GURDON and CHARRITEE. April 11, [1818].

Injunction to restrain the negotiation of bills of exchange void in their creation.

The bill prayed that three bills of exchange accepted by the Plaintiff, payable to the Defendants, for a sum of £8000 won at play, might be delivered up to be cancelled.

Sir *Samuel Romilly* and Mr. *Collinson* now moved, on certificate of bill filed and affidavit, for an injunction to restrain the Defendants from parting with the bills; suggesting that though the bills were void in their creation,<sup>(1)</sup> yet there negotiation would induce a necessity of making other persons parties to the suit.<sup>(2)</sup>

The Lord Chancellor [Eldon] granted the injunction.

[181] "His Lordship doth order that an injunction be awarded to restrain the said Defendants from indorsing, negotiating, or parting with the said three bills of exchange or promissory notes, or either of them, in the said bill mentioned, until the Defendants shall fully answer the Plaintiff's bill, or this court make other order to the contrary." (Reg. Lib. B. 1817, fol. 663.) (— *v. Blackwood*, 3 Anstr. 851.)

(1) The statute 9 Ann, c. 14, s. 1, enacts, "That all notes, bills, &c., where the whole or any part of the consideration shall be money or other valuable thing won by gaming or playing at cards, &c., shall be void to all intents and purposes." See *Robinson v. Bland*, 2 Burr. 1077; 1 Bl. 234, 256. *Bowyer v. Bampton*, 2 Str. 1155.

(2) On this principle a vendor, defendant to a bill for a specific performance, has been restrained from conveying the legal estate. *Echcliff v. Baldwin*, 16 Ves. 267.

The ATTORNEY-GENERAL v. LEPINE. June 22, [1818].

[S. C. 1 Wils. Ch. 465. See *Re Davis's Trusts*, 1889, 61 L. T. 430.]

Residuary estate bequeathed to the minister and church-officers of a parish in *Scotland*, for charitable purposes, was directed to be invested in stock, in the name of the Accountant-General, and the dividends to be paid from time to time to the minister and church-officers of the parish; but the courts of *Scotland* having jurisdiction to administer the charity, an order confirming the master's report, in approbation of a scheme, was reversed.

*John M'Nabb*, late of *Mile End*, in the county of *Middlesex*, by his will, dated the 8th of *May* 1800, bequeathed a moiety of the residuary estate in these words: "to be laid out in the public funds, or some such security, on purpose to bring one annuity, income, or interest, for the benefit of a charity or school, for the poor of the parish of *Dollar*, and shire of *Clackmannan*, where I was born, in *North Britain*, or in *Scotland*; that I give and bequeath to the minister and church of the said parish for ever, say to the minister and church-officers for the time being, and no other person shall have power to receive the annuity but the aforesaid officers for the time being, or their agent appointed for the time by them."

An information and bill having been filed in 1803, by the minister and elders of the parish of *Dollar*, [182] against *M'Nabb's* executors, by the decree made at the hearing for farther directions, on the 8th of *August* 1805, it was ordered that the Master should approve a scheme for carrying the charity into execution, and that the relators and plaintiffs should be at liberty to lay proposals before the Master for that purpose.

On the 22d of *February* 1815, the Master's report, approving a proposal, was confirmed, and it was ordered that the scheme therein stated should be carried into execution. (19 Ves. 309.)

From these decretal orders, the Attorney-General and the relators appealed,

insisting that the information and bill prayed no directions for carrying the charity into execution, and that the Court never gives directions for establishing a charity in *Scotland*, but directs the money to be paid to the trustees, who must administer it according to the law of *Scotland*, and under the direction of the Court of Session, in case it becomes necessary to resort to any court for direction.

The *Solicitor General*, Sir Samuel Romilly, and Mr. Bell, in support of the appeal.

The *Lord Chancellor* [Eldon]. I have always understood that where a charity is to be administered in *Scotland*, this Court does not take into its own hands the administration. The gift being for the foundation of a *Scottish* charity, is certainly good ; (1) but the courts in *Scotland* would have to de-[183]termine what kind of school or charity should be established. (*Provost, Bailiffs, &c., of Edinburgh v. Aubery, Amb.* 236.)

The decree reversing the former orders, so far as they confirmed the Master's report, and directed an execution of the scheme approved by him), ordered various sums of stock, constituting a moiety of the testator's estate, to be sold, and the money arising from the sale to be laid out in the purchase of 3 *per cent.* consols, in the name of the Accountant-General, in trust in the cause ; the dividends " to be paid from time to time to the defendant, the Rev. A. Mylne, and to the relators, and the plaintiffs, J. Gibson, J. Christie, and R. Smith, or such other person or persons who, for the time being, shall be the minister and church-officers of the said parish of *Dollar*, to be by them applied for the benefit of a charity or school for the poor of the said parish of *Dollar*, pursuant to the will of the said testator," &c.

(Reg. Lib. A. 1817, fol. 1601.)

(1) See *Campbell v. The Earl of Radnor*, 1 Bro. C. C. 271. *Oliphant v. Hendric*, 1 Bro. C. C. 571. *Curtis v. Hutton*, 14 Ves. 537. *Mackintosh v. Townsend*, 16 Ves. 330.

[185] WILLIAM MAYHEW and ANN GENT, *Plaintiffs* ; SARAH CRICKETT, ROBERT ALEXANDER CRICKETT, and EDWARD BACON, *Defendants*. April 8, 9, 11, 14, 1818.

[S. C. 1 Wils. Ch. 424. For revivor of liability where surety promises to pay subsequent to discharge see *Phillips v. Fozall*, 1872, L. R. 7 Q. B. 677. As to securities taken subsequently to the suretyship see *Forbes v. Jackson*, 1882, 19 Ch. D. 621. As to position of remaining co-surety when other surety has been discharged see *Polak v. Everett*, 1876, 1 Q. B. D. 674 ; *Re Wolmershausen*, 1890, 62 L. T. 545. Cf. also *Duncan Fox & Co. v. North & South Wales Bank*, 1879-80, 11 Ch. D. 88 ; 6 App. Cas. 1.]

A creditor whose debt is secured by a warrant of attorney, having received promissory notes from the debtor and two sureties, and afterwards entered up judgment and taken the goods of the debtor, and without the knowledge of the sureties, withdrawn the execution, has discharged the sureties ; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability. Right of contribution between co-sureties, whether by separate instruments, or by the same instrument.

The bill stated, that in August 1814, *Charles Batteley*, being indebted to the Defendants, his bankers, in the amount of £1000 or thereabout, secured by a warrant of attorney to confess judgment, the Defendant, agreed to advance to him the farther sum of £300 on condition of his procuring two persons as sureties for the repayment thereof, and also of the former balance ; [186] and the Plaintiffs having agreed to become sureties, two promissory notes, for £650 each, payable to the Defendants on demand, dated the 20th of August 1814, were signed, one by *Batteley* and *Mayhew*, the other by *Batteley* and *Gent* ; that the Plaintiffs had lately discovered that the Defendants did not advance the farther sum of £300 nor any part of it ; that in November 1814, the Defendants entered up judgment on the warrant of attorney against *Batteley* and issued execution thereon, and entered into possession of his dwelling house, and the stock in trade and other effects therein,

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and after continuing several days in possession, without consulting or apprising the Plaintiffs, withdrew the execution, *Batteley* paying the expenses ; and that in August 1815, *Batteley* again becoming embarrassed, the Defendants for the first time applied to the Plaintiffs for payment of the promissory notes, which the Plaintiffs refused ; and in *Michaelmas* term 1816, the Defendants commenced actions against them.

The bill, charging, that the notes ought in equity to be considered as void and given without consideration ; that by withdrawing the execution against *Batteley*, the Defendants had released the Plaintiffs ; that *Gent* never requested the Defendants not to press for payment of *Batteley's* debt ; and that if *Mayhew* made such request, it was in ignorance that the execution had been withdrawn, prayed that the Defendants might be decreed to deliver the promissory notes to the Plaintiffs, and indemnify the Plaintiffs against them, and be enjoined from proceeding in the actions at law.

The Defendants, by their answer, stated, that being dissatisfied with the large balance due from *Batteley*, they informed him that unless he procured a joint note from persons of responsibility they would take possession [187] of his effects ; and *Batteley* promising to give unexceptionable security, the Defendants added that if they were satisfied with the security, they might advance £300 more ; that when *Batteley* brought the two promissory notes, the Defendants said that they should make no farther advance till they had satisfied themselves of the security, and after inquiry, refused an advance ; and admitting that the execution was withdrawn at the request of *Batteley* on the 6th of November 1814, the Defendants not thinking it necessary to consult or apprise the Plaintiffs, who were not informed of the existence of the warrant of attorney, further stated, that on the application of the Plaintiffs in August 1815, *Mayhew* promised to pay his note in September following, and at that time came to the Defendants, representing that it was not convenient then to take up his note, but promised to pay it at Christmas, if they would wait till then : denied that they gave time and indulgence to *Batteley* to pay the debt secured by the promissory notes, except by withdrawing the execution ; and stated that on the 14th of February 1816, *Mayhew* promised, in the presence of two persons named, to take up the note for which he became answerable, on or before *Lady-day* following, and before that promise, *Mayhew* knew that the Defendants had taken possession of *Batteley's* effects under the execution, and had, at the request of *Batteley* and his friends, abandoned the same, and relied upon the notes as a security for the balance then due to them ; and the Defendants stated that they had heard and believed that at the time of such promise, *Mayhew* was in possession of a warrant of attorney given to him by *Batteley* to secure the payment of the £650 and interest, and that *Batteley* soon afterwards committed an act of bankruptcy, which prevented *Mayhew* from taking execution against his effects.

[188] The Defendants had recovered a verdict against the Plaintiff *Mayhew*, before the common injunction was obtained for want of answer. On a motion, after filing the answer, to dissolve the injunction, the Lord Chancellor, by order of the 13th of December 1817, continued it, with liberty to the Defendants to proceed to trial against Mrs. *Gent*. The Defendants, having declined to proceed to trial, not intending to prosecute their claim against Mrs. *Gent*, now moved to dissolve the injunction.

Sir Arthur Piggott and Mr. *Treslove*, in support of the motion, insisted that the grounds on which the Plaintiffs rested their equity, the want of consideration for the notes, and the abandonment of execution by the principal creditor, formed a legal defence, and cited *Hoare v. Contencin* (1 Bro. C. C. 27).

Mr. *Hart* and Mr. —, against the motion, argued that the concurrent jurisdiction of courts of equity was not excluded by the novel equitable doctrines of courts of law ; and that the question of fraud in obtaining the notes was peculiarly proper for a court of equity.

The Lord Chancellor [Eldon]. On the motion for an injunction, two grounds were taken ; first, that the principal debtor being indebted to the Defendants in £1000, the contract on which these notes were given was, that if he should produce securities for £1300, the Defendants would advance £300 in addition to the existing debt. In considering the question whether there was that agreement, we must not lose sight of the fact, that security was given for the exact sum of £1300 ; and if

such was the transaction, I am not quite prepared to say that the sureties could not [189] avail themselves of their non-liability at law as well as in equity, speaking of law at this day ; for many questions, (questions, for example, on marriage brokerage bonds, and on lost deeds), formerly exclusive subjects of equitable jurisdiction, have, since Lord *Mansfield's* time become subjects of the jurisdiction of courts of law.

The second ground was, that the Defendants, by releasing the execution, had relinquished their remedy, at least, *pro tanto*. I always understood, that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle which prevails both in courts of law and in courts of equity. On the other hand, if the surety afterwards makes a promise to pay, he cannot object to that as a promise without consideration : the promise is valid, not as the constitution of a new, but the revival of an old, debt. So, when a bankrupt is discharged by his certificate, he cannot, for that reason, impeach a subsequent promise to pay a former debt, as a promise without consideration.

Although the amount of £1300 is constituted here by separate promissory notes, and, although at one time the doctrine prevailed, that where there were separate securities there should be no contribution, that has been exploded ever since the case of *Deering v. Lord Winchelsea* (2 Bos. & Pul. 270 ; 1 Cox, 318). The liability of the plaintiffs must be considered, with reference, not only to general principles, but to the fact that one surety promised to pay, after he knew that the execution had been waived ; the effect of that may be varied by the circumstance, whether he then knew what was known to the co-surety.

There can be no doubt that it is a question fit to be [190] tried at law, whether, if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who were sureties for the due payment of the bill ? (1) The principle is, that he is a trustee of his execution for all parties interested in the bill.

April 9. The Lord Chancellor [Eldon]. I must be informed whether the Defendants abandon all claim against the Plaintiff, *Gent* ? That is an important feature of the case.

April 14. The counsel for the Defendants having undertaken to release the Plaintiff, *Gent*, the Lord Chancellor proceeded to give judgment.

The Lord Chancellor [Eldon]. The bill is filed by *Mayhew* and *Gent*, against the latter of whom I must consider the Defendants as having no [191] demand, since they prosecute none. It appears from the answer that there had been a proposition for an advance of a sum of £300 in addition to the original debt ; it is now admitted that the two notes of £1300 can be considered as a security for £1000 only, and, therefore, each note, in a court of equity, at least, is a security for only £500, the Defendants never having advanced the £300 or any other sum. The bill charges, as a particular ground of the equity on which the Plaintiffs insist, that two promissory notes were given, to enable the debtor to obtain time for £1000, and a further advance of £300 ; and that the advance not having been made, the notes ought not to be considered as a security for the existing debt. The mere circumstance that the Plaintiffs did not know that the Defendants held a warrant of attorney, would be of no consequence, because sureties are entitled to the benefit of every security which the creditors had against the principal debtor, (2) and whether the surety knows the existence of those securities is immaterial ; and I think it clear, that, though the creditor might have remained passive if he chose, (3) yet, if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety, both at law and in equity ; and I cannot but believe that there must have been some mistake on the part of the learned judge, at *nisi prius* ; that, however, should have been made the subject of a motion for a new trial.

[192] The application of the Defendants, in equity, proceeds on quite a different principle. They swear, that in the presence of two witnesses, *Mayhew*, knowing that the execution had been withdrawn, promised to pay the debt ; and it cannot be objected that there is a want of consideration for such a promise. If a creditor, having given time to the debtor primarily liable, makes a demand on one who is secondarily liable, and receives a promise from him, that is sufficient to sustain the demand, not as the creation of a new, but as the revival of an old, debt. (4) With respect to the other Plaintiff, *Mrs. Gent*, it must be assumed, that the Defendants have no demand against her. That reduces the case to this singular condition, that one surety is

discharged while there is a verdict against the other; and the Court must consider the effect of the discharge of one of two co-sureties. The fact, that the liability arises on separate instruments, affords no distinction as to the right of contribution between the sureties. The law is so settled by *Deering v. Lord Winchelsea*. I recollect that the decision in that case disturbed the then existing notions in *Westminster Hall*; having myself been counsel against that doctrine, I was much dissatisfied with it; but on farther and maturer consideration I ought to make so much amends as to say, that I am convinced it was right. When one surety has been discharged the co-surety is entitled to say to the creditor asserting a claim against him, you have discharged a surety from whom I might [193] have compelled contribution, either in my own name in equity, or using your name at law. (5)

Another view is, whether the circumstances of the case would not raise the question,—whether it is competent to the Defendants to make any use of the promissory notes, if the fact is, as the bill alleges, that the principal debtor had solicited a farther advance of £300, and that, when the sureties lent their names on instruments which raised a demand for £1300, the Defendants refused an advance, and now claim the notes as securities for the previous debt? There is some ground to infer, that the real dealing was for an advance of £300 *ultra* the £1000; and two points therefore require consideration; 1st, I am by no means clear, that if the sureties could establish that, it would not be a defence at law; though I am not disposed to say, that therefore a Court of equity would not relieve: but, 2dly, The surety must have known, that the execution had been withdrawn, and his promise to pay is to be considered as a promise made, in all probability, with a knowledge of the circumstances of the case.

On the whole, I am of opinion, that the Plaintiff, *Mayhew*, must pay into Court so much, as with what the Defendants have received from the bankrupt's estate (a commission of bankrupt had been issued against *Batteley*), will amount to £500, without prejudice. On those terms the injunction must be continued.

(1) On the question what transactions, with the principal, or person primarily liable, discharge the surety, or person secondarily liable, see, *Skip v. Huey*, 3 Atk. 91. *Nisbet v. Smith*, 2 Bro. C. C. 379. *Rees v. Berrington*, 2 Ves. Jun. 540. *Lav v. The East India Company*, 4 Ves. 824. *Ex parte Gifford*, 6 Ves. 805. *Boulthé v. Stubbs*, 18 Ves. 20. *Bank of Ireland v. Beresford*, 6 Dow. 233. *Samuel v. Howarth*, 3 Mer. 272. *Eyre v. Bartrop*, 3 Madd. 221. *Hodgson v. Nugent*, 5 T. R. 277. *The King v. The Sheriff of Surrey*, 1 Taunt. 159. *Thomas v. Young*, 15 East, 617. *Bowsfield v. Tower*, 4 Taunt. 456. *Croft v. Johnson*, 5 Taunt. 319. *Moore v. Bowmaker*, 6 Taunt. 379. *Bowmaker v. Moore*, 3 Price, 214. *Brickwood v. Anniss*, 5 Taunt. 614. *Tindal v. Brown*, 1 T. R. 167; 2 T. R. 186. *Ex parte Smith*, 3 Bro. C. C. 1. *Walwyn v. St. Quintin*, 1 Bos. & Pull. 652. *English v. Darley*, 3 Esp. 49. 2 Bos. & Pull. 61. *Gould v. Robson*, 8 East, 576. *Clark v. Devlin*, 3 Bos. & Pull. 363. *Withal v. Masterman*, 2 Campb. 179.

(2) *Parsons v. Briddock*, 2 Vern. 608. *Ex parte Crisp*, 1 Atk. 135. *Gammon v. Stone*, 1 Ves. Sen. 339. *Lee v. Rook*, Mos. 318. *Sir Daniel O'Carroll's Case*, Amb. 61. *Wright v. Simpson*, 6 Ves. 714, 734. *Ex parte Rushworth*, 10 Ves. 409. *Wright v. Morley*, 11 Ves. 12. *Glossop v. Harrison*, Coop. 61. *Antrobus v. Davidson*, 3 Mer. 569. *Robinson v. Wilson*, 2 Madd. 434. *Hoatham v. Stone*, cit. 2 Madd. 437; 1 Madd. Princ. and Prac. 236, n. g. *Plumbe v. Sanday*, Id. n. h.

(3) 6 Ves. 734. *The Trent Navigation Company v. Harley*, 10 East, 34. *Ex parte Mure*, 2 Cox, 63, 74.

(4) On the revival of debts by a subsequent promise, see, *Hyleing v. Hastings*, Lord Raym. 389, 421; Com. 54; Carth. 470; 1 Salk. 29; 12 Mod. 223; 5 Mod. 425; Rep. Temp. Holt, 427. *Southerton v. Whitlock*, 2 Str. 690. *Trueman v. Fenton*, Coup. 544. *Ex parte Burton*, 1 Atk. 255. *Birch v. Sharland*, 1 T. R. 715. *Rogers v. Stevens*, 2 T. R. 713. *Cockshott v. Bennett*, 2 T. R. 763. *Hopes v. Alder*, 6 East, 16, n. *Lundie v. Robertson*, 7 East, 231. *Besford v. Saunders*, 2 H. Bl. 116. *Lyndby v. Weightman*, 5 Esp. 198. *Mucklow v. St. George*, 4 Taunt. 613. *Fleming v. Hayne*, 1 Stark, 370. *Whitehead v. Howard*, 2 Brod. & Bing. 372.

(5) On the right of contribution between co-sureties, see, *Cooke v. —*, 2 Freem. 97; Toth. fo. 41. *Hole v. Harrison*, 1 Ca. in Cha. 246; Rep. Temp.

*Finch*, 15, 203. *Peter v. Rich*, 1 *Rep. in Cha.* 19. *Swain v. Wall*, 1 *Rep. in Cha.* 80. *Fleetwood v. Charnock*, *Nels.* 10. *Layer v. Nelson*, 1 *Vern.* 456. *Lawson v. Wright*, 1 *Cox*, 275. *Deering v. The Earl of Winchelsea*, 2 *Bos. & Pull.* 270; 1 *Cox*, 318. *Cowell v. Edwards*, 2 *Bos. & Pull.* 268. *Ex parte Gifford*, 6 *Ves.* 805; *Craythorne v. Livinburne*, 14 *Ves.* 160. *Dunn v. Slee*, 1 *Moore*, 2; *Holt*, *N.P.* 399.

[194] PARKHURST v. LOWTEN. April 16, May 2, Nov. 11, 1818; Jan. 28, April 20, May 1, July 22, 1819.

[See *Bursill v. Tanner*, 1885, 16 Q. B. D. 6.]

A witness objecting to answer interrogatories before the Examiner or Commissioners, demurs, by stating his objection on oath; his demurrer may then be set down for argument; and if overruled, the witness pays the same costs as a defendant on demurrer. Demurrer to interrogatories by an attorney overruled, without prejudice to the witness's demurring on his re-examination, stating his reasons.

The substance of the pleadings in this cause is stated, on the report of the motion for production of papers referred to by the answer, 1 *Mer.* 391.

*E. S. Godfrey*, having demurred to the interrogatories exhibited to him for his examination, on the ground that they referred to transactions in which he was employed as attorney and solicitor, the *Vice-Chancellor* ordered the demurrer, which had been set down to be argued among demurrers to bills, to be struck out of the paper, and afterwards refused a motion not supported by affidavits, that the demurrer might be overruled. (*Parkhurst v. Lowten*, 3 *Madd.* 121, where the demurrer is stated.)

April 16, May 2, 1818. A motion was now made by the Plaintiff, that the demurrer of the witness might be set down for argument, next after the pleas and demurrers already appointed.

The *Solicitor General* [Gifford] and Mr. *Sidebottom* in support of the motion. A witness to whom interrogatories are tendered which he is not bound to answer, can protect himself only by demurrer; if the party exhibiting the interrogatories is dissatisfied, the opinion of the Court may be taken by setting down the demurrer for argument. The following precedents establish the practice: *The South Sea Company v. Dolliffe* (cit. 2 *Atk.* 525; 2 *Ves.* 377, and under the name of *d'Oliphant v. South Sea Company*, 1 *Ves. Sen.* 318). *Hildersley v. Devisher*, (1) *Vail*-[195]-*lant* v. *Dodmead* (2 *Atk.* 524, 592), *Shepherd v. Downing*, from the Registrar's Book, (2) *Smithson v. Hardcastle*. (3)

[196] Sir Arthur Piggott and Mr. *Wetherell*, for the Defendants. The question, whether the witness is privileged from answering these interrogatories, cannot be decided in this form. The witness is not entitled to demur in the general terms of this demurrer; he may be bound to disclose some facts of which he obtained a knowledge as attorney; and must, therefore, specify the questions from which he seeks to protect himself by his privilege.

Mr. *Bell* for Mr. *Godfrey*. The witness is willing to answer so far as his duty to his client admits. He will be subjected to difficulty if his privilege is to be decided on demurrer; since, if the Court shall think him bound to depose to a single document, the demurrer, it will be said, is too extensive, and must be overruled. The course suggested by the Vice-[197]-Chancellor is, that the Plaintiffs should specify the facts, or the general nature of the case, to which they propose to examine the witness, who will then have an opportunity of raising the question, whether the examination is consistent with his professional duty.

The *Lord Chancellor* [Eldon]. The first question is, whether the proceeding for deciding the validity of the witness's objection should be by setting down the demurrer? Upon that point, the cases cited have settled the practice of the Court. We proceed as far as possible, by analogy to law. At law the witness swears to the facts which privilege him, and the Court then decides the question of privilege. Objecting to answer concerning facts which came to his knowledge as attorney, he must swear that he acted as attorney, and that he so acquired the knowledge. In this Court, the only way in which a witness can protect himself, is to state his objection before the examiner or the commissioners; the commissioners in a country

cause return the commission with what is called the witness's demurrer, and the question is brought before the Court, by setting that down for argument. Certainly it is not, strictly speaking, a demurrer, which is an instrument that admits acts stated for the purpose of taking the opinion of the Court; but by an abuse of the terms the witness's objection to answer is called a demurrer, in the popular sense; and there must be a way by which the Court can judicially determine its validity. I shall follow the example of Lord *Hardwicke*. It may frequently happen, that there is nothing in the pleadings or the interrogatories from which the commissioners or the examiner could collect, that the witness was in a situation which imposed on him a duty, for the protection of others, to decline an answer.

[198] The register informs me, that by the practice, when the demurrer of the witness is overruled, he pays the same costs as on the demurrer of a Defendant. (*Vide Shepherd v. Downing*, 2 Swans. 195, n.)

"4th May 1818. Whereas Mr. *Solicitor General*, and Mr. *Sidebottom*, of counsel for the Plaintiffs, this day moved and offered divers reasons, &c., that the demurrer put in by *E. S. Godfrey* to the interrogatories exhibited to him, &c., might be again set down for argument, the same having been struck out by order of his Honour the Vice-Chancellor, with liberty for the parties to apply to have the same restored, next after the pleas and demurrers already appointed, in the presence, &c. Whereupon, &c., his Lordship doth order the said demurrer to be restored to the paper to be argued before his Lordship."

Reg. Lib. B. 1817, fol. 919.(4)

[199] The demurrer of the witness was argued.

The *Solicitor-General* [Gifford], Mr. *Heald*, and Mr. *Sidebottom*, against the demurrer. It is clear, that unless the witness is privileged from answering any part of the interrogatories, the demurrer objecting generally to answer, is too extensive, and must be overruled. In *Vaillant v. Dodmead* (2 Atk. 524), Lord *Hardwicke* expresses his opinion, that these demurrers should be held to very strict rules, and overruled the demurrer as covering too much.

There is no doubt that an attorney is privileged from revealing the confidential communications of his client. *Robson v. Kemp* (5 Esp. 52), *Fountain v. Young* (6 Esp. 113), *Rex v. Withers*.(5)

[200] But he must answer "to a fact of his own knowledge, and of which he might have had knowledge without being attorney in the cause. As suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So, if the question were about a rasure in a deed or will, he might be examined to the question, whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head." (*Buller, N. P.* 284.) The distinction is between confidential communications, and transactions, at which he is present merely as witness, and where the presence of any unprofessional person might have been sufficient.—*Cutts v. Pickering* (1 Vent. 197), *Jones v. Countess of Manchester* (*Ibid.*), *Vaillant v. Dodmead* (2 Atk. 524), *Sandford v. Remington* (2 Ves. Jun. 189), *Doe v. Andrews* (Cowp. 845), *Wilson v. Rastall* (4 T. R. 753), *Spenceley v. Schulenburgh* (7 East, 357), *Duffin v. Smith* (Peake, N. P. 108), *Bowles v. Stewart*.(6)

It is clear, to omit other particulars, that this witness must answer, whether he was present at the contract, and whether he has the deed. He has not even stated for whom he was employed as attorney. His privilege arises not from the character of attorney, but of attorney to a particular individual. It is the privilege of the client, [201] and, if he assents, may be waived—*Lea v. Wheatley* (C. B. Pasch. 30 Car. 2, 20 *Howell's State Trials*, 574, n.). It would be singular, that a plea of privilege should omit to name the party privileged.

The demurrer is not duly authenticated; the witness must make affidavit of the truth of its contents. *Nightingale v. Dodd* (Mos. 228).

Sir *Arthur Piggott*, Mr. *Wetherell*, Mr. *Bell*, and Mr. *Spence*, for the demurrer. The demurrer is a statement by the witness under examination, and is therefore made on oath. The Court will not establish a practice analogous to that which regulates demurrers to bills; but will direct a reference to the master to inquire what interrogatories the witness must answer. The design of the interrogatories is to convict the witness's client of simony.



The *Lord Chancellor* [Eldon]. The witness demurring, on the ground that his answer would violate the confidence reposed in him as attorney, must name the party to whom he was attorney. In my limited experience at *nisi prius*, I recollect no instance in which the attorney's privilege prevailed, except where it was the privilege of one of the parties in the cause; but I would not be understood to say, that it was not so. (7) If *Brooksby* (the purchaser of the first presentation in 1799) were called he might state, that the bill alleges a simoniacal contract, and object to answer whether it was made, or even what sum was paid, [202] because he is not bound to answer any one question among many, which, as a link, has a tendency to subject him to a penalty. There might be a doubt, to what extent the attorney could protect himself from answering to information which he acquired as attorney, though not perhaps as attorney for *Brooksby*? It is consistent with this demurrer, that the knowledge of these facts was acquired by the witness as attorney for the Plaintiff.

If the demurrer is overruled, the next proceeding in regular course would be, a motion to commit the witness for not answering. Supposing an error in the form only of the demurrer, I would afford to the witness an opportunity of correcting it; but he must be careful so to frame his demurrer that it may embody in it the rule of law relative to the privilege of an attorney. The distinction is extremely nice between the questions which the attorney is bound to answer, and those which he is privileged from answering.

Though we give to this instrument the name of demurrer, it is nothing but the witness's tender of reasons why he should not answer the questions. As it now stands, I think the demurrer bad, and that a mere insertion of the name of the client will not supply the defect. The proper way of disposing of it will be, to declare that the reasons stated by the witness are not sufficient to prevent his farther examination on these interrogatories, but with liberty to state any other reasons against being examined.

Unless the argument which has been urged is valid, that the demurrer being the statement of the witness under examination, is made on oath, it must be supported [203] by affidavit. The examiner ought to take the statement of the witness on oath. It is clear, that in some way the Court ought to have the sanction of an oath for the facts on which the objection is founded.

Jan. 28, 1819. On this day the Plaintiff moved that the minutes of the last order might be varied.

The *Solicitor-General* [Gifford], Mr. *Heald*, and Mr. *Sidebottom*, in support of the motion.

Sir *Arthur Piggott*, Mr. *Wetherell*, and Mr. *Spence*, against the motion.

The *Lord Chancellor* [Eldon]. The minutes are certainly not correct, and require alteration.

The word "demurrer," as I have repeatedly observed, is used not in a very appropriate sense, in a business of this kind, to signify some objection by a witness to answer a question addressed to him; and though we find in the books cases in which the witness has been heard on demurrer, yet the oldest of us recollect no such case in our experience.

Mr. *Godfrey* having been employed as solicitor, properly thought that he ought not to submit to an examination with respect to transactions of his client, unless compellable by law. It is true that this demurrer, using the term in its inappropriate sense, must have been overruled, if for this reason only, that the witness has not stated by it who his client was; but on the other hand, it is impossible to say that these interrogatories do not [204] contain many questions which no protection that an attorney can claim, not on his own account but on that of his client, can shield him from answering. In the ordinary courts of law, if Mr. *Godfrey* were called as a witness, he would make his objection, stating, under the sanction of his oath, the circumstances in which he stood, as grounds for calling on the Court to protect him from answering particular questions. We have great difficulty here in knowing how to deal with these proceedings, not passing in Court, but the witness being examined before commissioners, or in the examiner's office.

I apprehend, that the witness cannot, before the commissioners or the examiner, say, merely, that he was attorney for A. B., and, therefore, will not answer any question; but must, at the hazard of a miscarriage in judgment, place himself

before the examiner or the commissioners, exactly in the same state in which a witness at *nisi prius* would place himself before the Chief Justice; that is, must submit to their judgment whether he has or not stated a sufficient reason for protecting himself from answering. If they are of opinion that he ought to answer, and he will not, he declines at the hazard of the animadversion of the Court; but on the other hand, it is too much to say, that if he declines, he must not have some mode of bringing before the Court the question, whether the judgment of the commissioners or the examiner is such as it will approve; and it is impossible for the Court to know whether the witness is right or wrong in his demurrer, unless he states the reasons of it. I therefore meant in this case to have the order drawn up, if possible, in such a way as once for all to make a decision which might serve as a guide for future cases; namely, to point out how a person who is a party to the examination but not to the suit, is to de-[205]-mur; that is, that his reasons should come before the Court, enabling it to decide on the demurrer exactly in the same way as the judge at *nisi prius*, who, if the witness declined to answer as attorney, would proceed to inform him, that though he might protect his client, there were many questions which he could not so decline answering. I meant to declare, that the reasons stated as grounds of this demurrer were not sufficient, and, therefore, to overrule it; then taking notice, that the commission having been returned, *Godfrey* could not be again examined under it, I meant, that another commission should issue, and that, therefore, the overruling this demurrer was to be without prejudice to *Godfrey's* objecting or demurring to answer questions on such grounds as he should state in his objections; intending thereby to secure to the Court, if the question should come here again, the opportunity of knowing the grounds on which he objected, either to the whole body of the interrogatories, or to some of them; in order that it might have the means of determining whether the judgment of the commissioners or the examiner was right, and of deciding the validity of what is called a demurrer, though quite a different instrument from that to which the name is ordinarily given.

I inquired what Lord *Hardwicke* had done with regard to costs, as a rule for myself; for no one can fail to observe, that he was inclined to overrule the demurrer in the case cited (*Vaillant v. Dodemead*, 2 *Atk.* 524), with a high hand. If the same rule is applied to the demurrer of a witness which is established for the demurrer of a party, it seems to me that I should adopt that rule, unless a special case is made for higher costs; and if Lord *Hardwicke* gave only £5 costs, I cannot give more.

[206] "January 28, 1819. Whereas Mr. *Solicitor-General*, Mr. *Heald*, and Mr. *Sidebottom*, of counsel for the Plaintiffs, moved and offered divers reasons unto the Right Honourable the Lord *High Chancellor of Great Britain*, that the minutes of an order made in this cause on the 11th day of *November* 1818, might be varied, in the presence of Sir *Arthur Piggott*, Mr. *Wetherell*, and Mr. *Spence*, of counsel for the Defendants; upon hearing what was alleged by the counsel on both sides, His Lordship doth order, that the minutes of the said order of the 11th day of *November* 1818, be rectified, and be as follows: viz. declare, that the reasons stated by *E. S. Godfrey*, in his demurrer, as the grounds thereof, are not sufficient reasons to sustain his demurrer, and, therefore, let the said demurrer be overruled; and the commission issued in this cause for the examination of witnesses having been returned, the said *E. S. Godfrey* cannot be examined without a new commission, and, therefore, let a new commission issue for the examination of the said *E. S. Godfrey*, directed to the commissioners named in the said former commission; but this is to be without prejudice to the said *E. S. Godfrey* objecting or demurring in writing, upon his examination under the new commission, to the interrogatories, or any of them, exhibited for his examination, or to any part or parts thereof, as he may be advised, upon such grounds as he shall state in such objections or demurrer; and let the said *E. S. Godfrey* pay unto the Plaintiffs, the sum of £5 for their costs of the said demurrer."

Reg. Lib. B. 1818, fol. 840.

April 20, May 1, 1819. A motion was made in behalf of Mr. *Godfrey*, to extend the minutes of the order of the 28th *January* 1819, by adding that the Plaintiffs are not to exhibit any new [207] interrogatories without the leave of the Court, and directing a reference to the Master, to settle the old interrogatories, by striking out, or altering, so much as required the witness to set forth any information he had

received from persons, who, or whose representatives, are not parties to the cause, or any other irrelevant matter.

Mr. Bell, for Mr. Godfrey, Sir Arthur Piggott and Mr. Wetherell, for the Defendants, in support of the motion.

It is clear that interrogatories may be suppressed for impertinence. *Practical Register* (p. 384), *Cocks v. Worthington* (2 Atk. 235. See *Pyncent v. Pyncent*, 3 Atk. 557. *White v. Fussell*, 19 Ves. 113), *Sandford v. —* (1 Ves. Jun. 400), *Mill v. Mill* (12 Ves. 406). In the common case the interrogatories are not seen by the adverse party till after publication, and then the interrogatories and depositions are suppressed together: but where, as in this instance, the interrogatories are seen before examination, immediate application must be made, the rule of the Court being, that, for impertinence, the party must apply as soon as apprised of its existence, and waives the objection by delay. A considerable part of these interrogatories (as questions to information) leads to the introduction of matter which cannot be evidence; tending to prove, not a point in issue in the cause, but the criminality of the contract. Before the examiner, a mere ministerial officer, the witness would not be permitted to object to their relevancy.(8)

[208] Both the witness and the party are entitled to be protected from the oppression of impertinence. An answer to impertinent interrogatories inflicts on the Defendants the expense of copies of useless depositions.

The witness, an officer of the Court, is bound to object to the disclosure of his client's secrets. It is true that no precedent has been found of such an application by a witness; but there is a want of authorities in the whole proceeding on a demurrer to interrogatories. Unless the irrelevant matter is expunged, the witness cannot meet the case by specific objections, on demurrer; and it is a hardship to be confined to that remedy at the peril of costs. The opinion of the bar has long been, that a witness is entitled to see the pleadings; and the form of the concluding general interrogatory supposes in him a knowledge of the points in issue.

The *Solicitor-General* [Gifford], Mr. Heald, and Mr. Sidebottom, for the Plaintiffs, in opposition to the motion. There is not a single interrogatory of which it may be truly said, that the answer can by no possibility be evidence; the relevance of the interrogatories cannot be ascertained till they are compared with the depositions; if, upon a reference directed after the examination, they are found irrelevant, they will be expunged with costs.

In the examination of an unwilling witness, the Court [209] permits questions in the form of cross-examination.—*Phillips on Evidence* (vol. i. p. 283).

The application by a witness is as irregular as novel. It has been decided, that a witness cannot demur to interrogatories for irrelevancy.—*Ashton v. Ashton* (1 Vern. 165; 1 Eq. Ca. Ab. 41). If such a motion could be sustained, a witness, colluding with one of the parties, and objecting to the questions addressed to him, might, in effect, compel the publication of the interrogatories before examination.

In the course of the argument the following observations were made by—

The *Lord Chancellor* [Eldon]. I agree that the Court is bound, at the instance of any person, to take care that no injustice is done; but I think that this motion must be argued on very different principles, as the application of the Defendants, and of the witness. For instance, before the Master, the witness cannot insist that interrogatories shall be struck out, requiring disclosure of what he knows as attorney; that must be done elsewhere. So the witness is not acquainted with the pleadings, and therefore cannot know how to object for irrelevancy (if, indeed, the opinion intimated from the bar is correct, that the witness is entitled to see the pleadings, that difficulty will be removed); the Master, according to this application, is to judge what shall remain part of the interrogatories; and whether right or wrong, the witness cannot suffer by his judgment. The party might take the opinion of the Court; but how can the witness proceed for that purpose? If it is insisted that this case is so monstrous that the Court must advert to it as an exception, that may be a question; but care must be taken not to open a door to [210] an application in every case in which a witness may choose to make it.

There is another circumstance on which I shall not lay much stress, that when the Defendants desire that the examination should be on the old interrogatories, and that the Master should expunge some part of them, they are, in fact, objecting to interrogatories to which they should have objected in an earlier stage of the cause.

It would be a vast thing for the Court in an order of reference to the Master, to direct him to consider as irrelevant, questions relating to information, from any person, who, or whose representative, is not a party; *non constat* that other witnesses may not prove that the person from whom the information was given, was in such a situation that his information would be evidence.

It is also material to consider whether these interrogatories are addressed to this witness only or to others. Of interrogatories addressed to a variety of witnesses, there is a very great difficulty in saying what part is impertinent with regard to one witness, without knowing the effect of other parts to be exhibited to other witnesses. Supposing that publication has not passed, how can the Master know that the answers of the other witnesses that are to be examined may not make the answer of this witness extremely material? It is one thing to say, that if the Court sees interrogatories, the answer to which cannot by possibility be evidence, let other witnesses state what they will, it will not permit them to be addressed to the witness; and another thing to say that other interrogatories shall not be addressed which may be very material, regard being had to the effect of the depositions of other witnesses, on the testimony of this particular witness. Interrogatories, no answer to which can be received in a [211] court of justice, I think that I ought to struggle to strike out; and it certainly is difficult to understand how any answer to some part of these interrogatories can be evidence.

On the other hand, the Court will distinguish between interrogatories to prove a fact, and to prove a crime. Suppose that the presentation in this case had been sold for £6000, to be paid at a future time, and the owner of the advowson had filed a bill against his trustee who had so sold, for an account of the profits of the sale, and the trustee did not think proper to report the circumstances of the sale or the amount of the money, alleging that he had good reasons to decline answering, might not the Plaintiff ask a witness, whether he paid to the trustee a particular sum? That question is put to establish, not simony, but the fact of payment to a trustee who will not answer. It would be dreadful for this Court to declare that a trustee may so deal with the trust-property, that he shall state to the *cestui que trust* what he has done only to a certain extent, and yet that the *cestui que trust* must believe what he so states.

If the Plaintiff were to ask the late or the present Mr. Lowten, whether he was not a party to the execution of this deed, he might refuse to answer; but a third person, a witness to whom the Plaintiff exhibits the deed, and asks, whether he attested the execution, must answer. Thus the Court would oblige the attorney of Lowten to show, that Lowten had been engaged in a simoniacal contract, from discovering which Lowten might protect himself. If the interrogatories are such as not to invade the privilege of the client, which is to be attended to by the attorney, though they bring out proof of simony, yet bringing out proof of payment of the money, they must be answered.

[212] A very singular question might arise with which the Court could not possibly deal: supposing that Daniel had conveyed the right of presentation to Lowten in trust to sell; that Lowten, in execution of that trust, had sold simoniacally; and that Daniel had applied to the Crown for the presentation forfeited, and could produce evidence of the simony.

It is clear, that the Court ought by some means to exclude a question which has no object but to prove simony; but if the object of the question is to prove payment of money, though the effect of the answer is to prove simony, we cannot here exclude it. If a trustee will not state all that belongs to his dealing with the trust-property, the *cestui que trust* is not bound to believe any part of his statement, and, is, therefore, entitled to learn from witnesses, not merely what they may choose to state, but all that he has a right to know.

This is in truth no more than a bill for an account. The Defendant has said that he received only £6000; supposing that he had proceeded to state the time at which he had received it, and other circumstances, and had then gone on to protect himself against a discovery of simony (for this Court will not require a man to disclose that he has been guilty of a great offence, it is his protection as a party), he could not be compelled to produce the deeds, and discover that he had involved himself in acts, the consequences of which are penal; but if, in order to try the truth of his statement, which the Plaintiff is never bound to believe, and whether he has

duly accounted for the sum which he received as trustee, a witness, an attorney, is examined to prove not simony, but the time, and amount, and circumstances, of payment, and it happens, that in so proving, he proves a case of simony, he has no right to object to that dis-[213]-closure, unless he stands in such a situation that his client is entitled to object. It is true, that such an examination brings forward a case of simony, but brings it forward not as simony, but as a statement of account.

Another consideration here may be this; though in ordinary cases, to know what has passed, the deeds must be produced, yet if a man declines to produce the deeds, as convicting him of simony, I should be glad to know whether this Court would not receive secondary evidence? If a deed is in the hands of a person who objects to the production as convicting him of a crime, whether against a party so objecting, secondary evidence of the contents may not be produced, as in the case of a lost deed, is a question, so far as I know, yet undecided.

Is it clear that, in a case in which the Defendant says that he will not disclose the contents of a deed in his possession, because, if he does, he shall prove himself guilty of an offence, the contents of that deed may not be proved by information? If a man chooses to place a deed in his possession in the same condition as if it were lost, it is a question, whether the contents of that deed may not be proved in the usual mode by which proof is given of the contents of a lost deed?

Can the Court undertake to reform interrogatories? How is it to know, that to any individual interrogatory the witness will not return a pertinent answer? Or that, in answer to a question, when the money was paid, he will specify a time which tends to prove simony? Nor can I, in conformity to our practice, admit the witness to state by affidavit, that he will so answer, which would be authorising evidence to be published as soon as given. How can the Master settle interrogatories? For that purpose he must know what answer the witness will [214] give; and there is no rule of the Court more established than this, that evidence shall not be known till publication has regularly passed.

If the Defendant states, in his answer, that he cannot give any information concerning the account, without giving evidence of his crime, he cannot be compelled to give that information; but that will not entitle other witnesses, who are not in a situation of confidence, to withhold their evidence.

At the close of the argument judgment was given as follows:—

The Lord Chancellor [Eldon]. The bill, in this case, calls on Mr. Lowten to account for the produce of some property vested in him, which he sold as trustee; one part of the property was a right of presentation to an ecclesiastical benefice, and, with what propriety I examine not, the bill has charged that Lowten, in execution of his trust, thought proper to sell that benefice to a clergyman who entered into a simoniacal contract with him, and the bill, among other things, seeks information, what money was made in that transaction. Lowten put in an answer; and it having been for ages a principle of British jurisprudence, and I hope it will continue so as long as the law continues, that no man shall be called on in a court of justice to accuse himself of an offence, in his answer Lowten stated, that by this sale, which, in some modes of conducting it, he might lawfully conclude, he procured a sum of £6000. It was alleged that the terms of the sale being, that a part of the purchase-money should be paid at the date of the bargain, and the rest on putting the incumbent into possession, the contract was simoniacal, forbidden by law [215] under severe penalties, no clergyman being capable of taking possession of his benefice without having made oath that he has entered into no such contract. Lowten stating that he received the money, did not state when he received it, and insisted on the protection of the law, that being charged with the offence of simony, he was not bound, as he certainly was not, to discover any circumstance tending to show that he was guilty; not only not bound to answer any question, the answer to which would criminate him directly, but not any which, however remotely connected with the fact, would have a tendency to prove him guilty of simony. On Lowten's death, the present Defendant of that name succeeded to his fortune, and therefore, in some respects, with reference to that property, became entitled to a similar protection; and the Court refused to compel him to produce deeds proving simony. (*Parkhurst v. Lowten*, 1 Mer. 391.) The object of the suit is an account; and Lowten not having stated the time of payment

of the £6000, the Plaintiff is entitled to examine witnesses to prove that fact ; and it is clear that, even if *Lowten* had stated the different times of payment of different parts of that sum, and set forth all the circumstances of the transaction, the Plaintiff would not be bound to believe him, but might proceed by witnesses to prove his own case.

There is no doubt, that the privilege which protects a man from criminating himself, does not belong to a witness whose disclosures may criminate not himself, but others ; if the matter which the witness has to state is relative to the time of payment, he cannot object to make the statement, because it may prove that some other person has been guilty of an offence. *Godfrey* (who I think acts most properly in struggling as much as possible against this examination, because it is a difficult [216] task to take on himself to say what professional confidence will or will not allow him to disclose), having been professionally concerned in the transactions which this bill characterises as an offence, when the interrogatories are exhibited to him, first takes that course which every one understands to be according to the practice of the Court. There is a great difference between a party or witness who objects to criminate himself, and a person standing in the situation of *Godfrey*. A party cannot be called on to criminate himself : it used to be said that a witness could not be called on to discredit himself ; but there seems something like a departure from that ; I mean that in modern times, the Courts have permitted questions to show, from transactions not in issue, that the witness is of impeached character, and therefore not so credible. I remember the time when that would not have been done. (Note : The authorities are collected in 1 *Phillips on Evidence*, 289–294, and the conclusion there adopted is, that to questions tending to the degradation of a witness an answer cannot be compelled.) *Godfrey* stands in a very different situation, insisting, not that the disclosure would tend to criminate himself, but that it would consist of matter of which he could obtain a knowledge only by the confidence of his employer. The privilege which he claims is the privilege, not of the attorney, but of the client, and is founded on this consideration, that there would be no safety in dealing with mankind, if persons employed in transactions were compelled to state that which they have learned only by this species of confidence ; but the moment confidence ceases, privilege ceases, and the attorney must answer as any other witness ; and if there are circumstances in this case to which his testimony may be required without a violation of confidence, *Godfrey* cannot decline answering, because his answer would prove simony in the late Mr. *Lowten* ; for the object of such an examination is not to prove simony, but to ascertain [217] how the account is to be taken, and for that purpose it is necessary to prove the contract under which the money was paid, and the times and terms of payment. The object of the examination being legitimate, the witness, unless in a situation of confidence, must answer, although he fixes third persons with offences.

On the former occasion, *Godfrey* put himself on this issue, that he was not bound to answer any part of the interrogatories ; his demurrer was overruled ; but a declaration was inserted in the order, indicating that, in overruling it, the Court did not proceed on any ground limiting the privilege to which the client was entitled in respect of the confidence reposed by him in *Godfrey*. In these circumstances the present motion, which has been argued with great ability, comes before me. I omit all that has been said on the subject of new interrogatories ; the motion seeks a reference to the Master to settle the old interrogatories, first, by expunging or altering so much as requires the witness to state information received from persons who, or whose representatives, are not parties to the cause ; secondly, by expunging any other irrelevant matter.

According to my notion of any principle which I am to apply to evidence not yet given, I cannot take on myself to say in any case, but particularly in this, where the party would not produce the instruments, and where he put them in the same situation as if they were lost, that no information received from any person, except a party or the representative of a party, can be evidence. Though not evidence by itself, it may become evidence by the testimony of another person ; and information may become evidence by reason of the character of the individual from whom it was received, though neither a party nor the representative of a party.

[218] How again can I say what will be relevant, unless the question is one to which the answer can by no possibility be relevant, neither directly, nor in con-

nection with other evidence? It has been argued, that it was sufficient for Mr. *Lowten* to say, he paid the money for the presentation at a time named, and to refer to his memorandum book and check on his banker; and the time and amount of payment being so ascertained, that the rest of the interrogatories must be expunged. I know not whether such is now the rule of law, but I know that at one period such was not the rule: but supposing it the rule at law, how am I to apply it as the rule in equity? In equity, if the witness thinks that the answer to the interrogatories will criminate him, he demurs, and the opinion of the Court is taken; if he is privileged by the privilege of his client, he states that, and thereon the opinion of the Court must be taken; but for the Court or the Master to declare prospectively, in any stage of the interrogatories, that such an answer will be given by the witness on his examination as enables them to say that no answer should be given, is impossible. Neither the Court nor the Master can know what the answer will be before it is given. I cannot in Chancery pre-suppose the answer, as I might, sitting in the Court of King's Bench, after the witness has proceeded to a certain stage. This part of the application, therefore, is impracticable.

Whether interrogatories may be considered an abuse of the process of the Court, I will not say; but it is clear that I cannot grant this motion according to its terms. I cannot direct the Master to settle these interrogatories upon the principle that no information given by persons other than persons who, or whose representatives, are parties, could be evidence; nor in our course of proceeding is it possible for the Master to say, *ab ante*, [219] what will be relevant or irrelevant matter. If the object were to expunge the whole of the interrogatories requiring an answer as to information, it might be necessary to examine the common form.

Motion refused with costs.

"His Lordship doth not think fit to make any order upon the said notice of motion, but doth order, that the said *E. S. Godfrey* do pay to the Plaintiffs the costs of this application, to be taxed, &c.; but the Plaintiffs are not to file any new interrogatories for the examination of the said *E. S. Godfrey*, without the leave of this Court."

Reg. Lib. B, 1818, fol. 1565.

July 22. Mr. *Godfrey*, on his examination under the new commission, having again demurred, the Plaintiffs moved, that copies of such of the interrogatories to which he demurred, and of his demurrer, might be delivered to the clerks in Court for the parties.

The Attorney-General [Shepherd] and Mr. *Sidebottom*, for the motion, stated, that the order proposed was in the terms of the order made on the former demurrer. Sir Arthur Piggot, Mr. *Wetherell*, and Mr. *Spence*, against the motion.

The Lord Chancellor made the order.

The entry in the registrar's book recites the application by the Plaintiffs' stating the last order, "That a commission was issued in Trinity Term last, in pursuance of the last order, which commission is returned, and now [220] remains with the Plaintiffs' clerk in Court; that the said witness having demurred to the interrogatories, the Plaintiffs are desirous of having copies of the demurrers, which they cannot have without the order of this Court, publication not having yet passed; and therefore it was prayed, that the clerk in Court for the Plaintiffs in this cause, might deliver over to the two senior six clerks, not towards the Plaintiffs or Defendants in this cause, the commission issued in Trinity Term last, for the examination of the said Mr. *E. S. Godfrey*, on the part of the Plaintiffs, with the return thereto; and that the said two senior six clerks might open the same, and deliver over to the clerks in Court, for the parties in this cause, copies of such of the interrogatories, to which the said *E. S. Godfrey* has demurred to answer, and of the demurrer or demurrers showing the grounds thereof respectively; and that the said two six clerks might again seal up the commission, with the return thereto, and re-deliver the same to the Plaintiffs' clerk in Court, without publishing the contents other than delivering copies as aforesaid: Whereupon, &c., his Lordship doth order, that the clerk in Court for the Plaintiffs in this cause do deliver over to the two senior six clerks, not towards the Plaintiffs or Defendants in this cause, the commission issued in Trinity Term, for the examination of Mr. *E. S. Godfrey*, on the part of the Plaintiffs, with the return thereto: and it is ordered, that the two senior six clerks do open the same, and deliver over to the clerk in Court for the Plaintiffs in this cause, copies of the depositions and demurrers of the witness, *E. S. Godfrey*;

but such delivery is not to be considered as publication." Reg. Lib. B. 1818, fol. 1509.

[221] The demurrer of *Godfrey* was set down to be argued.  
Reg. Lib. B. 1818, fol. 1846.(9)

(1) Cit. 2 *Atk.* 593, under the name of *Kildersley v. d'Fisher*, *Mos.* 195. (On the mention of this report the *Lord Chancellor* remarked, that although it had been said that *Moseley* should never be cited, his book contains many good cases.) *Hildersley v. Devisher*, 24th April 1729, "It is ordered that the demurrer put in by the Defendant, &c., to the interrogatories exhibited by the Plaintiffs, be set down to be argued next after the pleas and demurrers already ordered; but the same is to be set down within four days or else this order is to be of no effect." Reg. Lib. A. 1728, fol. 232.

(2) "*Shepherd v. Downing*, 6th February 1744. The matter of the demurrer put in by *William Graves*, Esq., to the interrogatories exhibited by the Plaintiff for the examination of witnesses in this cause, coming this present day to be argued before the Right Honourable the Lord High Chancellor, &c., his Lordship held the said demurrer to be insufficient, and doth order that the same be overruled." Reg. Lib. B. 1744, fol. 249. "19th February 1744. Upon opening of the matter this present day unto this Court by Mr. *Browne*, of counsel with the Plaintiff, it was alleged that this cause being at issue, the Plaintiff sued out a commission for examination of witnesses, and the same being returned, and publication passed, and the commission being opened, the Plaintiff found that *William Graves*, Esq., a material witness for him had demurred to the interrogatories exhibited to him, and refused to answer: that the said demurrer was set down, and upon arguing has been overruled; that the said *William Graves* is a very material witness for the Plaintiff, and is now in town, but as publication is passed, the Plaintiff cannot examine him without an order, and therefore it was prayed that the said *William Graves* may pay the Plaintiff the costs occasioned by the said demurrer, to be taxed, or such other costs as the Court shall think fit; and that he may be examined by one of the examiners of this Court, upon the said interrogatories, at his own expense; whereupon, and upon hearing, &c., it is ordered that the said *William Graves*, do pay unto the Plaintiff the sum of five pounds for the costs of the said demurrer; and it is further ordered that the said *William Graves* do attend and be examined in the examiner's office upon the said interrogatories, and the Plaintiff is to file the same within a week." Reg. Lib. B. 1744, fol. 190.

(3) 1 *Dick*, 96. See also *Jeferson v. Dawson*, 2 *Ca. in Cha.* 208. *Nightingale v. Dodd*, *Mos.* 228. *Bowman v. Rodwell*, 1 *Madd.* 266.

(4) Nov. 18, 27 *Car.* 2, 1675. "*Herbert v. Mayn*—A witness demurred to the interrogatories because he claimed a title to the land, but did not set forth how, nor under whom, nor swear that he had a title, and so overruled, and a commission awarded to take the oath of the aged witness."—Lord *Nottingham's MSS.*

*Mulgrave v. Lord Dunbar*. "The Plaintiff's bill was to have a discovery who were his father and mother, whether dead or alive, and what estate they left, real or personal, on surmises that he had been bred as a gentleman, and had been told, from time to time, sometimes that he was the son of A., other times of B.; sometimes that he had considerable real estate in this country, sometimes in that, or that he was entitled to a considerable distributive share of his father or his mother's personal estate.

"Lord *Dunbar*, by answer, admitted him to be his natural son, and that he had been at the charge of his education, but did not disclose by whom; and the Plaintiff attempted to prove who his mother was, in expectation of receiving a considerable sum, rather than that matter should be brought to light. The witnesses demurred to the interrogatories; and though they did not ask them to disclose any matter defamatory to themselves, yet *Lord Chancellor* allowed the demurrer, upon this ground, that the matter inquired of would, if disclosed, be defamatory to a third person, and did not appear to be material in the cause." Mr. *Cox's MSS.* The date of this case is not stated, but it occurs among Lord *Colchester's MSS.* in a book entitled as containing cases in 1713, 1715, 1765.

(5) 2 *Campb.* 168; and see *Bulstrode v. Letchmere*, 2 *Freem.* 5; 1 *Ca. in Cha.* 277. *Rex v. Dixon*, 3 *Burr.* 1687. *Sloman v. Herne*, 2 *Esp.* 695. *Brad v. Ackerman*



5 *Esp.* 120. *Gainsford v. Grammar*, 2 *Campb.* 9. *Stratford v. Hogan*, 2 *Ball & Beat.* 164. *Cromack v. Heathcote*, 2 *Brod. & Bing.* 4; and the privilege has been extended to an interpreter as "the organ of the attorney." *Du Barre v. Livette, Peake*, N. P. 77, n.; *T. R.* 756; and see *Parkins v. Hawkshaw*, 2 *Stark.* 239.

(6) 1 *Schoales & Lefr.* 226; and see *March* 83, pl. 136. *Annesley v. Earl of Anglesea*, 17 *Howell's State Trials*, 1228-1244. *Duchess of Kingston's Case*, 20 *Howell's State Trials*, 613, 614. *Lord Say and Seal's Case*, 10 *Mod.* 40. *Rez v. Watkinson*, 2 *Str.* 1122. *Cobden v. Kendrick*, 4 *T. R.* 431. *Bishop of Winchester v. Fournier*, 2 *Ves. Sen.* 445. *Copeland v. Watts*, 1 *Stark.* 95.

(7) It seems that the privilege prevails although the client is not a party to the suit. *Sloman v. Herne*, 2 *Esp.* 695. *Rez v. Withers*, 2 *Campb.* 578. *Copeland v. Watts*, 1 *Stark.* 95.

(8) "Commissioners ought not to judge what interrogatories are pertinent, and what not, but are to examine upon the interrogatories as they find them, according to their commission. *Bake con. Cole, Hill.* 9 *Jac.* The commissions were ordered to be renewed, and new commissioners named, the former being rejected for so doing." *Practice of Chancery*, prefixed to *Choice Cases*, p. 16. But commissioners are not "bound to divest themselves entirely of all discretion as to what is or is not, legal evidence." *Whitelock v. Baker*, 13 *Ves.* 515.

(9) "26th Feb. 26 *Car.* 2, 1673-4. A bill charged the suppression of Sir Charles Hussey's will upon all the Defendants, and prayed a discovery. Mr. King of Gray's Inn demurred, because all his knowledge came as being counsel with my Lady Hussey. I overruled it, and ordered him to answer, for the trust of a counsel does not extend to suppression of deeds or wills.—*Rothwell v. King.*" Lord Nottingham's MSS.

"19th November, 26 *Car.* 2, 1674. Between *Spencer and Luttrell*. The Plaintiff demanded an annuity, and £6000 arrears, and prayed to set aside a lease precedent for security of portions already satisfied, whereof the Defendant was assignee, and that he might discover satisfaction. Defendant pleads he knows nothing of the satisfaction but as counsel, and demands judgment whether he should discover. Ordered to answer." Lord Nottingham's MSS.

"7th July, 27 *Car.* 2, 1675. Between *Harvey and Sir Robert Clayton*. The Plaintiff's father had mortgaged several lands in *Leicestershire*, and the now Plaintiff exhibited a bill against the Defendant, to discover whose money it was that was thus secured, and for whom the Defendant was intrusted. He, by answer, says, that he was ready to receive his principal and interest, and to give the Plaintiff a discharge, or to continue it longer upon payment of interest, if it might be for the service of the family; but as to discovery of the money or the trust, pleads, that he is a scrivener, and trusted with men's estates, and demands the judgment of the Court, whether he shall be obliged to discover; which plea was allowed; for it was safer for the Plaintiff to be ignorant of the trust than to have notice of it; but it may be a ruin to the Defendant, in his trade, to discover it; for no man hereafter, will employ him. And what if it be the money of a recusant convict, person outlawed, &c., shall the debtor be revenged if his creditor, and wound him through the sides of his scrivener?" Lord Nottingham's MSS.

"*Stanhope v. Nott*. To a bill for discovery of deeds, the Defendant pleaded, that he knew nothing of them otherwise than as counsel, and that he had them not: [222] the Court held, that it was not sufficient to plead that he knew nothing but as counsel, without divesting himself of them, and disclosing to whom he had delivered them; for, otherwise, deeds having been played into the hands of a counsel might be suppressed, and the party injured left without remedy; the plea, therefore, was overruled per Lord Chancellor, to stand for an answer; but with liberty to except as to when and to whom he had delivered the deeds." Mr. Cox's MSS.

BINKS v. Lord ROKEBY. May 4, 1818.

The purchaser of an estate, sold as tithe free, cannot be compelled to take it subject to tithe on terms of compensation ; but an estate of a hundred and forty acres being sold under a decree, the particulars stating about thirty-two acres to be tithe free, and no evidence of exemption having been produced on the reference of the title, the Master was directed to certify the proper amount of compensation. A purchaser under a decree for sale having accepted, and (on a report of an objection to the title, for which compensation was ordered) returned, possession, must pay interest on the purchase money, from the time at which he took, or at which a title was shown under which he might have safely taken, possession, and is entitled to an allowance for prior, not for subsequent, deterioration of the estate.

On a reference to inquire, whether a good title could be made to an estate of about a hundred and forty acres, purchased by one *Carter* at a sale under a decree (see *Binks v. Lord Rokeby*, 2 Madd. 227) ; by his report, dated the 20th of December 1815. the Master certified, that a good title could be made, except that the particulars of sale stated about thirty-two acres of the estate to be tithe free, whereas no sufficient evidence had been produced to him of any part thereof being tithe free.

Sir *Samuel Romilly* and Mr. *Heald* now moved, that the report might be confirmed, and that it might be referred to the Master to certify what allowance should be made in respect of that part of the estate described as tithe free, but not proved to be so.

[223] Mr. *Bell* and Mr. *Shadwell*, against the motion. It is now settled by the decision of this Court, in *Ker v. Cloberry* (stated *Sugden's Law of Vendors*, p. 251, where the cases are collected) that the purchaser of an estate described as tithe free, cannot be compelled to take it subject to tithe upon terms of compensation. There is no principle by which compensation can be ascertained : the party purchased an exemption from litigation. In *Forteblow v. Shirley*, much discussed before your Lordship, it appeared that the estate was subject to the repairs of the chancel of the parish church ; the parties agreed to accept an indemnity, settled by an arbitrator ; but the Court refused to allow interest, holding the purchaser justified in declining to take possession while the title was in dispute. It was not necessary to except to the report, the blemish being apparent on the face of it.

Sir *Samuel Romilly* in reply. The reasoning in *Ker v. Cloberry* is inapplicable to this case. Can the purchaser, acknowledging that he purchased three-fourths of the estate subject to litigation, insist that the addition of less than one-fourth not, as it is described to be, exempt from litigation, entitles him to renounce the whole contract ? He knew that the far larger part of the estate was liable to tithe.

The Lord Chancellor [Eldon.] Where an estate sold as tithe free is subject to tithe, the Court will not compel the vendee to perform the contract on terms of compensation ; but here, as I understand, the estate of about a hundred and forty acres was described as subject to tithe, except thirty-two acres. I am of opinion that the principle which pro-[224]tects the vendee in the former cases, is not applicable to such a case.(1)

" This Court doth order, that the said Master's said report, dated the 20th day of December 1815, be confirmed, and that it be referred back to the said Master to inquire and certify what allowance is fit and proper to be made to Mr. *R. Carter*, the purchaser of the said estate, in respect of that part of the said estate, containing about thirty-two acres of land, stated to be tithe free, but in respect of which the said Master, by his said report, certified, that no sufficient evidence had been produced before him, of any part thereof being tithe free ; and it is ordered, that it be referred to the said Master to settle the conveyance of the said estate, in case the parties differ about the same." &c.

Reg. Lib. A. 1817, fol. 1070.

July 25. On this day the Plaintiffs moved that *Carter* might on or before the 10th of August next pay into the bank £6334, 13s., being the amount of the purchase-money of the estate, after deducting £315, 7s., allowed by way of [225] compensation for the tithes of thirty-two acres, and also £1804, 6s., the amount of interest from the 31st November 1812 to the 10th of August 1818.

Sir *Samuel Romilly* and Mr. *Heald*, for the motion, insisted on possession taken by the purchaser.

Mr. *Hart* and Mr. *Shadwell* opposed the motion, on the ground that the purchaser had taken possession subject to inquiry into the title, and had abandoned it on the Master's report that the whole estate was liable to tithe; and they claimed a deduction for deterioration of the estate since the purchaser quitted possession.

The *Lord Chancellor* [Eldon]. There seems little reason to doubt that the vendor will eventually obtain both a compensation for a supposed liability of part of this estate to tithe, and also the advantage of the fact that it is not liable. I mention that for the sake of the observation, that if this had been a case in which the greater part of the lands sold had been subject to tithe, I should not have followed the doctrine that the purchaser of an estate described as exempt from tithe, shall be compelled to take it subject to tithe; but here only a small part was described as exempt; and the fourth condition of sale expressly stipulates, that errors in description shall not vitiate the sale. I was, therefore, of opinion, that the purchaser must accept the estate.

With regard to possession, the purchaser was not to take possession till he had paid the purchase-money, and that condition of payment could not be performed unless, prior to the time appointed for giving possession, the vendor could show a title under which the purchaser [226] would be safe in taking possession and paying his purchase-money. The case therefore requires, that it should be ascertained when a good title could be made; for, without that, the purchaser was not bound to take possession. That might raise another question; whether, by taking possession which he was not bound to take, he waived objections to the contract. If he ultimately obtains a title, he must be considered, by relation, as in possession, under that title, from the time at which he took possession, and from that time must be understood to say, that if he could hereafter have a title made to him, he was to be considered as in possession, and must receive the rents and profits, and account for interest on the purchase-money. But the fact of possession must be investigated; and it is for those who sell, undertaking that the purchaser might have possession at *Candlemas*, to show that they were in a condition then to give possession. In that case he must pay interest from the time at which he took possession, and even for the time during which he returned the possession.

The purchaser must pay into Court the purchase-money, and the Master must inquire when he took possession; or if he did not take possession, when it appeared by the abstract that he had a title, in respect of which he might take possession; and I reserve the consideration of interest till the report. Those inquiries will go far towards determining what is to be done in respect of deterioration. For, as to deterioration after he took possession, or after there was a title under which he might take possession, the purchaser cannot have an allowance in respect of that; but for deterioration before he took possession, or before there was a title under which he could take possession, he is entitled to an allowance. I therefore reserve also the consideration of allowance for deterioration till after the report.

[227] "His Lordship doth order, that *R. Carter*, the purchaser of the premises in the said Master's report mentioned, do, on or before the 18th day of *August* next, pay the sum of £6334, 13s., into the bank in the name of the accountant-general, to be laid out, &c.; and it is ordered, that it be referred to the said Master to inquire and state to the Court, whether the said *R. Carter* ever took possession of the estates and premises so purchased by him, and if he did, when he so took possession; and, in case the said Master shall find that he did not, then he is to inquire and state to the Court, when he might have taken such possession, it appearing that a good title could be made. And his Lordship doth reserve the consideration as to the question of interest upon the said purchase-money, and also as to any sum which ought or ought not to be allowed in respect of any deterioration of the said premises, until after the said Master shall have made his report; and, upon payment of the said sum of £6334, 13s. into the bank as aforesaid, it is ordered, that the said *R. Carter* be let into possession of the said purchased premises, in case it shall appear he is not already in possession thereof, and into the receipt of the rents and profits thereof, from *Midsummer-day* last; and the said bank-annuities, hereinbefore directed to be purchased, are not to be transferred or disposed of without notice to the said *R. Carter*, the purchaser.

Reg. Lib. A. 1817, fol. 1668.

(1) *Smith v. Lloyd*, July 16, 18, 1818. On an application for a reference to the Master to certify whether a good title could be made to an estate sold, and whether it was subject to tithe, the *Lord Chancellor* observed, that whether an estate is free from, or subject to, tithe, is no question of title; when a vendor, represents that he has a good title, and that the estate is tithe free, the question whether tithe free is not a question of title; but a question, whether the estate held by a good title is held free from tithe: if the purchase were of lands and of tithes, then the matter of tithe would be matter of title; but in a purchase of lands free from tithe, the tithe is not matter of title, but of fact.

PROTHEROE v. FORMAN. May 4, 1818; May 22, 24, 1819.

Injunction to stay execution, on a bill filed after a judgment at law, refused.

The bill stated, that the Plaintiff, Sir *Henry Protheroe*, having been in partnership with one *Robert Jones*, in a colliery, held under a lease for twenty-one [228] years from 1809, carried on under the firm of the *Pen Van Coal Company*, in July 1812, it was agreed that the Plaintiff should be no longer interested therein, and that *Jones* should pay to him an annual rent of £400; and in May 1814, the Plaintiff agreed to let his interest in the colliery, during the remainder of the term, to *Jones* and *Hopkin Perkins*, for a like rent; that the Plaintiff had not retained any interest in the business since July 1812; and in March or April 1812, the Plaintiff, having reason to think that *Jones* had accepted bills in the name of the partnership for his own use, sent to *Homfray, Moggridge*, and Co. the bankers employed by the partnership, a written notice not to discount or pay any bills or drafts of *Jones* on account of the *Pen Van Coal Company*; that in October 1813, the partnership of *Homfray, Moggridge*, and Co. was dissolved, and the Defendants, who were partners therein, succeeded to the shares of the retiring partners.

The bill farther stated, that in January 1815, a demand was made by the Defendants against the Plaintiff, in the character of a partner in the *Pen Van Coal Company*, for the payment of certain bills of exchange alleged to have been drawn or indorsed by *Jones* in the name of the *Pen Van Coal Company*, in June, July, and August 1814; and in March following, the Defendants brought an action against the Plaintiff and the partners in the *Pen Van Coal Company*, and obtained judgment.

The bill, alleging that the bills were not drawn or indorsed for any purposes relating to the Company, but for the private advantage of *Jones*, and that the Defendants, when they discounted the bills, knew that they were not for the use of the Company, and that the Plaintiff was no longer a partner, charged, that by a [229] letter in the custody of the Defendants, of the 23d March 1812, which reached the hands of *William Fothergill*, who then was, and still continued, the chief clerk of *Homfray, Moggridge*, and Co. and of the Defendants, the Plaintiff gave notice to *Homfray, Moggridge*, and Co. that he would not be responsible for any bills drawn or accepted by *Jones* in the name of the *Pen Van Coal Company*; and that the Plaintiff, though resident within four miles of the town of Newport, where the business of the Defendants is carried on, never received any intimation of the bills till March 1815, *Jones* having become bankrupt in October 1814.

The bill prayed an injunction against issuing execution upon the judgment obtained, or commencing or prosecuting any action or other proceedings at law against the Plaintiff upon the judgment, or upon any of the bills drawn or indorsed by *Jones* in the name of the *Pen Van Coal Company*, and that they might be decreed to deliver up the bills to the Plaintiff, or otherwise to indemnify him against all actions and demands upon them.

The answer stated, that the Defendant, *Forman*, was not a partner in the former firm of *Homfray, Moggridge*, and Co.; denied knowledge or belief that the Plaintiff had retired from the *Pen Van Coal Company* in July 1814; stated, that a demand of the amount of the bills from the Plaintiff was made in November and December 1815, and an action commenced by the Defendants in March 1816; denied knowledge or belief in themselves or *W. Fothergill* that the bills were drawn or indorsed for any purposes unconnected with the Coal Company; the Defendants having been informed by *Jones*, and believing that they were drawn for the purposes of the

[230] Company, and that all the money advanced on them was applied for those purposes.

The answer also denied, that, at the time of discounting the bills, the Defendants had notice that the Plaintiff had retired from the partnership; admitted letters received by *William Fothergill* from the Plaintiff in April 1812, requesting that *Homfray, Moggridge, and Co.* would neither pay nor discount any bills on account of the *Pen Van Coal Company*, without previous advice to him; but stated, that the Defendants were first informed of such letters in January or February 1815; and that about Christmas 1812, *Jones* assured *William Fothergill*, that he had remonstrated with the Plaintiff on the subject of the notice, and had satisfied him that the *Pen Van Coal Company* could not go on without discounts, and that the Plaintiff had authorised him to communicate that to *William Fothergill*.

The Plaintiff now showed cause against dissolving the injunction which had been obtained for want of answer.

The *Solicitor-General* [Gifford] and Mr. *Wilbraham*, in support of the injunction. On the merits, the Defendants are not entitled to recover from the Plaintiff the amount of bills of exchange accepted in the partnership name, by a person with whom he had ceased to be a partner, and after express notice to the Defendants, that the Plaintiff would not be responsible for such bills. *Lord Galloway v. Mathew*. (10 East, 264).

The judgment at law was recovered by default; the action having been commenced in March 1815, the judgment was signed in the same month. However re-[231]-luctant a court of equity may be to interfere after a verdict, yet, where the justice of the case is clear, and the merits have not been examined at law, nor submitted to the opinion of a jury, relief will not be denied. On that point, the *dicta* of Sir *Joseph Jekyll*, in the *Countess of Gainsborough v. Gifford* (2 P. W. 424), are express.

Sir *Samuel Romilly* and Mr. *Treslove*, against the motion.

Where a party has no defence to an action on a bill of exchange, except from circumstances in the knowledge of the Plaintiff at law, this Court will not entertain a bill for discovery after judgment. In *Manning v. Mestaer*, in which Lord *Eldon* and Sir *Samuel Romilly* were counsel (precisely analogous to the present case), the Plaintiff in equity alleged, that circumstances in the knowledge of the Defendant in equity would have afforded a defence; but Lord *Thurlow* decided that there having been judgment at law, this Court would not interfere. If the judgment in this case were by default, of which no evidence is produced, it would still be most mischievous, and contrary to the practice, to permit the Defendant to obtain an examination on interrogatories in this Court.

It is, at least, extremely doubtful whether at law a partner can protect himself, as this Plaintiff seeks, against liability on the securities in the partnership name.

The Lord Chancellor [Eldon]. This is a case of great importance to the practice of the Court. It is stated that here is an accidental and unfortunate judgment by default; but that judgment was suffered by default is shown in such a way that I cannot [232] take much notice of it. No circumstances are confessed in the answer, or in any way established, from which it can be collected that the judgment was not deliberate. If a Defendant has a good legal defence, but the matter has not been tried at law, it becomes a very serious question, whether a party, who, being competent, does not choose to defend himself at law, can come into equity, and change the jurisdiction. Consider the effect of that: he might not have succeeded in his defence at law; but, by coming into equity, he secures so much additional time.

The case of the *Countess of Gainsborough v. Gifford* (2 P. W. 424) proves nothing, except from the *dicta* of Sir *Joseph Jekyll*; because the party who brought the action for the price of the shares, not having deducted from the sum which the Countess was to pay, the money for which he had sold them, it was clear that she was entitled to be relieved from so much of the amount which he had recovered at law.

Sir *Joseph Jekyll* says,—“I agree the Court ought to be very tender how they help any Defendant after a trial at law, in a matter where such Defendant had an opportunity to defend himself. But still such cases there are, in which equity will relieve after a verdict, in a matter where the Defendant at law might properly have defended himself: as, if the Plaintiff at law recovers a debt against the Defendant, and the Defendant afterwards finds a receipt, under the Plaintiff's own hand, for the

very money in question. Here the Plaintiff recovered a verdict against conscience, and though the receipt were in the Defendant's own custody, yet he not being then apprised of it, seems entitled to the aid of equity, it being against conscience that the Plaintiff should be twice paid the [233] same debt ; so if the Plaintiff's own book appeared to be crossed, and the money paid before the action brought." (2 P. W. 425.)

Sir *Joseph Jekyll* here takes, as a circumstance, that the Defendant at law was not apprised that he had such a receipt in his custody ; even if given to himself, he might not be apprised that it was in his custody, but he must have known that it had been given ; and then the question would have been, whether he should not have filed a bill praying an injunction till discovery, and then have gone to law ? That would have been so, unless the Defendant at law was not himself the person who paid the money, but represented some one by whom it was paid ; in which case the fact would not be in his own knowledge.(1)

I have some recollection, and may find a note, of *Manning v. Mestaer*. Lord *Thurlow* was very tenacious of the doctrine, that a party who had an opportunity of trial at law, and would not avail himself of it, could not come here. If the Court would allow that in any case, at least the case should be extremely clear. Where a question depends on papers the existence of which the Defendant at law knew, and by which he might have explained the fact, that perhaps is not so clear a case, that the Court will interfere.

[234] May 22, 1819. The case having been again mentioned, the Lord Chancellor intimated that he remained of opinion that the question was legal ; that the Plaintiff had shown no title to relief in equity, and that he could not have succeeded at law.

May 24. The Lord Chancellor [Eldon]. I have read the papers again, and my decided opinion is, that the injunction must be dissolved.

Injunction dissolved.(2)

Reg. Lib. B. 1818, fol. 1164.

(1) "*Desborough v. Adlard*, February 24. 26 Car. 2, 1673. The Plaintiff exhibited a bill to be relieved against a verdict and judgment at law, obtained against him upon a plea of *n'ungs exor.* which was dismissed, because this plea must needs be contrary to his own knowledge."—Lord *Nottingham's MSS.*

(2) See *Snowball v. Vicaris*, Bunb. 175. *Hankey v. Vernon*, 2 Cox, 12. *Chennel v. Churchman*, 3 Bro. C. C. 16, n. *Withal v. Liley*, Forr. 94. *Kensington v. White*, 3 Price, 169. *Whitmore v. Thornton*, 3 Price, 231. *Field v. Beaumont*, 1 Swans. 204. "In *Rowe v. Wood*, *Michaelmas* 1816, the Lord Chancellor said, In general an injunction is never granted to stay execution, except for want of appearance or answer ; the parties ought to have applied sooner, and it would be extremely mischievous to grant the writ in favour of persons who have lain by so long. An injunction is not granted to stay the sheriff from selling property taken under an execution, unless it had been previously obtained against the Defendant to stay execution ; and the sheriff thus enjoined must sell under subsequent executions, unless the Plaintiff will indemnify him. In a special case, an injunction to stay execution has been obtained on affidavit, as where a warrant of attorney had been obtained by fraud.

Mr. *Bell* mentioned a case of *Mootham v. Waskett*, in which a warrant of attorney having been fraudulently obtained, execution was stayed by injunction." From Mr. *Merivale's Notes* ; and see 2 *Maddock*, Principles and Practice of Chancery, 131, 132. *Lord Courteney v. Godschall*, 9 Ves. 473. *Annesley v. Rookes*, 3 Mer. 226, n.

#### [235] BROWN v. PETRE. May 23, 1818.

A lessee for years determinable on lives, having paid an advanced rent during a dispute whether the last *cestui que vie*, who had been many years absent from the realm, was alive, and a demand of a farther advanced rent being made by the lessor, on a bill by the tenant to recover those payments, a commission to examine witnesses to prove the *cestui que vie* still living was issued, the plaintiff paying into court the arrears and accruing payments of the advanced rent, which he had been accustomed to pay.

The bill stated, that by a lease of the 1st of June 1768, Lady *Stourton* demised to *C. Haddock*, her executors, &c., an estate in the county of *Lancaster*, for ninety-nine years, if *John Aspinall* of *Darwen*, then aged sixty years, *William Aspinall*

of *Blackburn*, then aged eighteen years, and *John Aspinall* of *Salisbury*, then aged fifty years, or any of them, should so long live, subject to a yearly rent of £1; that the term became vested, on the 3d of November 1784, in *Henry Brown*, and, after his death, in March 1815, in the Plaintiffs; the reversion, subject to the term, being vested in *George Petre*, the Defendant; that *John Aspinall* of *Darwen* died in 1785, and *John Aspinall* of *Salisbury*, in 1782, and *William Aspinall* was, at the Spring assizes for the county of *Lancaster*, in 1787, convicted of stealing, and sentenced to transportation for fourteen years, and was accordingly transported to *New South Wales*, and had ever since been resident in that colony; that in 1795, *J. Harper*, receiver of the rents of the late Lord *Petre*, in whom the reversion of the premises was then vested, represented to *Henry Brown* that, by the statute 19 Car. 2, c. 6, Lord *Petre* was entitled to the possession of the estate, *William Aspinall* not having been in *England* for many years, and that *Brown* would be dispossessed, unless he agreed to pay to Lord *Petre* twenty guineas a-year; that *Brown*, being ignorant of the law, and not having any evidence that *William Aspinall* was then living, paid twenty guineas a-year for the premises, during about ten years, when *Harper* insisted that he should pay forty guineas a-year; and *Brown*, not being able to prove the life of *William Aspinall*, paid one half year's rent at that rate; but finding then that *William Aspinall* was alive, refused to make any further payments: that it appeared by the [236] register kept at the office of the Secretary of State, that, at the last muster, made in August 1806, *William Aspinall* was living in *New South Wales*, as a free British settler, and, from the statement of persons arrived from that place, that he continued living in 1808.

The bill then stated correspondence between the solicitors of the parties, containing various proposals for ascertaining the sum to be paid by *Brown*, on account of rent of the premises, since Michaelmas 1805 (the Defendant claiming £40 *per annum*, to 1810, and, from that time, £79, 10s. *per annum*), but without effecting any conclusive arrangement.

The bill, alleging the death of *Henry Brown*, in 1815, that the Plaintiffs were his administrators with the will annexed, and that it appeared, by a certificate of persons resident in *New South Wales*, dated the 13th of March 1816, that *William Aspinall* was then alive, prayed an account of the sums of money which the Defendant, or any person by his order, &c., had received from *Henry Brown*, on account of rents of the premises by virtue of the lease, and that he might be decreed to pay what should appear due, and that the Plaintiffs might be declared entitled to remain in quiet and peaceable possession of the premises, at the rent specified in the lease, for the residue of the term, if *William Aspinall* should so long live, and that the Plaintiffs might have a commission or commissions for the examination of witnesses in *New South Wales*, and elsewhere, beyond the seas, to prove, that the *William Aspinall* who was living in *New South Wales* is still living, and that he is the *William Aspinall* named in the lease.

The Defendant, by his answer, insisted, that there was no regular authenticated document to prove, that the [237] *William Aspinall* living in *New South Wales* is the nominee in the lease; and that under the statute 19 Car. 2, c. 6, he was entitled to the possession of the premises, and claimed the like benefit at the hearing of the cause, as if he had pleaded the statute in bar.

Sir *Samuel Romilly* and Mr. *Dowdeswell* having, on a former day, in behalf of the Plaintiff, moved for a commission to examine witnesses, on affidavits of the identity of the nominee in the lease, and *William Aspinall* resident in *New South Wales*, the Lord Chancellor now gave judgment.

The Lord Chancellor [Eldon]. On this application, the question is, whether a commission should be issued for the examination of witnesses to ascertain, whether a person who was some years ago transported to *New South Wales*, and lately living there, is still alive, and if the commission should be issued, on what terms? That a commission must be issued, it is impossible to doubt. The statute (19 Car. 2, c. 6, s. 2) declares, that if persons for whose lives estates have been granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient proof be made of their lives, in any action commenced for recovery of such tenements by the lessors or reversioners, they shall be accounted dead, and the judge shall direct the jury to give their verdict accordingly. It seems to me, that both at law and in equity, where it is necessary to produce sufficient proof, that the *cestui que vie* is alive, the party would

be entitled to obtain that proof by the means open to every other Defendant, and in course by a commission for the examination of witnesses. The statute also provides (sect. 4, 5), that [238] if there is an eviction of the tenement by virtue of the act, and it afterwards appears in proof, that the *cestui que vie* was living at the time of the eviction, the persons entitled to the estate, while his life subsists, may, by the means prescribed, recover the profits of the land during their dispossession; and that, whether the action is brought during the life of the *cestui que vie*, or after his death.

This case presents the peculiarity that, at a particular period, when the parties differed on the fact, whether *Aspinal* was living or dead, they came to an agreement by which the rent was raised from twenty shillings to twenty guineas, and, at a subsequent period, from twenty guineas to £42. If the *cestui que vie* is alive, in justice, the estate ought to have been held at the rent reserved; but a difficulty in recovering the amount paid beyond that rent will be created by the dispute whether he was living; and it seems fair that the Plaintiffs should continue to pay the £42 *per annum* (not £79, 10s.) which he has been accustomed to pay, without prejudice to the question, whether he should not be relieved against so much of the payment as is additional to the rent reserved. On that point the question will be, whether it can be recovered as paid by mistake; it may be represented to have been paid by agreement, under a doubt whether the *cestui que vie* was alive or dead.

"His Lordship doth order, that the Plaintiffs be at liberty to sue out a commission for the examination of witnesses in *New South Wales*, to prove whether *William Aspinal*, named in the indenture in the pleadings of this cause mentioned, is still living or dead, and, if dead, when he died; and the Defendants are, in six days after notice thereof, to join and strike commissioners' names with the Plaintiffs' clerk in Court, or, in default thereof, the Plaintiffs are to be at liberty to take out such com-[239]-mission directed to their own commissioners; and it is ordered, that the Plaintiffs do pay the sum of £262, 10s., being the amount of the rents of the premises in question, at the rate of £21 *per annum*, from *Michaelmas* day 1805 to *Lady* day 1818, into the bank, with the privy of the accountant-general, &c.; and it is ordered, that the said Plaintiffs do continue to pay the said rent of £21 *per annum* from time to time into the bank, &c.; and it is ordered, that the Plaintiffs do give security to be approved, &c., for the payment of the farther sum of £21 *per annum*, in case the said *William Aspinal* prove to be dead, from the time he so died; but this is to be without prejudice." Reg. Lib. A. 1817, fol. 2133.(1)

(1) See *Holman v. Exton*, *Carth.* 246; *Ca. Temp. Holt*, 195; 6 *Ann.* c. 18. *Ex parte Sir John St. Aubyn*, 2 *Cox*, 373. *Ex parte Grant*, 6 *Ves.* 512. *Doe v. Deakin*, 4 *Barn. & Ald.* 433.

CARWICK v. YOUNG. May 23, 26, 28, [1818].

A reference to the master to inquire whether proceedings at law and in equity are for the same matter, stays all proceedings, without the special order of the Court, which will give or withhold leave to proceed, according to the circumstances of each case.

The Defendant moved that the replication filed in this cause might be withdrawn, and the bill dismissed with costs for want of prosecution, and that the Plaintiff's, or the Defendant's clerk in Court, might pay the costs. The affidavit in support of the motion stated, that the Defendant's clerk in Court having informed his solicitor that no replication was filed on the 7th of May, an order of the *Vice-Chancellor* was obtained, dismissing the bill for want of prosecution; that from the refusal of the Defendant's clerk in Court to procure the usual six clerks' certificate, on the ground that no notice had been given to the Plaintiff of the Defendant's intention to move to dismiss, the order could not be [240] drawn up; and that, on the 9th of May, a replication was filed.

At the same time, the Plaintiff had given notice of a motion for leave to withdraw the replication and amend the bill, not requiring any farther answer, and undertaking to file the replication again forthwith. The affidavit in support of that motion stated, that the bill was filed to compel specific performance of an agreement; that



the Defendant refusing to pay rent, and the Plaintiff having proceeded to recover it at law an inquiry before the Master was directed, whether the Plaintiff's proceedings at law and in equity were for the same matter, and the Master reporting in the negative, his report was confirmed; that a second reference to the Master for the same purpose had been since obtained by the Defendant, but the order had not been drawn up; and specified the intended amendment.

Sir Samuel Romilly and Mr. Wingfield, in support of the Defendant's motion, insisted that the Defendant was entitled to move to dismiss the bill without giving notice, and that the replication filed after the order was pronounced, though before it had been drawn up, was too late. *The Attorney-General v. Finch* (1 Ves. & Bea. 368. See *Reynolds v. Nelson*, 5 Mad. 60. *Lorimer v. Lorimer*, 1 Jac. & Walk. 284). In no instance has a Plaintiff been permitted to withdraw, for the purpose of amendment, a replication filed to prevent the dismissal of the bill.

Mr. Heald, against the Defendant's, and in support of the Plaintiff's, motion.

The case cited is not applicable to the present question; the reference to the Master to inquire whether [241] the proceedings at law and in this Court are for the same matter, suspends all proceedings till the report. In *Mousley v. Basnett*, stated in a note to *Boyd v. Heinzelman* (1 Ves. & Bea. 381), the order expressly reserved to the Plaintiff liberty to proceed pending the reference; and in *Mills v. Fry* (3 Ves. & Bea. 9), your Lordship states, that without such reservation all proceedings are stayed. The Defendant having thus prevented the Plaintiff from proceeding either at law or in equity, clandestinely instructs counsel to move the dismissal of the bill for want of prosecution. The replication ought not to have been filed; it was unnecessary as well as irregular.

Sir Samuel Romilly, in reply.

The Defendants, in April, gave notice of a motion for a reference to the Master to approve a lease; a sufficient proof that they did not consider proceedings stayed. It has been understood, that the order stays the proceedings at law, but not in equity.

The Lord Chancellor [Eldon]. It would not be difficult, in the particular circumstances of this case, to dispose of it; but it is important to settle the practice of the Court, and for that purpose I wish the register to make inquiry, and certify the result.

The opinion which I expressed in *Mills v. Fry* (which seems scarcely supported by *Mousley v. Basnett*), proceeded not only on the communication of the register, but on the consideration of a difficulty that has often occurred to me, and which induces me to doubt whether [242] there is any general rule on the subject. Suppose an action brought on the Northern Circuit in Michaelmas term, and a bill filed in the same term, and the common order for a reference, alleging that the Plaintiff proceeds for the same matter at law and in equity; in such a case, I do not think it wholesome that proceedings should be stayed; because, in all probability, the report of the Master would be obtained long before any thing effectual could be done at law; but if the Master reports that the proceedings were for the same matter, and the Plaintiff afterward chuses to proceed in equity, the Court would direct him to pay the costs of the proceedings at law. Suppose an action to be tried between Easter and Trinity term, and a bill filed when the parties were going to trial; unless the Master's report could be obtained within the first four days of the next term, before the question was decided, execution might be taken. The terms of the order in *Mousley v. Basnett*, allow the Plaintiff to proceed at law without any restraint; if the order is so drawn, regard being had to the period at which the action was commenced and the bill filed, execution might issue before the question could be decided. I doubt, therefore, whether there is a general rule; but if the register, on examination, finds, that it has been the constant course to stay the proceedings at law and not in equity, that established practice would be more satisfactory than any opinion of my own.

Mr. Heald. The mischief suggested arises from the delay of the party in not filing the bill sooner.

The Lord Chancellor [Eldon]. If the party is early in one Court and late in the other, all the inconvenience is that of which he is the author.

[243] I abide by the authority of *The Attorney-General v. Finch*, but it is not applicable to this case, which depends on its circumstances. I think it not necessary

to obtain the six clerks' certificate before the motion to dismiss. I am satisfied that, by the practice of the Court, it is enough to produce the certificate on applying to have the order drawn up. The clerk in Court should not have refused to procure the certificate, but it would be impossible for the Court to suffer the Plaintiff to take advantage of a slip in the conduct of an officer of the Court. Whatever may be the certificate of the register, this case must be decided on its circumstances, and with reference to the fact, that the matter was in a situation in which it was very difficult for any one to know how to deal with it.

*May 26.* The *Lord Chancellor* [Eldon]. On a search in the register's office, the result of which has been communicated to me, the general rule appears to be, that the Plaintiff is not at liberty, after an order for election, to proceed either at law or in equity; but the Court, in the particular circumstances of each case, will give liberty to proceed, as those particular circumstances require; and accordingly, in some of the orders, the party has been allowed to proceed, in others, he has been directed to give judgment, with an express restraint against taking out execution. There is no case in which the Court would not modify the rule according to circumstances.

*May 28.* The *Lord Chancellor* intimated, that, under the circumstances of the case, considering the difficulty in the proceedings at law and in equity, the cause ought to be reinstated; and that without express permission to proceed, which, in special circumstances, the Court would give, the order to elect stays proceedings at law.(1)

(1) See *Mills v. Fry*, 19 Ves. 277; *Coop.* 107; *Anon.* 2 Madd. 395. *Browne v. Poynter*, 3 Madd. 24. *Coupland v. Bradock*, 5 Madd. 14. *Hogue v. Curtis*, 1 Jac. & Walk. 449. In *Barker v. Dumaresque*, 2 Atk. 119. *Barnard. Rep. in Cha.* 277. Lord *Hardwicke* "gave the Plaintiff leave to make a special election, viz. to proceed at law to recover judgment with a stay of execution, and likewise to proceed in this court for a discovery and an account of assets."

GARRARD v. GRINLING. *Rolls.* June 15, 16, 17, [1818].

[S. C. 1 Wils. 460.]

Specific performance of a written agreement refused, on parol evidence that one term of the actual agreement was omitted.

The bill stated written articles of agreement, dated the 24th of *November* 1807, by which the Defendant agreed to let to the Plaintiff a dwelling-house, malt-house, and twenty-five acres of land, for twenty-one years, from the 11th of *October* preceding, at an annual rent of £88; and the Plaintiff agreed to pay the property-tax during the term, to provide straw for thatching the buildings, to keep the gates, stiles, barns, and bridges, in repair (the Defendant finding rough wood for that purpose, and repairing the buildings), and to take all the live and dead stock, which the Defendant should think fit to leave, at a fair valuation by two impartial persons, and all the barley at the price at which the Defendant bought it, and to keep the malt mill in repair, the stone excepted.

The bill filed on the 22d of *November* 1809, prayed the specific performance of the agreement, and compensation for the time which had elapsed since the lease ought to have been granted.

[245] The answer of the Defendant stated, that the written agreement did not contain all the terms upon which the lease was to be granted; the Defendant having stipulated that five hundred coombs of malt should be made yearly during the term by the Plaintiff, and that the lease should contain a covenant on the part of the Plaintiff, not to assign the premises without the consent of the Defendant, and proper covenants for farming the lands: that the Plaintiff prepared the agreement stated in the bill, and brought it to the Defendant for his signature, who, having attempted to read it, but not being able to make it out, observed to the Plaintiff and his brother *John Garrard*, who was then present, that he supposed he should find it right; to which the Plaintiff and his brother replied, that it certainly was: and the Defendant, not supposing that the agreement was prepared in any manner different from the

terms stipulated, and confiding in the assurances of the Plaintiff and his brother, that he would find it right, was induced to sign it, without having read, or shown it to any person, on his behalf; but that the Defendant would not have executed any agreement for letting the premises, if he had not understood that proper covenants, to the effect stated in the answer, were to be introduced into the lease.

*John Garrard*, the brother of the Plaintiff, deposed, that on the 23d of *November* 1807, the Defendant proposed to let the premises to the Plaintiff, at a rent of £86, and, on the terms specified in the written agreement, as to taking the stock and repairs, the Plaintiff undertaking to make annually seven hundred coombs of malt; that the Plaintiff and the witness agreed to those terms, except as to the quantity of malt to be made, in lieu of which it was proposed by the Plaintiff to undertake to make annually five hundred coombs only, to which the Defendant assented; and also except as to the rent of £86, [246] in lieu of which the Plaintiff proposed to pay £84 only, which the Defendant refused to accept; that, on the following day, the Plaintiff having resolved to accept the proposal, with the alteration of the quantity of malt, from seven hundred to five hundred coombs, the witness reduced the proposal to writing, in the form of an agreement; and, on the same day, went with the Plaintiff to the house of the Defendant, for the purpose of completing the same, when the Defendant required £88 *per annum* rent, instead of £86: that the Plaintiff expressed himself willing to give £86, and the witness informed the Defendant that he had prepared an agreement according to the terms mentioned the evening before; and, in the expectation that the Defendant would accept £86, interlined the word *six* after the word *eighty*, and then delivered the agreement to the Defendant for his perusal, who accordingly read the same over from the beginning to the reservation of the rent, to which he objected, and wrote the word *eight* over the word *six*; that the witness remonstrated with him for so doing, but the Defendant positively refused to make any further alteration in the rent, and continued to read the agreement for two or three lines further, when he gave it to the witness, and requested him to read it; that the witness read the whole agreement from the beginning to the end, distinctly and aloud, in the presence of the Plaintiff and Defendant, and of *Sophia Philpot*, the Defendant's housekeeper; upon which the Defendant expressed himself perfectly satisfied, and the agreement was signed by both parties, the Defendant observing to the Plaintiff, that if any thing had been omitted, respecting covenants, or any thing which they had talked over the day before, he supposed it would be agreeable to them to have it inserted in the lease, to which the Plaintiff and the witness assented, saying, that they did not desire to have the lands without proper covenants; and the Defendant proposing that [247] the agreement should be left in the hands of the witness, on behalf of both parties, he immediately took possession of it.

*Sophia Philpot* deposed, that the last witness read, as part of the agreement, a clause requiring five hundred coombs of malt, to be made annually on the premises; and that, in the conversation preceding the signature of the agreement, it was stipulated that the Plaintiff should not assign the lease without the consent of the Defendant.

*Mr. Hart* and *Mr. Roupell*, for the Plaintiff. The written agreement, which it appears was read to the Defendant, and in which he introduced an addition to the rent, is the actual contract, and supersedes all previous proposals. There is no evidence that the written agreement varies from the intention of the parties; and the covenant against assignment never formed a term of the contract; and the covenant to use the malt-house is included, without express stipulation, as an usual covenant, according to the custom of the country.

*Mr. Bell*, *Mr. Wetherell*, and *Mr. Pepys*, for the Defendant. The bill, seeking the specific performance of an agreement different from that which the parties intended, must be dismissed. *The Marquess Townshend v. Stangroom* (6 *Ves.* 328), *Woollam v. Hearn* (7 *Ves.* 311), *Higginson v. Clowes* (15 *Ves.* 516; 1 *Ves. & Bea.* 524, and see *Clarke v. Grant*, 14 *Ves.* 519. *Kennedy v. Lee*, 3 *Mer.* 441). A covenant for making a certain quantity of malt, is not within the principles established in *Church v. Brown* (15 *Ves.* 258), a usual covenant.

[248] *The Master of the Rolls*. On reading the pleadings and the evidence, I am of opinion that the Plaintiff has not established a case for the specific performance which he prays. It is incumbent on the Plaintiff, in such a suit, to satisfy

the Court that he is entitled to specific performance of the very agreement stated in the bill ; insisting on a written contract, the question must be, is that written contract conformable to the actual contract ? It is certainly competent to the Defendant to show, that by fraud, or mistake, or otherwise, the written contract and the actual contract differ ; and it is established by the evidence on the part of the Plaintiff, that such is the fact in this case.

Without imputing fraud to the Plaintiff, it appears that by some inadvertence, this written contract has not included the terms on which the parties had agreed. It was a part of the agreement on the 23d of *November*, that the Plaintiff, if he took the malt-house, should make annually five hundred coombs of malt ; a fact not disputed on the part of the Plaintiff, but proved by his brother. On the 24th of *November*, the parties having previously adjusted all points except the amount of rent, the Plaintiff is willing to accede to the Defendant's terms in that article, and a written contract is prepared by the Plaintiff. That contract, detailing in particular many of the terms that are to constitute the covenants to be contained in the lease, specifying payment of the property tax, repairs, and a valuation of the stock, yet wholly omits that which appears to have been the subject of discussion at the moment of drawing it, the five hundred coombs of malt.

It is insisted, that the omission is immaterial, because the agreement contemplated a future lease, which [249] would include all proper covenants, and that it is neither necessary nor usual in executory contracts, to enumerate all the covenants to be inserted in a lease. If the covenant relative to five hundred coombs of malt falls within the description of a usual covenant, it required no specification, but was incidental to the contract, and implicitly included in it. But can such a covenant be so described ? It is not necessary to inquire particularly into the nature of usual covenants ; the parties cannot ingraft on a contract specifying covenants in a future lease, any covenant which is not of that description. The written contract, if to be specifically executed, is the guide to the Master in approving a lease conformable to it ; and this contract would clearly not authorise the insertion of a covenant for malting five hundred coombs ; not an usual, but a peculiar, covenant, imposing a specific obligation on a party who without it would take the premises, unfettered by restriction in the use of them. The written agreement was brought by the Plaintiff for signature, not after a considerable interval, when he might have forgotten the previous stipulations, but at the instant ; and while it specifies a number of covenants usual and proper, which it was not necessary to specify, totally omits those which had at that moment been the subject of discussion.

Without adverting to the question, whether the agreement was so read to the Defendant as to inform him that the covenant with regard to malt was not included, it is clear that the Defendant signed it under a representation, that if any of the terms of the real contract were omitted, they should be inserted in the lease. The Defendant seems afterwards to have objected to the transaction, and on the question, whether the lease ought to contain a covenant against assigning without the assent of the landlord, the witnesses differ. It does [250] not appear that a new contract was ever concluded between the parties ; the bill seeks performance of the written contract ; and the single question is, whether, as the pleadings are framed, and with a bill insisting on the written as the actual agreement, the Court can decree performance of a contract, which it is clear on all hands is not the true, and compel the Defendant to execute a lease not providing the cautions which he imposed on the Plaintiff ?

Without adverting to collateral matter, the probable motives of each party, it is enough to say, that on a bill for specific performance, when it is certain that the written is not the actual contract, when the Court must decree performance, if at all, with supplemental variations, establishing an agreement, the terms of which are some in writing, some parol, after a great lapse of time, and with compensation for the period expired, while the doubt depended, in such a case, the Plaintiff cannot be declared entitled to relief.

The bill must be dismissed, but without costs. The real subject of dispute was the restraint of assignment, and on that part of the case I am not perfectly satisfied. I shall follow the example of the late *Master of the Rolls* in *Woollam v. Herne* (7 *Ves.* 211).

Bill dismissed without costs.

Reg. Lib. A. 1817, fol. 2076.

[251] SMYTHE v. SMYTHE. May 28, 1818.

[S. C. 1 Wils. Ch. 426.]

A tenant for life without impeachment of waste, not restrained from felling trees fit for the purposes of timber, though young, and not such as would be felled in a course of husband-like management of the estate.

The supplemental bill in this cause (reported 1 *Swans*. 252), filed on the 15th of April 1818, stated, that since the Defendant put in his answer to the original bill, he had marked for cutting a large quantity of timberlike trees, unfit to be cut as timber, or in a due course of cutting; and prayed, that the Defendant might be restrained from felling or cutting any timber or other trees on the estates in question, unfit to be cut or felled in a due course of cutting or felling, or not come to maturity and fit to be cut as timber.

The answer of the Defendant denied that he had marked any trees which were unfit to be cut as timber, or in due course of cutting.

On this day, the Plaintiff moved for an injunction to restrain the Defendant from cutting any timber or other trees or saplings standing on the lands mentioned in the pleadings, that are unfit to be cut or felled in a due and fair course of husbandry.

The affidavits in support of the motion (filed before the answer to the supplemental bill) stated, that the Defendant had marked for cutting every tree, however young, that could be sold; that if some of the oak trees marked should be cut, great waste would be committed, and irreparable loss ensue, and the saplings left would perish. According to the affidavits in reply, a very small proportion of the oak trees marked to be felled measured less than nine cubical feet, and no injury would ensue to the saplings or trees left, by felling those marked.

[252] The *Solicitor-General*, and Mr. *Rose*, in support of the motion, cited the *Marquess of Downshire v. Lady Sandys* (6 *Ves.* 107), and *Lord Tamworth v. Lord Ferrers* (6 *Ves.* 419).

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Dowdeswell*, against the motion.

The *Lord Chancellor* [Eldon]. A tenant for life, without impeachment of waste, is clearly not compellable to cut timber, in such way, as a tenant in fee would think most advantageous, but is entitled to cut down any thing that is timber. This motion requires an affidavit, pledging the deponent, that the trees about to be cut are not fit for timber. It is settled, that a tree, which a tenant in fee, acting in a husband-like manner, would not cut, may be cut by a tenant for life, unimpeachable of waste, provided that it is fit for the purpose of timber. A tenant for life, unimpeachable of waste, might cut down all these trees, without question, at law; and to subject him, in this Court, to the rules which a tenant in fee might observe, for the purpose of husband-like cultivation, would deprive him of almost all his legal rights. If the trees are so far advanced as to become timber, the tenant may cut them down, though they are in a state to thrive, and though cutting them down would injure the saplings. It is not sufficient to state, that this is thriving wood; it must be thriving wood not fit for the purposes of timber. I cannot determine whether a tree, measuring less than nine cubic feet, is, or is not, fit for purposes of timber. If the Plaintiff files an affidavit, stating, that trees measuring less than nine cubic feet are not fit for purposes of timber, that must be met. In the cases referred to, the injunction restrained [253] the tenant for life from cutting trees unfit to be cut as timber.

Injunction refused.(1)

(1) On the equitable rule which restrains a tenant for life without impeachment of waste from felling timber-trees unfit to be felled as timber, see *Lord Castleman v. Lord Craven*, 22 *Vin. Ab.* 523; 2 *Eq. Ca. Ab.* 758. *O'Brien v. O'Brien*, *Amb.* 107. *Perrot v. Perrot*, 3 *Atk.* 94. *Chamberlayne v. Dummer*, 2 *Dick.* 600; 1 *Bro. C. C.* 166; 3 *Bro. C. C.* 549. *Strathmore v. Bowes*, 2 *Bro. C. C.* 88; 2 *Dick.* 673; 1 *Cox*, 263. *Marquess of Downshire v. Lady Sandys*, 6 *Ves.* 107. *Lord Tamworth v. Lord Ferrers*, 6 *Ves.* 419.

WILLIAMS v. WILLIAMS. June 10, [1818].

[S. C. 1 Wils. Ch. 473, n.]

A coach master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from *R. to London*, or prejudicial to the business which he had sold, an injunction was granted restraining him from running a coach from *P. through R. to London*.

The bill stated, that, previously to *November 1817*, the Plaintiffs and the Defendant were concerned as partners in coaches running from *Reading to London*, and back; that by articles of agreement, dated the 4th of *November 1817*, the Defendant agreed to sell to one of the Plaintiffs his share in the business, with a condition, that he should not at any time after *November*, be in any manner concerned in any coach running from *Reading to London*, or from *London to Reading*, or in any other coach that might in any manner injure the business then carried on by the Plaintiffs; that the Defendant had lately begun to run a coach from *Pangbourne*, about six miles beyond *Reading*, to *London*, and from *London to Pangbourne*, passing through *Reading*, and running throughout the same road as the coach of the Plaintiffs, to the great injury of their business. The [254] bill prayed a specific performance of the agreement, and an injunction.

The allegations of the bill being verified by affidavit, Sir *Samuel Romilly* moved for an injunction.

"His Lordship doth order, that an injunction be awarded to restrain the Defendant, his servants and agents, from running any coach or coaches from *London to Reading*, and back again from *Reading to London*, as in the Plaintiff's bill mentioned, until answer and farther order."

Reg. Lib. B. 1817, fol. 1035.(1)

(1) It has been long settled, that covenants restraining the exercise of a trade in a particular place, as contradistinguished from covenants in general restraint of trade, are valid, *Mitchel v. Reynolds* (which collects the earlier authorities), 1 P. W. 181; 10 Mod. 27, 85, 130; Fort. 296. *Chesman v. Mainby*, Fort. 297; 2 Str. 739; 2 Lord Raym. 1456; 1 Bro. P. C. ed. Toml. 234. *Colmer v. Clark*, 7 Mod. 230, under the name of *Clerke v. Comer*, Lee Rep. Temp. Hardwicke, 53. *Davis v. Mason*, 5 T. R. 118. *Bunn v. Guy*, 4 East, 190. *Gale v. Reed*, 8 East, 80, and a Court of Equity will compel the specific performance, and enjoin against the violation, of such covenants, *Harrison v. Gardner*, 2 Madd. 198. *Williams v. Williams*, supra. *Shackle v. Baker*, 14 Ves. 468. *Cruttwell v. Lye*, 17 Ves. 335. See *Hardy v. Martin*, 4 Bro. C. C. 419; 1 Cox, 26. *Barrett v. Blagrove*, 5 Ves. 555; 6 Ves. 104. *Bozon v. Farlow*, 1 Mer. 459. But the mere sale of the good will of a trade, imposes no obligation on the vendor to forbear the exercise of the same trade. *Shackle v. Baker*, *Cruttwell v. Lye*, *Kennedy v. Lee*, 3 Mer. 441, nor it seems will Courts of Equity execute a contract for the sale of good will. *Baxter v. Conolly*, 1 Jac. & Walk. 576.

[255] JOB v. BARKER. June 20, 1818.

After a reference to the master of exceptions to an answer, an order for leave to amend, and that the defendant might answer the exceptions and amendments at the same time, obtained before the report, on the allegation that the master had allowed some of the exceptions, discharged with costs.

The Plaintiffs having amended their bill after answer, took exceptions to the answer to the amended bill, to which the Defendant submitted, and put in a farther answer, and, on the 30th of *May*, the Plaintiffs obtained a reference to the Master to look into the Plaintiffs' amended bill, and the Defendant's answer, and farther answer, and the exceptions taken to the former answer, and certify whether the answers were sufficient in the points excepted to. The Master was attended on the exceptions, but before he had made his report, the Plaintiffs, on the 3d of *June*, obtained an order, alleging that the Master had allowed one or more of the exceptions, to amend the

bill, and that the Defendant might answer the exceptions so allowed by the Master, and the amendments at the same time. The Defendant now moved to discharge that order for irregularity.

Mr. *Shadwell*, for the motion.

Mr. *Agar*, against it.

The *Lord Chancellor* [Eldon]. The order obtained was against all practice: the petition, that the Defendant may answer the amendments and exceptions at the same time, ought to state, that the Master has made his report, and certified the answer to be insufficient.

Order discharged with costs.

Reg. Lib. A. 1817, fol. 1250.

[256] POSTLETHWAITE v. BLYTHE. *June 22, 24, 1818.*

Estates being conveyed, among other purposes, to secure a debt of comparatively small amount, the Court will not direct a release upon payment into court of the largest sum to which the debt can in probability amount; the incumbrancer being entitled to retain the security till the debt is discharged.

Estates in *Jamaica* having been conveyed to trustees, in trust, *inter alia*, to raise money for the payment of a debt due to the Plaintiff, the bill in this cause was filed to compel payment. By their answer, the Defendants the trustees disputed the amount of the Plaintiffs' claim, and having paid into Court a sum of £2661. 2s. 3d., they moved before the *Vice Chancellor*, that upon payment into Court of the farther sum of £4034. 11s. (amounting with the former sum to £6695. 13s. 3d., the utmost extent of the debt claimed) the Plaintiff might release the estates. The *Vice Chancellor* made the order, on payment into Court of an additional sum for securing the Plaintiffs' costs. (*Postlethwaite v. Blythe*, 3 *Madd.* 242.)

On this day, the Plaintiff moved to discharge the *Vice Chancellor's* order.

Mr. *Bell* and Mr. *Heald*, for the motion. An incumbrancer cannot be compelled to release the estate before he has actually received his debt. In no instance has the Court directed a creditor who contracted for real security, to accept the security of stock.

The *Solicitor-General* [Gifford] and Mr. *Maddock*, against the motion. The amount due to the Plaintiff can be ascertained only upon taking a long account; the Defendants are ready to make any further payment into Court necessary as a provision against the depreciation of stock, and for securing the largest sum to which the Plaintiff can by [257] possibility be entitled; but the Court will not sanction the injustice of confining estates worth £70,000, pending the investigation of a claim which cannot exceed a tenth part of that sum.

The *Lord Chancellor* [Eldon]. This order supposes the possibility, that the fund paid into Court may be deficient to satisfy the mortgagee, and then requires him to accept for that deficiency the personal security of the trustees; is it not too clear for argument, that such an order is wrong in principle?

The rules of the Court with regard to mortgagees have been strongly impressed on my mind by the conduct of two distinguished practitioners. Mr. *Lloyd* constantly protested, that he never would, on the part of a mortgagee, consent to a sale; and the late Mr. *Maddocks*, who was himself a mortgagee for £20,000 on a *Welsh* estate, refused his concurrence in a sale, to the great dissatisfaction of Lord *Thurlow*. They both maintained, one on behalf of his client, the other of himself, that the mortgagee was entitled, before he relinquished the estate, to have the money, not in the hands of the Accountant-general, but in his own. It was not till a late period that it was contended that a mortgagor was bound to show his mortgage-deeds to a person contracting for the purchase of the estate. (See *Anon. Mos.* 246.) The mortgagor is entitled to say to the intended purchaser, that if he choose to take his chance of title, he may, on payment of the mortgage-money, have a conveyance. The general doctrine of the Court is, that if the party claiming to redeem will take the mortgagee's word for the sum due, and will pay it, the mortgagee must convey; but when the mortgagee states a certain sum to be [258] due, the Court will not order him to re-convey on payment of that sum into Court; placing him in this situation, that if that sum is more than sufficient to satisfy his demand, he shall

not have the surplus, if not sufficient, he shall have only personal security for the difference.

This case seems to me within these general principles ; but I will examine the papers.

*June 24.* The Lord Chancellor [Eldon]. I take it to be contrary to the whole course of proceeding in this Court, to compel a creditor to part with his security till he has received his money. Nothing but consent can authorise me to take the estate from the Plaintiff before payment.

Order discharged.

BOWDEN v. HODGE. *June 22, [1818].*

On a bill for discovery, and a commission to examine witnesses abroad, in aid of the defence to an action, the plaintiff, having obtained the common injunction for want of an answer, was held entitled to a commission, and to extend the injunction to stay trial.

The bill prayed, that one or more commission or commissions might be issued for the examination of witnesses at *Riga, Lubec, Hamburg*, and elsewhere beyond the seas, as to the several matters in the bill mentioned, and that the Plaintiffs might be at liberty to make use of the depositions of such witnesses upon the trial of the action commenced by the Defendant, and in the mean time, that the Defendant might be restrained by injunction from proceeding in the action.

On the 27th of *May* 1818, an injunction was granted, restraining proceedings at law till answer and farther [259] order ; but the Defendant was in the mean time to call for a plea, and proceed to trial thereon, and for want of a plea to enter up judgment ; but execution was stayed.

On the 8th of *June*, the Plaintiffs moved before the Vice Chancellor, that a commission might be issued for the examination of witnesses at *Riga, Lubec, and Hamburg*, and that the injunction might be extended to stay trial. The affidavit of the Plaintiffs in support of the motion stated, that in *January* or *February* 1817, *M. J. Haller, of Hamburg*, consigned to the Plaintiffs a quantity of linseed for sale on his account ; that the seed was contained in barrels commonly used for that purpose, and duly branded with the official mark, denoting that the seed was grown in 1816 ; that the seed was shipped at *Riga*, examined, and re-shipped, at *Lubec* and *Hamburg*, and accompanied by certificates from each of those places of its growth, examination, and shipment without alteration ; that soon after the arrival of the seed at *Hull*, in *March* 1817, *H. Ross* applied to the Plaintiffs, on behalf of the Defendant, to purchase a part of it, and went to the warehouse where it was deposited, and after examining the state of several of the barrels, as agent of the Defendant, entered into a contract with the Plaintiffs for the purchase of two hundred and ninety-seven barrels, at two guineas a barrel, and wrote and delivered a bought note, describing the seed as " new *Riga* sowing linseed, crop 1816 " ; that one hundred and ninety-seven barrels having been delivered to the Defendant, who paid for them the price stipulated, he soon afterwards applied to the Plaintiffs for an allowance, alleging, that the seed did not correspond to the description in the note ; but the Plaintiffs believing the seed to be such as described, refused to comply with his demand, and in *Michaelmas* term 1817, the Defendant [260] commenced an action in the Court of Exchequer against the Plaintiffs, to recover damages, on the ground, that the linseed was not of the crop of 1816, but of bad quality and unfit for sowing ; that the Defendant's solicitors refused to consent to a commission for the examination of witnesses abroad ; that the Plaintiffs were advised, that they could not safely proceed to trial without the testimony of persons resident in *Riga, Lubec, and Hamburg*, or elsewhere abroad ; and that they had reason to expect and believe that they should procure, if they were allowed a commission for that purpose, such evidence as would enable them to make a good defence.

The following order was made :—" This Court doth order, that one or more commission or commissions issue out of, and under the seal of, this Court, for the examination of the Plaintiff's witnesses, at *Riga, Lubec, and Hamburg*, returnable without delay ; and, it is ordered, that the Defendant's clerk in Court do, within four days after notice given, join and strike commissioners' names with the Plaintiff's clerk in Court, or, in default thereof, that the Plaintiffs be at liberty to sue out such commis-



sion directed to his own commissioners ; and the Plaintiffs are also to be at liberty to issue a duplicate and triplicate of such commission or commissions, if necessary ; and, if the Defendant joins in commission, it is ordered, that eight days' notice of the execution of the commission to the Defendant's commissioners, or one of them, be deemed good notice, and that the commissioners be authorized to swear one or more interpreter or interpreters, who shall, upon his or their oath, solemnly swear, well and truly to interpret the oath or oaths and interrogatories which shall be administered and exhibited to the witnesses to be examined, out of the English language, into the language spoken by the said witnesses, and also to interpret their depositions taken to the said interro-[261]-gatories ; (1) and it is ordered, that the injunction granted in this case, for stay of the Defendant's proceedings at law, be extended to stay the trial of the action at law, until after the return of the said commission, or this Court shall make further order to the contrary ; but, if any delay arises in obtaining the return of the said commission, the Defendant is to be at liberty to apply to this Court, respecting the same, as he shall be advised."

Reg. Lib. A. 1817, fol. 1949.

On this day the Defendant moved to discharge the *Vice Chancellor's* order.

Mr. Agar and Mr. Boteler for the motion. It has been decided, we admit, in *Noble v. Garland* (Coop. 222 ; 19 Ves. 372), that a commission to examine witnesses abroad may be obtained before answer, if the time for answering is expired ; but the present order proceeds to extend the injunction to stay trial until the return of the commission ; such an extension of the terms of the injunction is never made, except on an affidavit of belief that the answer will be material to the defence at law. At least the Court [262] will require the Plaintiff to give security. *Foderingham v. Wilson* (Coop. 222, n. ; 19 Ves. 373, n.).

Mr. Bell against the motion.

The Lord Chancellor [Eldon]. As I understand, the question to be tried in the action at law is, whether the linseed sold by the Plaintiffs to the Defendant was or not seed of a particular year. That question, in all human probability, must be decided by the testimony of witnesses in the country where the seed was grown. The Defendant may have good ground for believing that it is not the seed of the year specified, but all proof must come from that country. Without entering into the question how courts of law deal with cases in which witnesses are abroad (see *Mostyn v. Fabrigas*, Cowp. 174, 175. *Furly v. Newnham*, Dougl. 419. *Calliand v. Vaughan*, 1 Bos. & Pull. 210), it is a part of the ancient jurisdiction of this Court, where a bill is filed for discovery, to compel that discovery, and to aid the trial of an action, by issuing a commission for the examination of witnesses in foreign countries ; and the issuing of that commission would be absurd, unless the party had the benefit of it to produce testimony at the trial.

I have a recollection of cases, in which it has been held, that the Defendant shall not have a commission, till he has answered, for *non constat*, that after his answer a commission will be necessary : his answer may enable the Plaintiff at law, also Plaintiff in equity, to succeed at law. The case is different when the Defendant puts in an answer which may be true, but the truth of which can be proved only by witnesses examined abroad. But it is the Defendant's fault that his answer is not filed in time. The rule of the Court is, that, if the time for answering [263] is expired, the Plaintiff may have a commission before answer, otherwise the Defendant might deprive the Plaintiff of a commission, during all the period of orders for time.

In the case in which the Court, granting the commission, ordered the Plaintiff to give security, the parties had referred the matters in dispute to arbitration, but the arbitrator made his award two days after his authority expired. (*Foderingham v. Wilson*, 19 Ves. 373, n.).

The authorities referred to seem to have settled the practice, and it must not be altered capriciously. The object of granting the commission is to collect evidence for the trial ; the consequence of which is, that, *prima facie*, the trial must not take place till the return of the commission. (See *Nicol v. Verelst*, 4 Bro. P. C. ed. Toml. 416.)

Motion refused.(2)

(1) See *Smith v. Kirkpatrick*, 1 Dick. 103. *Lord Viscount Belmore v. Ander-*

son, 4 Bro. C. C. 90; 2 Cox. 288. The oath administered to the interpreter in that cause, required him to keep the depositions secret, until publication passed; see the order from Lord Colchester's Notes, 4 Bro. C. C. ed. Bell. 90, n.

"18 Nov. 1673, 25 Car. 2. I established a rule that no alien be examined as a witness without a motion first made in Court to swear an interpreter, that so the other side may know him, and take their exceptions to the interpreter; but for the present I allowed a witness at the hearing, because the exception came too late." Lord Nottingham's MSS.

(2) The following are the principal cases on commissions to examine witnesses in foreign countries. *Jessup v. Duport*, Barnard. 192. *Lowther v. Whorwood*. Bunb. 20. ——— v. *Romney*, Amb. 62. *Coote v. Coote*, 1 Bro. C. C. 448. *Akers v. Chancy*, 2 Bro. C. C. 273. *Oldham v. Carleton*, 4 Bro. C. C. 88. *Bourdillon v. Alleyne*, 4 Bro. C. C. 100. *Cojamaul v. Verelst*, 4 Bro. P. C. ed. Toml. 407. *Nicol v. Verelst*, 4 Bro. P. C. Ed. Toml. 416. *Cook v. Donovan*, 3 Ves. & Bea. 76. *Noble v. Garland*, Coop. 222; 19 Ves. 372. *Cheminant v. De la Cour*, 1 Madd. 208. *King v. Allen*, 4 Madd. 247. *Thorpe v. Macauley*, 5 Madd. 218. *Atkins v. Palmer*, 4 Barn. & Ald. 377.

[264] SMITH v. GRAHAM. June 22, 1818.

The deposition of a witness examined previously to the decree, on his re-examination before the master without an order for that purpose, suppressed with costs, on motion of which notice was given four days after publication. The usual order was afterwards obtained for his re-examination, on interrogatories to be settled by the master, to matters to which he had not been before examined.

The decree, in this cause, directed a reference to the Master to take certain accounts, and the Plaintiffs having carried in two states of facts charging the Defendants with the receipt of various sums of money, on the 2d of May 1818. *J. W. Ready* was examined before one of the examiners, as a witness in support of the charges, without any order obtained for that purpose, although he had been examined as a witness in the cause previous to the hearing.

Mr. Agar, for the Defendants, moved, that the deposition on the second examination might be suppressed, referring to *Browning v. Barton* (2 Dick. 508), and *Sawyer v. Bowyer* (2 Dick. 639; 1 Bro. C. C. 388).

Mr. Winthrop, against the motion.

1. The deposition is not irregular; the rule of the Court prohibits only examinations to the same matter to which the witness had been previously examined. It appears here, by affidavit, that the examination was to different matters. 2. It is too late to object to the examination, even if irregular, after publication. The Defendants had notice that this witness would be examined, and should have objected before they knew the effect of his evidence. The Court discourages objections to witnesses after publication. In *Callaghan v. Rochfort* (3 Atk. 643), Lord Hardwicke said, that it was never allowed to exhibit articles against the competency of a witness (a practice equivalent to the modern proceeding by motion) [265] after publication, unless the objection came to the knowledge of the party, after examination.

The Lord Chancellor [Eldon]. The single difficulty in this case arises from the period at which the motion is made, namely, after publication. The fact, that the examination is not to the same matters, is not an answer to the application. The established practice is founded on this principle, that the Court expects to have the judgment of the Master, in the first instance, on the interrogatories, in order to prevent depositions that may affect the previous statement of the witness. Adopting a rule to avoid the necessity of itself inquiring, in every case, whether the examination is to the same matters, the Court, for that purpose, directs the Master to settle the interrogatories.

Mr. Agar. Publication passed on the 21st of May, and, on the 25th, notice of this motion was given.

The Lord Chancellor [Eldon]. Let the depositions be suppressed with costs, but without prejudice to any application for the re-examination of the witness.

Reg. Lib. B. 1817, fol. 1228.

July 2. On this day, Mr. *Winthrop* moved "that W. J. *Ready* be examined as a witness on behalf of the Plaintiffs, under the said decree, to any matters to which he has not been before examined, and that it be referred to Mr. *Courtenay*, one, &c., to settle the interrogatories for that purpose; which, upon hearing Mr. *Agar*, of counsel for the Defendants, is ordered accordingly."

Reg. Lib. B. 1817, fol. 1112. (See *Browning v. Barton*, 2 *Dick.* 508. *Sawyer v. Bowyer*, [266] 2 *Dick.* 639; 1 *Bro. C. C.* 388. *Sandford v. Paul*, 2 *Dick.* 750; 3 *Bro. C. C.* 370; 1 *Ves. Jun.* 398. *Cowslade v. Cornish*, 2 *Ves.* 270. *Vaughan v. Lloyd*, 1 *Coz.* 312. *Smith v. Althus*, 11 *Ves.* 564. *Greenaway v. Adams*, 13 *Ves.* 360. *Purcell v. M'Namara*, 17 *Ves.* 434. *Birch v. Walker*, 2 *Schoales & Lefr.* 518. The following case is extracted from a MS. in the possession of the Editor.)

*Pearson v. Rowland. Hilary Term, 1715.*

The Plaintiff and Defendant filed several interrogatories in the office, and afterwards joined in a commission, where the Plaintiff exhibited the same interrogatories, and the Defendant part of his, but omitted, *inter alia*, the interrogatory exhibited to prove a will in question, not having the will at the commission. Several witnesses appeared, who were the Defendant's witnesses to the will, and the Plaintiff examined them to several matters; and the Defendant declined to examine them to any then, not having the will there, but afterwards examined them in the office without the leave of the Court.

Upon a motion to suppress these depositions in the office, the regularity of this cross-examination was referred to the two senior masters. Sir *Thomas Grey* reported it regular, Mr. *Rogers*, irregular. And, upon a second motion to suppress, after these reports, it was urged for the Plaintiff, that cross examination of a witness at the office, who had appeared and been examined at a commission where the other side joined, and had interrogatories, and an opportunity of cross examining there, was unprecedented, unless it were to prove an exhibit, and not even that without the leave of the court; that the allowing it would introduce perjury, it being known, that neither the commissioners nor the clerks are sworn to secrecy (*Note*: An order of *February* 1721, directs the commissioners and their clerks to take an oath of secrecy. Orders in Chancery, ed. *Beames*, 327, 330), and that it is no hard matter for a party to discover what a witness has sworn at a commission; and when he knows it, if he hath time between the witness's [267] examination and cross examination, he may tamper with him to retract or contradict his first examination upon his second; that, therefore, the examination ought to be perfected *uno flatu*, and by the same commissioners, who might refresh his memory if they found him inconsistent with himself; that if both sides joined in a commission, though the one exhibited no interrogatories, the Court, so far, regards the probability of that party being informed of the depositions by the commissioners, as not to allow them to examine after without the leave of the Court, and without referring it to a master to settle the interrogatories,

*Vernon e contra.* This is the first time that this was ever made a question; nobody ever thought but that both parties were at liberty to examine, or cross-examine, in the office at any time before publication; but if the doctrine prevails, it will put an end to all second examinations in the office, or at commissions; if the supposition of a party having a means of knowing what a witness has sworn at a commission be a reason to hinder his cross-examining him at a future day, it is equally good against any further examination of any other witnesses, lest they should be drawn to contradict the first. It is, indeed, a rule of the Court, that where a party has examined a witness to some interrogatories, he shall not examine him again to others, without the leave of the Court; and, for this reason, we declined examining these witnesses at the commission when we had not the will, and could not complete their examination; and it is true, that if a party's commissioners have been present at one commission without filing interrogatories, the Court, upon application for a second, will direct the pleadings to be laid before a master, for him to draw proper interrogatories; but here our interrogatories were all exhibited before the commission, and no room to suppose them adapted to overthrow what had been sworn. The reason given for the necessity for cross-examining by the same commissioners, will appear to have nothing in it, if it be considered that the commissioners ask their questions out of the interrogatories; and it is

notorious, that in the examiner's office, if a witness be examined, the same examiner does not cross-examine him, but the examiner on the other side. Had we applied for a new commission, [268] the Court, perhaps, would have permitted us, for not being provided to examine our witnesses at the commission, by obliging us to bring them to the office ; but that we have done voluntarily and regularly.

The *Lord Chancellor* [Cowper]. Where the reasons for suppressing depositions are doubtful, they ought to be preserved: When they are suppressed, the Court has no means to judge upon them ; but when they are preserved, truth has that probability in it, and falsehood is generally attended with some mark or inconsistency, that there is no danger of the Court being misled by them ; but, in this case, it might be very inconvenient to establish such a rule as the Plaintiff desires ; one party might, by that means, trick the other out of his evidence, by asking his most material witnesses two or three immaterial questions, where he finds him not fully provided to examine them, and then telling him you must examine them now or never.

VAWSER v. JEFFERY. *June 29, July 1, 2, [1818].*

A covenant to surrender copyhold previously devised, is a revocation of the will in equity, if the surrender would have been a revocation at law.

*Guylott Cowherd*, being seised of freehold and copyhold estates, on the 24th of April 1794, surrendered the latter to the use of his will, which was dated on the same day, and contained various devises of his estates, copyhold and freehold. By indentures of lease and release, dated the 14th and 15th of February 1800, *G. Cowherd*, on his marriage, conveyed certain of the freehold and copyhold estates, comprised in his will, to trustees, upon trusts specified, and covenanted to surrender the copyholds to the uses of the deed, but no surrender was made. *G. Cowherd* died, without issue, in May 1801.

On a bill filed by his co-heirs at law, and customary [269] heirs, for an execution of the trusts of the settlement, the *Master of the Rolls* declared the deed a revocation of the devises of the freehold and of the copyhold estates. (*Vawser v. Jeffery*, 16 *Ves.* 519, where the facts of the case are more fully stated.) The cause now came before the *Lord Chancellor*, on appeal from that decree.

*Mr. Wetherell* and *Mr. Wilbraham*, for the Defendants. Upon the first question in this case, whether the devise of the freehold is revoked, we cannot question the authority of *Cave v. Holford* (2 *Ves. Jun.* 604, n. ; 1 *Bos. & Pull.* 576 ; 3 *Ves.* 650 ; 7 *T. R.* 399 ; 7 *Bro. P. C. Ed. Toml.* 593), but it is extraordinary that the distinction between the two deeds in that case, the latter of which was designed only to secure an annuity payable as a jointure, was scarcely noticed, except by the Chief Justice of the Common Pleas, who held the latter not a revocation. There seemed strong ground for contending that such deed is within the rule established from the earliest times, that a conveyance, executed for the partial purpose of securing a sum of money, is not a revocation of a previous will, disposing of the estate. The principle is, that an imperfect conveyance is not a revocation, unless inconsistent with the will ; that is, unless the purpose to be accomplished is contrary to the will. *Montague v. Gefferies* (1 *Roll. Abr.* 615), *Winkfield's case* (*Godb.* 132), *Shove v. Pincke* (5 *T. R.* 124, 310), *Reid v. Shergold* (10 *Ves.* 370). A conveyance for a partial purpose, is, in equity, a revocation only *pro tanto*, *Parsons v. Freeman* (3 *Atk.* 741 ; 1 *Wils.* 308 ; *Amb.* 116 ; 2 *Ves. Jun.* 431), *Sparrow v. Hardcastle* (3 *Atk.* 798 ; *Amb.* 224 ; 7 *T. R.* 416 n. *Keny.* 67), *Harwood v. Oglander* (6 *Ves.* 199 ; 8 *Ves.* 106), *Williams v. Owens* (2 *Ves. Jun.* 595).

[270] In *Cave v. Holford*, the question, whether the deeds were a revocation of the will in equity was, in effect, decided at law ; and, on the return of the case to this Court, the distinction of the latter deed, as executed for a partial purpose, was not adverted to.

The second question, whether the deed is a revocation of the devise of the copyhold, rests on different principles. With regard to the copyhold, the deed operates, not as a conveyance, but as a covenant, and the question is, whether, if a copyholder, having surrendered to the use of his will, and made a will, afterwards, on marriage, covenants to surrender the copyhold for the particular purpose of securing a jointure to his wife,

that covenant revokes the will? On this question, no direct authority occurs, but, on principle, the decree is wrong.

The cases cited on the former argument, *Rider v. Wager* (2 P. W. 328, see p. 332), and *Cotter v. Laver* (2 P. W. 622), have no application to the present; in them, the subsequent deed, being a complete disposition of that which had been given by the will, inevitably worked a revocation, or, more accurately, an ademption of the subject on which the will was designed to operate; and the only doubt there, was, whether the covenant bound the realty, acted *in rem*, or gave no more than a right to damages. In *Knollys v. Alcock* (5 Ves. 648, on appeal, 7 Ves. 558), the co-parcener of the testatrix had become owner of the estate of which the will purported to dispose.

The proposition, that the covenant is a revocation of the will, must proceed on the assumption, that the covenant could not have been executed but by a conveyance, which would have operated a revoca-[271]-tion; if the act done were not a revocation at law, the agreement to do it could not be a revocation in equity.

The doctrine of revocations of devises of freehold, on which the devise operates as a conveyance, proceeds on the nature of legal seisin, which changes with every change of the legal estate, and on the words of the statute of wills; and is not applicable to devises of copyhold, which operate as appointments. The Plaintiffs contend, that, if the covenant had been executed by surrender and admittance, the estate which the testator would have taken, subject to the term, would have been a new estate. That doctrine was certainly sanctioned by Lord Coke (*Allen v. Palmer*, 1 Leon. 101); but is now exploded; and the conclusion collected by the most respectable text-writers from the decisions, is, that the estates derived under the uses of a surrender, are new estates, so far only as they differ from the estate in the surrenderer, at the time of the surrender. (*Fearne, Cont. Rem.* 67, *et seq.*; 1 *Walk. on Copyhold*, 95, *et seq.*) In *Thrustout v. Cunningham*,<sup>(1)</sup> it is expressly decided, that a copyholder in fee, having surrendered to the use of his will, and subsequently surrendering to particular uses, with the reversion to himself in fee, may devise the reversion, without any new surrender to the use of his will; and the same doctrine is recognized in *Roe v. Griffiths* (4 Burr. 1952). It is clear, therefore, that if the testator had done all that the covenant required, his acts would not have revoked his will.

[272] If a copyholder, having made a will without surrender, afterwards surrenders to such uses as he shall by will appoint, and dies without a new will, the copyhold passes by the former. *Spring v. Biles* (1 T. R. 435, n.)

Beyond the provision for the wife, the covenant is voluntary, and a court of equity would not decree an execution nugatory or every other purpose, merely to effect a revocation of the will.

The Lord Chancellor [Eldon]. On the first question in this case, with regard to the copyholds, the late *Master of the Rolls* thought it clear, that if there had been a surrender to the uses of the covenant, the will would have been revoked at law.

The other question, with which this Court alone can deal, is, whether, admitting that the surrender would have been a revocation at law, the covenant is a revocation in equity? It is contended, that, if the widow had applied to this Court to have the covenant executed, the Court need not have directed any such acts as would raise this question. My present opinion is, that I must consider the testator to have died with the intention which he expresses in the covenant, unless it can be shown that he intended otherwise to execute his purpose of providing a jointure.

It is further argued, that this is not a revocation in equity, because it is a conveyance for a partial purpose. Upon that, I am of opinion, that if the surrender is a revocation at law, the covenant will be a revocation in equity. As to mortgages, conveyances for payment of debts, and other conveyances to secure merely personal interests, it is perhaps stated too generally, that they are [273] not revocations beyond the purpose. What Lord Hardwicke rests the doctrine on is this, that a court of equity looks on a conveyance for securing a sum of money, whatever is the form of the conveyance, as a security only; (2) but, if a man conveys the *whole* of his estate, taking back an estate for life, or giving an estate for life to another, that is a revocation. I have no conception that this doctrine of equity, in cases of conveyance for payment of money, has ever been applied, except where the conveyance is considered only as a security for payment of money. Though a conveyance for a particular purpose will necessarily operate as a revocation no further than the particular purpose requires, yet, if the conveyance goes beyond what the particular purpose requires, that will be a revocation,

That brings back the material question, whether the covenant, if executed, would be a revocation ; on which I believe, there is no decision. Perhaps the best course will be to direct a case. If the surrender would be a revocation at law, I think the covenant will be a revocation in equity ; but whether the surrender would be a revocation, is a question undecided.

It is now settled, at least I shall so consider it till the House of Lords decides the contrary, that if a man devises a fee-simple estate, and afterwards for securing a jointure, instead of simply limiting a jointure, which would be quite enough, by lease and release, conveys the estate out of which jointure is to come, to the use of himself for life, with remainder, to the intent and purpose, that the intended wife may take a rent charge, and to the use that she may distrain (for that may be limited [274] by way of use (see *Cassamajor v. Strode*, 2 Swans. 347), and then to enter, with remainder to trustees, for ninety-nine years, the better to secure the jointure, with the ultimate remainder to himself and his heirs ; although the moment he takes the seal off the wax his old estate is *eo instanti* vested in himself, that is a revocation of the will ; the true question, with reference to copyhold estates, being, whether there is about as much charge of estate, in the transaction with the Lord, as in that conveyance. Lord Chief Justice *Eyre's* argument, in *Cave v. Holford* (3 Ves. 662, *et seq.*), is, no doubt, extremely able ; but it is settled, that, if a man devises his freehold estate, and afterwards makes a settlement with a limitation to his own right heirs, that indeed is his old use, yet, because he takes it back by a conveyance which purports to pass his whole estate, it is a revocation.

The effect of the surrender is a pure legal question ; and if it can be distinguished from *Cave v. Holford*, it is material that it should be so distinguished by courts of law ; and to them the question must be addressed, quite clear of all consideration of equitable revocation, on the statement of a surrender made.

If this proceeds to a case, my notion would be to suggest the consideration of a point that has not yet been argued, whether, if the testator had attempted to convey his copyhold estate in the same manner as he has conveyed his freehold estate, that would not afford evidence of his intention, however incomplete the conveyance may be ? A bargain and sale without enrolment, feoffment without livery of seisin, imperfect conveyances, though not capable to pass the estate, would amount to a revocation.

Copyhold estates not being within the statute which [275] requires the attestation of three witnesses to a will (29 Car. 2, c. 3, s. 5, 6), it may be a question, whether many acts are not revocations of a will of copyholds, which would not work a revocation in the case of freeholds ; and it will be material for both sides to look into cases of revocation of wills prior to the statute of frauds.

July 2. On the request of Mr. *Hart* and Mr. *Roupel*, for the Plaintiffs, a case was ordered.

July 2. " His Lordship doth order, that a case be made for the opinion of the judges of his Majesty's Court of King's Bench ; and it is ordered that the question be, whether the devise of the copyhold estates in the will of *G. Cowherd*, the testator in the pleadings named, was revoked by the surrender of the said copyhold estates to the uses of the indenture of settlement bearing date the 15th day of February 1800, pursuant to the covenant therein contained ; and it is ordered, that such case do state the said indenture of settlement, and that an actual surrender had been made, pursuant to the covenant by the said *G. Cowherd*, of the said copyhold estates to the uses of the said indenture of settlement, and all other necessary facts ; and it is ordered, that it be referred to Mr. *Courtenay*, the Master to whom this cause stands transferred, to settle such case, in case the parties differ about the same ; and the judges of the Court of King's Bench are to be attended with such cases ; and it is ordered, that the appeal do [276] stand over until after the judges of the Court of King's Bench shall have made their certificate."

Reg. Lib. B. 1817, fol. 1649.(3)

(1) 2 Bl. 1046. *Fearne, Cont. Rem.* 68. Some observation was made on a supposed inconsistency between the two statements of this case, which not being verified on examination, has been omitted. The report of Sir William Blackstone seems to agree with that of Mr. *Fearne*. in describing the settlement of 1744, as made by *Thomas*, the father. on his own marriage, not on the marriage of his son.

(2) The *dictum* referred to, from Lord *Hardwicke's* judgment in *Sparrow v. Hardcastle*, *ubi supra*, is more distinctly reported by Lord *Kenyon*, 70.

(3) The judges of the Court of King's Bench certified, that "the surrender made by *G. Cowherd*, of the copyholds, to the uses of his marriage-settlement, did not revoke the surrender made to the use of his will, and the devise of such copyholds." *Vawser v. Jeffery*, 3 *Barn & Ald.* 462.

The following case on revocation is extracted from Lord *Nottingham's* MSS. "*Elton v. Harrison*, March 5, 26 *Car.* 2, 1674. The Lady *Anderson*, *cestui que trust*, devised to Mr. *Harrison*, and then directed her trustees to make new conveyances to other trustees for her and her heirs, and died without any new publication; I held this to be a revocation; for devises of equity are as revocable as devises of land; and *ergo*, when the testator does any act, either inconsistent, or in any way working upon the thing devised, his intent is presumed to be changed without a new publication; as a feoffment to the use of the testator and his heirs revokes the will, though it be the old trust; but a case was desired, which I granted.

*Elton v. Harrison*, June 6, 28 *Car.* 2, 1676. The Lady *Anderson*, *cestui que trust* of lands and rents in *Norton*, devises several legacies, all which before-mentioned legacies not limited to a continued payment, my will is, shall be paid within a year, if my lands in *Norton* can be sold, and gives the residue, after debts and legacies paid to the Defendant, whom she makes her executor; and afterwards, by deed, under hand and seal, appoints her trustees to transfer the trust, to convey the lands in *Norton* to *Hall* and *Boys*, in trust for herself. First, I held this devise sufficient to give the executors authority to sell. (See *Bentham v. Wiltshire*, 4 *Madd.* 44); second, But yet the subsequent conveyance by direction of the testatrix, was a revocation, without a new publication. Mr. *Attorney* urged the contrary, because the new conveyance had not put the testatrix's interest in another plight, for she had still a trust, and the same old trust, in her; and compared it to the case where a testator makes a feoffment to the use of himself and his heirs, which is the old use; and this, he said, was no revocation: I denied that case, and said it was expressly contrary to the print-[277]-ed book, 1 *Car. Cro.* 24, and to the judgment there cited by *Yelverton* (1 *Ro. Abr.* 616, *U. pl.* 4, cited by *Yelverton*, *J. Cro. Car.* 24); third, Admit no revocation, yet the executor did not sell the land so long as the personal estate was sufficient; for though the land, if saleable, be assets in equity, yet certain it is, the personal estate was liable, in the first place, and it would be very hard, by a strained construction, to exclude the personal estate being contributory in the first place, on purpose to mend the executor's interest in the residuum of that personal estate. Wherefore the Defendant consented to pay the principal, and convey the land, so as interest and costs might be spared, which was accepted."

MEUX v. MALTBY. July 8, 10, [1818].

[See *Small v. Attwood*, 1832, *You.* 458; *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] *A. C.* 443.]

A joint stock company established by act of parliament, vesting in them all property then belonging to them, and authorising them to bring actions in the name of their treasurer for the time being, having purchased an estate pending a suit against the vendors, to compel the specific performance of an agreement to grant a lease of part; on a bill by the vendee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could be made for the execution of a lease.

In May 1804, *Moses Agar* agreed to let to *Richard Frost* a house in *Rotherhithe*, for twenty-one years from *Christmas* 1803, at an annual rent of £55, *Frost* paying £150 towards the expenses of building the house. *Frost* accordingly paid that sum, and had possession of the house; but no lease having been executed, he, in June 1806, filed a bill for specific performance. *Agar*, by his answer, admitted the agreement, but alleged that he was unable to fulfil it, stating, that he had since sold and conveyed an estate at *Rotherhithe*, including the house in question, to *David Matthews*, who, before the [278] contract of sale was completed, was informed of the agreement with *Frost*, and engaged to perform it. *Matthews*, having been

made a Defendant, by his answer, admitted, that, in the course of the treaty with *Agar* for the purchase of the estate, he understood that *Frost* occupied the house, under some lease, or agreement for a lease.

In October 1807, *Matthews* sold and conveyed the estates which he had purchased from *Agar* to Sir *Charles Price* and *William Browning*, in trust, for the *East Country Dock Company*.

By an act of Parliament, 51 Geo. 3, c. clxxi., entitled "An act for completing and maintaining the *East Country Dock* at *Rotherhithe*, in the county of *Surrey*;" it was enacted, that the several persons therein named, together with such other person or persons, body or bodies politic, corporate or collegiate, as should, according to the conditions and restrictions in that act contained, be possessed of any part of the joint stock of the said company, their several and respective executors, administrators, and assigns, being a proprietor or proprietors of any share or shares in the said dock or docks, should, for the purposes of the act, be a joint-stock company, by the name and style of the *East Country Dock Company*. The fourth section enacted, that all the messuages, lands, tenements, and hereditaments, which then belonged, or might thereafter belong, to the company, and all buildings, erections, and other matters and things thereon and thereunto belonging, and also all basins or docks, &c., which should be made, &c., by the company, should be, and the same were thereby, vested in the company, and it should be lawful for the company, in the name of their treasurer for the time being, to bring any action or actions, and to prefer or prosecute [279] any bill or bills of indictment, against any person who should damage, or cause to be damaged, any of the works to be made, erected, &c., by virtue of the act, or who should injure or destroy the same whilst doing, or impede the doing thereof, or steal, or wrongfully take away any materials or machines provided or to be provided from time to time, or used, or intended to be used thereon, or for any other purposes of the act, or who should wilfully do or suffer, or consent to do, any thing whereby damage might accrue to the messuage, erections, and buildings to be purchased, or the works or machines to be made or erected by virtue of the act.

In May 1813, *Frost* having become bankrupt, and *Browning* being dead, the assignees of *Frost* filed a supplemental bill against Sir *Charles Price* and *Matthews*, which, on the hearing, was dismissed as against Sir *Charles Price*, without costs, with liberty for the Plaintiffs to amend by adding parties.(1)

The supplemental bill was afterwards amended by making *Thomas Maltby*, the treasurer of the *East Country Dock*, and seven other persons, the directors, Defendants, alleging that the treasurer and directors were also the holders, or possessed of, and entitled to, certain shares of the joint stock of the company, and a considerable number of other persons were likewise the holders of, or entitled to, shares of the joint stock; but the shares of such stock or concern being transferrable at the pleasure of the respective [280] holders thereof, the Plaintiffs were unable to discover or ascertain who were the present holders or proprietors of shares, or where they respectively resided, or were to be met with, or who, by name, at present constituted the *East Country Dock Company*. The bill prayed, that a proper lease might be executed to the Plaintiffs, according to their agreement, and that they might be quieted in the possession of the premises, during the residue of the term of twenty-one years, and that the *East Country Dock Company* and the Defendants *Maltby*, and the present directors, and all future treasurers and directors of the company, might be restrained, by injunction, from obtaining possession of the house from the Plaintiffs; and that, if the Plaintiffs were not entitled to such lease as against the *Dock Company*, that the Defendant *Matthews* might be decreed to pay to the Plaintiffs such sum as would be the full value of the lease, if the same were granted, and that the value might be ascertained in such manner as the Court should direct.

The Defendants, by their answer, admitted, that the contract between *Matthews* and the company, and the conveyance to *Price* and *Browning*, were entered into and executed after *Matthews* had answered the original bill of *Frost*; and denying notice of the agreement with *Frost*, insisted that they were not bound to grant a lease.

Mr. *Hart* and Mr. *Shadwell*, for the Plaintiffs. The Plaintiff's equity is clear, and relief may be obtained against the present Defendants, without bringing before



the Court all the proprietors of the company. *Adair v. The New River Company* (11 Ves. 429). In a recent case of the *Gravesend Watermen*, before Sir William Grant, some individuals of each class were permitted to sustain the suit.

[281] Mr. Agar and Mr. Wingfield for the Defendants. The cases cited are not authorities for the present attempt. In no instance has the Court decreed a conveyance by some only of numerous parties interested in an estate, or directed them to procure the concurrence of the rest. The Defendants cannot grant the lease required; they have not the whole interest; they are ready to convey what they have. Can the master settle proper covenants in the absence of the other parties? An injunction, being ancillary to relief by the execution of a lease, to which the Plaintiffs are not entitled in this suit, cannot be sustained.

July 10. The *Master of the Rolls* [Sir Thomas Plumer]. If this were a case between party and party, there could be no defence. The bill, for specific performance of the contract to grant a lease, was notice to the purchaser *pendente lite*, and it has been repeatedly decided, that the purchaser of an estate, in the possession of a tenant, is bound to inquire by what right, and under what agreement, the tenant holds it. (*Daniels v. Davidson*, 16 Ves. 249; 17 Ves. 433. *Allen v. Anthony*, 1 Mer. 282.) It is clear, therefore, that the present Defendants are as much bound by the contract, as the person who originally entered into it. They insist, however, that they have a right to proceed by ejectment to recover possession from the Plaintiffs. The single question is, whether there is a defect of parties to the suit.

The general rule, which requires the Plaintiff to bring before the Court all the parties interested in the subject in question, admits of exceptions. The liberality of this [282] Court has long held, that there is of necessity an exception to the general rule, when a failure of justice would ensue from its enforcement. I will shortly refer to some authorities, which show, from how early a date was established this doctrine of dispensing with parties, and admitting some to represent the absentees, where it would lead to great inconvenience to bring them all before the Court; authorities after which the subject is no longer open to argument.

The first case, the *City of London v. Richmond* (2 Vern. 421), occurred in 1701, and the decree of this Court was affirmed by the House of Lords. (1 Bro. P. C. ed. Toml. 516.) In the following year the same principle was adopted in *Quintin v. Yard* (1 Eq. Ca. Ab. 74). In *Vernon v. Blackerby* (2 Atk. 144), Lord Hardwicke refers to the case of the Bubble, in 1720, in which, "although several persons were interested, yet they lodged a general power and authority in some few only, and therefore to avoid inconvenience from making such numerous parties, this Court restrained them to those particular persons who were intrusted with this general power." (2 Atk. 145.) In 1722, occurred *Chancey v. May* (Prec. in Cha. ed. Finch. 592). That indeed was the case of Plaintiffs suing in behalf of themselves and all other proprietors except the Defendants; but it appeared that the eighteen original shares of the undertaking had been divided into eight hundred; and the second reason assigned by the Court for over-ruling the demurrer, is "that it would be impracticable to make all the proprietors parties by name, and there would be continual abatements by death, and otherwise, and no coming at justice, if all were to be made parties." (*Ibid.*)

[283] *Cullen v. the Duke of Queensberry* (1 Bro. C. C. 101, affirmed in the House of Lords, 1 Bro. P. C. ed. Toml. 396), determined in 1781, and *Horsley v. Bell* in 1778, referred to in a note on that case (reported also Amb. 770), proceed on the same principle. In *Lloyd v. Loaring* (6 Ves. 775) the reason given for sustaining the amended bill, is the absolute failure of justice, which would be the consequence of an opposite doctrine; and reference is made to *Fells v. Read* (3 Ves. 70), and *Pearson v. Belchier* (4 Ves. 627). Lord Eldon concludes his judgment thus, "In the manuscript notes I have seen strong passages, as falling from Lord Hardwicke, that, where a great many individuals are jointly interested, there are more cases than those, which are familiar, of creditors and legatees, where the Court will let a few represent the whole (considering the Court possessed of jurisdiction, on the principle that otherwise there would be a failure of justice). There is one case very familiar, in which the Court has allowed a very few to represent the whole world." (6 Ves. 779.) In *Adair v. the New River Company* (11 Ves. 429), Lord Eldon, though he dismissed the bill, again recognised this principle. It is insisted, that the Plaintiff cannot sue in equity, without bringing before the Court all the proprietors of

the King's share, as well as the company, whose share is also subdivided; but those parties are represented; and, it is clear, no objection of that kind arises as to them," &c. (11 *Ves.* 443.) The *Lord Chancellor* there mentioned the case, which is to be added to those that I have stated, of a lord of a manor filing a bill to compel service to his mill. There "it is not necessary to bring all the individuals: why? Not that it is inexpedient, but, that it is impracticable, to bring them all. The Court therefore has required so many, that it can be justly said, they will fairly [284] and honestly try the legal right between themselves, all other persons interested, and the Plaintiff." In reference to the case before him, the *Lord Chancellor* concludes, that "it is competent to the Court to say, that if the Plaintiff brings so many of those, who represent the King's share, as can be taken duly and honestly to enter into that contest, in which all the others are concerned, that ought, in equity, to bind those who are present, representing those who are absent." (11 *Ves.* 445.)

In cases familiar to every practitioner in another Court, it is the course of every day to hold all parishioners bound by a suit to set aside or establish a *modus*, though some only are parties. The same principles have been recognized, in *Cousins v. Smith* (13 *Ves.* 542), and, as I am informed, in a very recent case relating to the town of *Brighton*, the *Attorney-General v. Brown* (1 *Swans.* 265, see p. 306).

Here is a current of authority, adopting more or less a general principle of exception, by which the rule, that all persons interested must be parties, yields when justice requires it, in the instance either of Plaintiffs or Defendants. The rigid enforcement of the rule would lead to perpetual abatements. This, therefore, cannot be regarded as a new point, or as creating a difficulty. It is quite clear that the present suit has sufficient parties, and that the Defendants may be considered as representing the company. Can I then dismiss the bill for want of parties, because all the proprietors, admitted to be so numerous that it is difficult to find them, are not before the Court? There is no fair distinction in that respect between this case and those which have been stated.

The only novelty is, that the bill requires an act to [285] be done by the absentees. Not having them before the Court, though their rights may be bound, there is a difficulty in making them act. The Plaintiff requires specific performance of the agreement; and it would hardly be sufficient, supposing it proper, for a few to execute a lease on behalf of the rest. In a conveyance of the interest, all must join. But that difficulty presents no objection to binding the rights of the parties not before the Court. That is authorized by every one of the cases referred to. If the Court cannot proceed to compel the Defendants to do the act required, it must go as far as it can.

Consider what a failure of justice would otherwise ensue. In 1805, the owner of this land entered into an agreement to grant a lease for 21 years, for a rent and a pecuniary price. The land eventually comes into the possession of the Dock Company, who, representing the original party to the contract, are called on to perform it. On the merits, they have no defence; the Plaintiffs have as clear a right to this lease as the Defendants have to their estate. Are they to be left to an action at law, with all the difficulties relating to parties, and of ascertaining what damages or compensation they are to recover? To be expelled from this Court, where their proper remedy is, because the estate is in the hands of persons who will not perform the contract which they are bound to perform? Is that justice? Can this be assimilated to the cases in which courts of equity refuse relief, and leave the parties to an action? That is the practice only where an action will better accomplish justice, or where the Court is of opinion that the Plaintiff is not intitled. Here the impediment arises solely from the conduct of the Defendants, not from the difficulty of the case. The estate, without the Plaintiff's fault has come into the hands of persons who refuse to execute the contract. What would [286] be the consequence of allowing the objection? Are the company aware, or do they mean to avow, that, in every case, it is impracticable to compel them to perform a contract? That, unless all the proprietors are made parties, which is impossible, no suit can be maintained against them, in equity? It is a benefit to the company to over-rule such an objection. If it prevails, no one will ever contract with them. I cannot suppose that they intend, or will be advised, to insist on it.

Instead of dismissing the bill, I will do what I can to assist the Plaintiffs; bind the right, declare the Plaintiffs entitled to a lease, and restrain the treasurer from disturbing their possession. I have had doubt whether I ought not to go farther. It

is hard that the Plaintiffs have not all the justice which they would have, as between party and party; that they cannot carry their lease to market: but thus far I shall certainly give relief.

"His Honor doth declare, that under, or by virtue of, the agreement in the pleadings mentioned, dated the 16th day of *May* 1804, the Plaintiffs are entitled to a lease from the *East Country Dock Company* of the premises in question, for the unexpired term of twenty-one years from *Christmas* 1803, at the rent of £55; and it is ordered, that it be referred to Sir *J. Simeon*, Bart., one, &c., to tax the Plaintiff's costs of the original suit, and of the supplemental suit against the Defendants, the treasurer and directors of the said company, and the Defendant, *David Matthews*; and it is ordered, that the Defendants in the supplemental suit do pay to the Plaintiffs such costs; and it is ordered, that the Plaintiffs do pay the rent to grow due from time to time, to the Defendant, *Thomas Maltby*, as treasurer, and to the treasurer for the time being, of the said company; and it is ordered, that such treasurer be restrained from bringing any ac-[287]-tion to disturb the Plaintiffs in the possession and enjoyment of the premises, during the term for which the Plaintiffs are hereinbefore declared to be entitled to a lease, and any of the parties are to be at liberty to apply to this Court as there shall be occasion."(2)

(1) "19 *June* 1815. His Honor doth order, that this cause do stand over, with liberty for the Plaintiffs to amend their bill, by adding proper parties thereto, with apt words to charge them; and it is ordered that the plaintiff's bill do stand dismissed out of this court without costs, as against the defendant Sir *Charles Price*, Baronet."—Reg. Lib. B. 1817, fol. 1616.

(2) See, in addition to the cases cited, *Brown v. Howard*, 1 *Eq. Ca. Ab.* 163. *Cuthbert v. Westwood*, *Gilb. Rep. in Eq.* 230. *Biscoe v. The Undertakers of the Land Bank*, 2 *Eq. Ca. Ab.* 166, pl. 7, cit. *Gilb. Rep. in Eq.* 230. *Moffat v. Farquharson*, 2 *Bro. C. C.* 338. *Good v. Blewitt*, 13 *Ves.* 397. *Brown v. Harris*, 13 *Ves.* 552. *Cockburn v. Thompson*, 16 *Ves.* 321. *Pearce v. Piper*, 17 *Ves.* 1. *Beaumont v. Meredith*, 3 *Ves. & Beam.* 180.

EDWARDS v. M'LEAY. *July* 6, 10, 11, [1818].

[See S. C. with note, G. Coop. 308.]

An estate having been sold, some part of which, material to the enjoyment of the rest, was subject to a defect of title known to the vendors, but not disclosed by the abstract, and unknown to the purchaser, the contract was rescinded, and the vendors were ordered to repay the purchase money, with all costs and expenses incident to the purchase and conveyance.

The original decree in this cause (reported *Coop.* 308), dated 19th *July* 1815, was as follows: "His Honor doth declare, that the sale in the pleadings mentioned, and the conveyance executed in pursuance of such sale, bearing date the 24th and 25th days of *May* 1811, were fraudulent and void; and doth order and decree, that the same be set aside, and the said conveyance delivered up to be cancelled; and it is ordered, that it be referred to Mr. *Steele*, one, &c., to inquire and state to the Court, when the Plaintiff quitted the beneficial possession of the house and premises in question in this cause, and to take an account of all sums of money paid, laid out, or expended, in repairs or improvements made by the said Plaintiff on the same, and the said Master is also to take an account of the costs, charges, and expenses, which the Plaintiff has incurred and been put to, in consequence of, or which have been incidental to, his purchase and conveyance thereof; and the Master [288] is to compute interest at the rate of £5 *per cent. per annum.* upon the several sums which, under the directions herein contained before given, he shall find to have been so paid, laid out, or incurred, and also upon the sum of £5390. from such time as the said Master shall find that the Plaintiff quitted the beneficial possession of the said house and premises; and it is ordered, that the Defendants do pay unto the Plaintiffs the said sum of £5390, together with what the said Master shall certify to be the amount of the several accounts hereinbefore directed, together with his costs of this suit to be taxed, &c.; and thereupon it is ordered, that the Plaintiff do re-convey and

re-assign the said purchased premises, at the Defendants' expense, unto them the said Defendants, or as they shall direct, such conveyance and re-assignment to be settled by the said Master," &c.

Reg. Lib. A. 1817, fol. 1601-1605.

From this decree the Defendants appealed.

The case having been argued by Mr. *Hart* and Mr. *Shadwell*, for the Defendants, and Sir *Samuel Romilly* and Mr. *Spranger*, for the Plaintiff, the *Lord Chancellor* observed, that nothing appearing on the abstract which altered the nature of the case, he approved the judgment of the *Master of the Rolls*; and that the pleadings did not authorize the argument that a good title could still be made.

*July 11.* The *Lord Chancellor* [Eldon]. Having read the pleadings, I am entirely of opinion, that, though it may be necessary to state with more precision the subject of inquiry relative to repairs and improvements, the decree is substantially right. Nothing [289] was done by the Plaintiff after he knew the defect of the title; he certainly could have claimed no allowance even for subsequent repairs. The case resolves itself into this question, whether the representation made to the Plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprised of any such decision, but I agree with the *Master of the Rolls*, that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract. In principle, therefore, the decree is right, though it seems to have gone too far on the subject of repairs and improvements. Its terms must be made conformable to the prayer of the bill; striking out the word "improvements," and leaving the words "repairs," I give the Plaintiff all that he has asked by his bill, and I cannot give him less.

*July 11.* "His Lordship doth order, that the decree made on the hearing of this cause, on the 19th day of *July* 1815, be varied, so far as it directs an account to be taken of all sums of money paid, laid out, or expended, in improvements made by the Plaintiff, on the house and premises therein mentioned; and, instead thereof, it is ordered that it be referred to the said Master, to take an account of all costs, charges, and expenses, which the Plaintiff has been properly put to, in consequence of, or which have been incident to, the purchase of the said house and premises, and the conveyance thereof to the Plaintiff; and, for the better taking of such account, the parties are to produce, &c.; and, with the said variation, it is ordered, that the said decree be affirmed; and, it is ordered, that one moiety of the sum of £10, deposited with the register, &c., be paid to the plaintiff," &c.

Reg. Lib. A. 1817, fol. 1813.

### [290] *Ex parte* BROWN. *July* 9, 1818.

Commission superseded, on the petition of the bankrupt under commitment for not answering, with the consent of all the creditors.

The bankrupt being under commitment for not answering to the satisfaction of the commissioners, petitioned that the commission might be superseded; all the creditors who had proved debts had signed their consent to the petition, and the commissioners certified to that effect. Mr. *Montagu*, for the petition, cited *Ex parte M'Gennis* (18 *Ves.* 289; 1 *Rose*, 60, 84), overruling *Ex parte Bean* (17 *Ves.* 47).

The *Lord Chancellor* [Eldon]. If a bankrupt, under commitment, applies to supersede a commission, by reason of its invalidity, he is entitled to be heard, as in *Ex parte M'Gennis*; but that he shall be discharged, on consent of the creditors, when committed under a valid commission, is a different proposition. At least, the order must be qualified by an undertaking on his part, to bring no action, in respect of his commitment, and to confirm sales under the commission. With those qualifications, unless I intimate an opinion to the contrary to-morrow, you may take the order.

*July 10.* The *Lord Chancellor* [Eldon]. With the consent of all the creditors, it is of course to supersede the commission; the consequence is, that the authority for keeping the bankrupt in custody has ceased. He must be discharged upon the terms which I intimated.

[291] "Now upon hearing the said petition read, and what was alleged by the counsel for the petitioner, and the petitioner undertaking not to bring any action, and also to confirm all sales made by the said assignees under the said commission, I do order,

that the said commission issued against the petitioner *J. Brown*, and dated the 11th of *March* 1817, be superseded, and that a writ of *supersedeas* do forthwith issue for that purpose." Orders in Bankruptcy, 1818, Lib. 149. p. 30.

ATTORNEY-GENERAL v. WARREN. *July* 14, 16, [1818].

[S. C. 1 Wils. Ch. 387. See *In re Clergy Orphan Corporation*, [1894] 3 Ch. 154.]

A decree pronounced in 1670, in a suit against the trustees of a charity, improper rectors, and persons interested in the due application of the funds, to which the Attorney-General was not a party, having directed the trustees under the indemnity of the Court, to perform an agreement with the Plaintiff in that suit, for granting a lease of tithes for 980 years at a fixed pecuniary rent, and an exchange of lands, and the conveyances having been accordingly executed, and the rent constantly paid, and the lands enjoyed in conformity to the decree; an information by the Attorney-General, at the relation of the present trustees, against the person claiming under the Plaintiff in the former suit, for an account of tithes, not stating the decree of 1670, which was set forth in the answer, was dismissed.

The information filed, on the 21st *November* 1815, at the relation of the trustees of "*Foljambe's Charity*," stated, that *Godfrey Foljambe*, by his will, dated the 24th of *February*, in the 37th year of the reign of *Elizabeth*, devised to *Isabel Foljambe*, his wife, and her heirs, the rectory and parsonage of *Adenborough*, in the county of *Nottingham*, together with the glebe lands, upon trust (after the expiration of a term of years which *George Foljambe* had therein), to pay certain annuities to the preacher and schoolmaster at *Chesterfield*, and to the Masters and Fellows of *Jesus* and *Magdalen* Colleges, *Cambridge*, and to apply the residue of the rents and profits towards the relief of the poor of the parish of *Chesterfield*, at the view and oversight of his executors and the survivor; and after their decease, of such per-[292]-son as should be owner of his mansion-house of *Walton*; that, by a conveyance dated the 27th of *August* 1584, *Isabel Foljambe* granted the rectory to *William Ireton*, and *Mary*, his wife, and their heirs, to pay the sums of money, and accomplish the purposes expressed in the will.

The information further stated, that the succession of trustees had been regularly continued, and that the rectory was then vested in the relators on the trusts of the will, and they, as improper rectors, were entitled to the tithes of corn, grain, and hay in the parish of *Adenborough*; and that the Defendant, *Sir John Borlase Warren*, Baronet, then was, and, since 1809, had been, the owner of lands within the parish.

The information, stating, by way of pretence, a lease, dated the 12th of *September* 1763, by which the trustees of that time granted to *Arthur Warren*, an ancestor of the Defendant, the tithes of the lands then belonging to him within the parish, for 980 years, charged, that the compensation made by the pretended lease to the trustees for the tithes, was grossly inadequate and fraudulent, and that the lease was illegal and wholly void, and that the then trustees were not enabled to enter into, or to grant any such lease, tending, in the highest degree, to injure the interest of the charity; and the relators submitted, that the lease was fraudulent and void, and could only be binding on the parties thereto.

The information prayed, that the pretended lease, or agreement for a lease, might be declared to be illegal and void, and ordered to be delivered up and cancelled, and that an account might be taken of the single value of all the titheable matters which had arisen on, or from, the farms and lands occupied by the Defendant, and that he [293] might pay to the relators what should appear to be due from him, the Plaintiff waiving all pains and penalties that might have been incurred by the Defendant, for subtracting or not setting out the tithes.

The answer of the Defendant stated, that the rectory being in the possession of *Henry Foljambe*, under a lease from the trustees, and *Arthur Warren* being possessed of the manor of *Toton* (a part of the parish of *Adenborough*), and of some arable lands in the parish, for the remainder of a term of a thousand years (the reversion in fee being vested in *Benjamin Weston* and *Hopton Shuter*, in trust for him), and having entered into the agreement after-mentioned, in *Easter Term* 1662, *Arthur Warren*, in conjunction with his trustees *Weston* and *Shuter*, exhibited a bill in Chancery

against *Henry Pierpoint* and the other trustees of the charity, *Henry Foljambe*, the tenant of the rectory, the masters and fellows of *Jesus* and *Magdalen* Colleges, *W. B.* the preacher and *R. S.* the schoolmaster of the parish of *Chesterfield*, and the churchwardens and overseers of the poor of the parish, stating the foundation of the charity, and that there being tithes payable by *Arthur Warren*, out of his manor and lands, to the impropiators of *Adenborough*; about September 1661, he treated with *Henry Foljambe* for the payment of a certain sum of money in lieu of such tithes, and for laying the lands belonging to the rectory, which were intermixed with *Arthur Warren's* lands, into several closes by themselves; and that it was agreed between *Warren* and *Henry Foljambe*, that the former should pay to *Foljambe*, during his term in the rectory, £60 *per annum* for the tithes, and that the taxes should be equally borne between them, and that the glebe lands, which were arable lands lying in the fields of *Toton*, should be all laid together in one place of the fields, at the choice of *Foljambe*, and that *Warren* was to [294] fence them out, and the Defendants to maintain the fence afterwards, and that such lands were to continue tithe-free for ever to the rectory; that the meadow and pasture-grounds belonging to the glebe in *Toton* should be set forth and laid together, as *Warren* and *Foljambe* should agree, to remain in severalty for ever tithe-free; and that *Foljambe* should have seven acres of land set out in *Toton Moor*, towards *Chelwell*, to be and remain to the rectory for ever, in satisfaction of all common of pasture belonging to the rectory lying within *Toton*, and that *Foljambe* should maintain the fence towards *Chelwell*, and the same towards the lane then made by *Warren*; and that *Warren* was also to divide that part of the *Holme Lyes* belonging to the rectory, which was staked out from the rest, and to maintain all the fences of the same for ever; and pay 40s. to *Foljambe*, and give him twenty loads of stone towards making a bridge; and that he was also to divide the meadows belonging and laid out to the rectory from the vicar's lands, and *Foljambe* was to have as much laid out for it, with a convenient way through certain adjoining lands; that the bill farther stated, that this agreement had been reduced into writing, and was to be confirmed by *Pierpoint* and the rest of the trustees, and that they being acquainted with it, and being sensible of the advantage that would arise to the charitable uses, approved of the agreement; and that *Warren* had laid out the arable lands, and in other particulars performed his part of it, and offered to secure the payment of the £60 *per annum*, by a conveyance of a part of the manor of *Toton*, then on lease, and by bond during the continuance of that lease; the bill prayed the execution of the agreement.

The answer farther stated, that the Defendants to this bill appeared, and put in their answers, and the Defendants, the [295] Masters and Fellows of *Jesus* and *Magdalen* Colleges, by their answers, submitted to the judgment of the Court, how far the agreement should be performed; that *Henry Foljambe* having died, the suit was revived against *John Foljambe* and *Henry Foljambe*, his executors: and, in 1670, a decree was pronounced, directing that the agreement should be performed, and that the Plaintiffs, according to their several interests, should hold and enjoy the manor and all the lands in *Toton*, in which they had any interest, and not set out to the Defendants, and also the lands allotted to the Plaintiffs by the agreement, discharged of tithes for ever, and of the yearly payments to the minister and schoolmaster of *Chesterfield*, and to the colleges, and of all fee-farm rents chargeable on the rectory; and, that in lieu thereof, *Warren* should convey and settle the lands offered for security of the £60 *per annum*, to the trustees, and that that sum should be paid according to the agreement; and that the trustees should convey the ancient glebe lands allotted by the agreement to *Warren*, and that the Defendants should enjoy the lands allotted to them, in lieu of the ancient glebe lands and common of pasture, as the glebe lands of the rectory; and the trustees were to be protected by the Court, for what they should do, in pursuance of the decree. It was also decreed, that, as well the whole rectory of *Adenborough* (the tithes and glebe in *Toton*, and such other lands as were the Plaintiffs', and which they were to have by the agreement, and in pursuance of the order and decree excepted), as the £60 *per annum*, to be secured in lieu of the tithes of *Toton*, and the lands set out, or to be set out, for security of the £60 *per annum*, and in lieu of the rectory in *Toton*, should for ever stand charged and liable, in the hands of the trustees, theirs heirs and assigns, to the payment of the several sums to the several persons therein-mentioned, respectively, and the residue of the profits of the rectory, and of the £60 *per annum*,

[296] and the lands set out for the glebe in *Toton*, should be for ever employed and disposed of for the relief of the poor of the parish of *Chesterfield*, according to the intent of the will of *Godfrey Foljambe*.

The answer farther stated, that conveyances were afterwards executed, dated the 12th and 13th of *September* 1673, by which *Arthur Warren*, and his surviving trustee *Shuter*, conveyed to the trustees of the charity the lands set out for them, according to the agreement, together with the other premises intended as a security for the payment of the £60 *per annum*; and the trustees of the charity assigned to *Warren*, for a term of nine hundred and eighty years (being the residue of his term of one thousand years), the glebe lands of the rectory lying in *Toton*, together with the tithes of the lands belonging to *Warren*; and the inheritance of the glebe lands and tithes was conveyed by the trustees to *Shuter* and his heirs, in trust, for *Warren* and his heirs, the trustees covenanting for quiet enjoyment of the lands and tithes.

The answer also stated, that *Arthur Warren*, and those claiming under, or in trust for, him, took and had ever since retained possession of the lands and tithes, and had regularly paid the £60 *per annum*, in lieu of tithes, and the trustees had possession of the lands conveyed to them; and that the manor and estates of *Arthur Warren* had become vested in the Defendant, *Sir John Borlase Warren*.

The sum of £60 *per annum* was accepted by the trustees in lieu of tithes, down to the 11th of *October* 1814, but a tender, on the 6th of *April* 1815, of the sum then due, was refused.

The answer submitted, that the trustees were bound [297] by the agreement and decree; and that the compensation for the tithes was not inadequate.

Mr. *Wetherell*, Mr. *Horne*, and Mr. *Dowdeswell*, for the information. The original transaction, in effect an absolute alienation of charity estates, at a fixed rent, is a gross breach of trust, and cannot prevail in this Court. *Attorney-General v. Green* (6 *Ves.* 452), *Attorney-General v. Owen* (10 *Ves.* 555), *Attorney-General v. Griffith* (13 *Ves.* 565), *Attorney-General v. Backhouse* (17 *Ves.* 283). From the earliest times, leases granted by trustees of a charity, at an undervalue, have been rescinded. *Wright v. The School of Newport Pond* (*Duke*, Law of charitable uses, 46), *The Inhabitants of Eltham v. Warreyn*, and other cases in *Duke*. (*Duke*, 67, see *Attorney-General v. Magwood*, 18 *Ves.* 315, and the authorities there cited, and *Attorney-General v. Wilson*, 18 *Ves.* 518.)

The decree of 1670, on which the answer insists, is not an effectual confirmation of the previous transaction. That proceeding was a fraudulent contrivance for obtaining the sanction of the Court to a voluntary agreement. The suit was not adverse; no inquiry was directed whether the contract was beneficial to the charity; the *Attorney-General* was not a party; as against him, it is *res inter alios acta*. A decree, in such a cause, is an imposture. (1) In the case of *Hemsworth Hospital*, (2) [298] a decree by the *Master of the Rolls*, was, in a subsequent suit, treated as a nullity; and in the *Attorney-General v. Cholmley*, (3) a decree, confirming an agreement between a rector and the parishioners, for an exchange of lands, and an annual pecuniary compensation, in lieu of tithes, was set aside, notwithstanding an acquiescence of eighty years. In *Sellers v. Dawson*, Lord *Thurlow* considered an irregular order a nullity. (2 *Dick.* 738; 2 *Anstr.* 458, n.) It is clear that length of time is not a bar to a claim on behalf of a charity. The fact, that the property has passed through the hands of many tenants, creates no objection; they are not charged. The only defence to a suit like the present, is purchase for a valuable consideration without notice, of which here is no pretence.

[299] On the merits, therefore, the *Attorney-General* is entitled to a decree, nor does the form of the record present any obstacle to the administration of the justice of the case. It might have been more accurate to have amended the information after the answer was filed, by introducing an allegation of the decree, and charging fraud; but that was not necessary. The *Attorney-General*, suing on behalf of a charity, is not bound by the rules which prevail in ordinary suits. *Attorney-General v. Parker* (1 *Ves. Sen.* 43), *Attorney-General v. Scot* (1 *Ves. Sen.* 418), *Attorney-General v. Breton* (2 *Ves. Sen.* 426), *Attorney-General v. Whiteley* (11 *Ves.* 247), *Attorney-General v. Brooke* (18 *Ves.* 324, 325, and see 1 *Ves. Sen.* 72). He cannot, indeed, claim indulgence to the prejudice of the Defendant; but the Defendant cannot be prejudiced by a decree on the facts stated in his answer: the record presents the same case, as if the information had been amended; a case substantially requiring relief. In the *Attorney-General v. Cholmley*, the information stated the decree: and prayed

that it might be set aside, but it appears from the registrar's book, that the decree then pronounced contained no declaration to that effect, but, without referring to the former decree, treating it as a nullity, declared the rights of the parties in contradiction to it.(4) It cannot be necessary, therefore, to state the decree on the record.

[300] Mr. *Hart*, Mr. *Bell*, and Mr. *Blenman*, for the Defendant. No evidence has been produced to authorise the Court in pronouncing the summary decree proposed by this information, and directing an account of tithes as matter of course. For any thing that appears, the original transaction was valid; there is no proof of under-value; it was not a mere lease, but a grant of tithes for a pecuniary consideration, accompanied by an exchange of lands. The Court will not rescind a contract in part. It is clear that absolute alienation may be consistent with a due administration of a charity estate. In a case, about seven years ago, a house near *Lewes*, in *Sussex*, the property of a charity, which had formerly produced a large income, by being let in apartments, having fallen into a state of dilapidation, which rendered it unproductive, and the charity having no funds to rebuild it, but the materials and scite being of considerable value, an information was filed, and the Master having reported that it would be for the advantage of the charity to sell the house, Sir *William Grant* directed a sale, on the authority of a decree by Sir *Thomas Clark*, or Sir *Thomas Sewell*, cited by Mr. *Hollist*. In the information against the corporation of *Exeter* (*Attorney-General v. Cross*, 3 *Mer.* 524), the Court refused to disturb subsisting leases, which, from a long course of dealing, it presumed to have been properly granted.

But on this record it is not competent to the Court to examine the validity of the original transaction. That question is concluded by the decree of 1670, which the information does not seek to affect. A decree may certainly be impeached for fraud, but the Plaintiff in a suit to that end, must put in issue, the decree and the facts [301] from which he infers fraud. Orders and decrees remain in force till regularly discharged or reversed. *Wall v. Bushby* (1 *Bro. C. C.* 484), *Boddy v. Kent* (1 *Mer.* 361). It was not necessary that the *Attorney-General* should be a party to that suit. He had no interest, and could have interfered only to secure a correct statement of the facts, which were correctly stated. The Court may give directions for the management of a charity, in a suit to which the *Attorney-General* is not a party. *Monill v. Lawson* (4 *Vin.* 500). The decision in the *Attorney-General v. Cholmley*, the case of an ecclesiastical rector, whose lease, as against his successors, was void by statute, is no authority for setting aside this decree; but it is a direct authority for our proposition, that it can be set aside, if at all, only on an information stating it, and praying that relief.

The proceeding in this case should have been by information and bill. Perhaps the distinction between the cases in behalf of a charity, which require respectively a bill, an information, or a bill and information, may be thus stated: where the object is not to decide a right, as merely to compel a party to account, the trustees may proceed by bill; to decide a right, the *Attorney-General* must be a party, and an information is necessary; where both those objects are combined, the proceeding must be by bill and information. In the present case the trustees are not parties; as relators, they are subject only to costs (*Note*: Some cases concerning relators, are collected, 1 *Swans.* 305, n.), but the Court, having them before it in that character alone, could not bind their interests, or compel them to convey. (*Note*: The substance of the remaining argument for the Defendant is stated in the judgment.)

[302] The *Master of the Rolls* [Sir *Thomas Plumer*]. Without finally disposing of this case, I will state my present view of the two questions into which it resolves itself; 1st, The validity of the transaction, independently on the form of the pleading; 2dly, The fitness of this record, for the purpose of impeaching it.

On both these questions a principal feature of the case is, the decree pronounced in 1670, as affecting, as well the validity of the contract, as the form of the suit which seeks to impeach it. In that respect there is a novelty in this case, not found in any one of those cited at the bar. If the information sought to impeach a recent agreement in these terms, by trustees of a charity, admitting that the legal estate is absolutely theirs, and that they can convey it for ever, and conclude a contract, binding their interest, and the charity, at law, the question in this Court always is, how far alienation absolute, or for a long term, shall prevail when accompanied



with circumstances which amount to a breach of trust ; that is, alienation not consistent with that provident administration which is incumbent on trustees of a charity ? The principle that governs all the cases is this, that trustees are bound to a provident administration of the fund for the benefit of the charity. There is no positive law which says, that in no instance shall there be an absolute alienation. If so, even in the case of an inquiry under an order of the Court, whether alienation would be beneficial to the charity, being contrary to law it could not be good ; but on many occasions, by the authority of the Court, alienation has taken place ; as in the case mentioned of a decayed house, in which, after a reference to the Master to inquire, whether it was for the interest of the charity, the Court directed it to be disposed of. If contrary to law, the Court could not authorise the dis[303]-position : alienation, under the authority of the Court, would be as invalid as without it. These decisions, therefore, afford a conclusive proof, that alienation not improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good ; and disclose the principle on which any bill to rescind that alienation must proceed. So, in the information against the corporation of *Exeter* (*Attorney-General v. Cross*, 3 *Mer.* 524), the late *Master of the Rolls* was of opinion, that leases for three lives are not necessarily an unlawful alienation of charity estates ; and being satisfied, that the value had been rightly estimated in the fine and rent, the duration of the leases did not, in his judgment, constitute an objection, when it appeared, that the trustees had not, *de novo*, introduced that mode of alienation, but merely followed the custom of the country ; but that custom could not have authorised the alienation if contrary to law.

In *The Attorney-General v. Smith* (2 *Vern.* 746), the Court sanctioned alienation, under a principle which it would be a little difficult to recognize at present. It appearing, on a reference to the Master, that the property of a charity had been recovered, in a great degree, by the activity of the party who sought a permanent interest in it, he was declared entitled to a lease renewable for ever. It cannot be taken, in contradiction to these examples, as an inflexible rule, that, in no circumstance whatever are trustees of estates, devoted to charitable purposes, authorised to alien, either absolutely or for long terms. The question therefore is, whether, under all the circumstances, the alienation is a breach of trust, or whether the contract was not for the benefit of the charity ?

It appears here, that *Henry Foljambe*, the tenant of [304] the rectory, having an interest, the extent of which we know not, had entered into an agreement, not confined to the subject of tithes, but by which he undertook to demise all the tithes of the manor, containing, as I understand, about 1200 acres, for the remainder of *Warren's* term of 1000 years, accompanied by a further agreement relative to the glebe (which seems designed to place the glebe lands together, according to the choice of the tenant of the rectory), and for seven acres in lieu of right of common. The exact nature of the rector's right of common, or his interest in the tithes, is not in evidence : or whether the owner of the lands might have claimed any exemption ; it appears only, that in future, the rector was to receive £60 a-year for tithes, that stipulation being accompanied by an exchange of lands relative to the glebe. Now, stopping here, and considering this agreement with modern impressions, an alienation of charity estates for 1000 years at a stationary rent, it is impossible to deny that it is a decisive breach of trust ; not permitting the rector to avail himself of any change of times, but keeping his interest fixed in amount ; the compensation which he received might be adequate at the date of the contract ; but he was precluded, during 1000 years, from any advantage of increased value. It is true, that he was secured from diminution, and in some instances to guard against fluctuation, may be as much the interest of one party as of the other ; but that would be an answer to all cases in which trustees have made an alienation at a fixed rent. It is not fitting for trustees to divest themselves of the power of profiting by change of value. The progress of events, and the depreciation of money, have shown the improvidence of this agreement ; at the same time, it is just to say, that these principles do not seem to have been acted on at that early period, in 1670. There is no case produced, in which mere improvidence, inferred solely from the extent of the term, was held sufficient to rescind the [305] alienation. In many cases in *Duke's* collection, the Court has acted on inadequacy of value ; in none on mere extent of term ; where the alienation appeared, at the time, to be a provident administration, an alienation for a value then adequate,

the prospective possibility that it might become inadequate, does not appear, at that period, to have had the effect which it has at present. Lord *Eldon*, in 1801, says, that he can find no precedent for regulation of the judgment of the Court, having before it the case of a long lease of a charity estate (*Attorney-General v. Green*, 6 Ves. 452), and in a subsequent case (*Attorney-General v. Owen*, 10 Ves. 555), although he states, that during the last twenty-five years no doubt had been entertained on that point; yet no express decision was produced, that a long term, without reference to value, is an improvident alienation.

I mention the fact to show that these trustees might not know that, in the judgment of the law, they were guilty of a breach of trust; but it is a different thing to say, whether the Court can retrospectively give validity to such a contract, and, with reference to modern principles, permit it to remain? That is a question of considerable difficulty; but whenever it can properly be considered, the point will not be merely, whether a demise of tithes for a thousand years at a fixed rent is a good administration of a charity, for it never can be just to consider a part of a contract and not the whole: in examining the conduct of the trustees, and deciding whether this was a provident administration of the property of the charity, the Court must advert not only to the tithes, but to the glebe, and, as far as it can, to all the circumstances.

Length of time, though not a bar, is certainly an ob[306]-stacle in the way of setting aside a contract made near a hundred and fifty years ago, and acted upon ever since, till the filing of this information. It creates a difficulty in ascertaining all the circumstances under which the agreement was made, and a strong case is required to justify the interposition of equity after such a lapse of time, at the instance of one of the parties, who may have enjoyed all the benefit of the contract for perhaps the whole, or a great part, of the interval, and who never could have been compelled, at the instance of the other party, to relinquish it, when, from an alteration in the relative value of money, the agreement has become disadvantageous to him. It is additionally difficult, in such a case, partially to set aside the contract, leaving the charity still to enjoy all the benefits of the other part of the transaction; and yet the information neither seeks, nor is properly framed, nor has the necessary parties, for a complete rescission of the whole agreement, and a restitution of both parties to their original rights, as they stood antecedent to the formation of it.

But I am not now required to decide these questions, and must not overlook the main feature of the case, that the contract was brought under the view of a court of justice, before it is executed. It is necessary to consider that proceeding.

The suit was instituted by *Warren* against the persons who had entered into the contract, with the addition of the overseers of the poor, and all other parties interested. Was there any omission fairly to disclose to the Court the nature of the contract? Was the Court fully possessed of what constituted the objection, namely, the length of time and the fixed rent? These are prominently stated in the pleadings, and there needed no [307] reference to the Master to ascertain the fact of the agreement, to let the tithes belonging to the charity at £60 a-year for a thousand years; the trustees submit to act under the authority of the Court; it was stated, that such an agreement had been made by their tenant, but was not binding on them, and intended to be binding or not as they approved; by their answer, they submit to the judgment of the Court how far the agreement should be performed. The Court, on debate and hearing what could be alleged, declared that it ought to be performed, and that the trustees should be protected in the performance. What could the trustees do after this decree was pronounced? Could they refuse to execute the deeds in conformity to the decree, when ordered by the Court to execute and convey, and protected by it? Am I to assume, that the Court lent itself as ancillary to a fraud and breach of trust? If there were a breach of trust, it was committed by the Court, which, with perfect knowledge of what constitutes the alleged breach of trust, the length of term, and fixed amount of rent, ordered the agreement to be carried into execution. In considering the propriety of this contract, am I not bound, in deference to the Court, to suppose, that it was satisfied that there was not a breach of trust; that the agreement and the decree were proper? I must presume *omnia rite acta*. It is said, that the Court did not direct a reference to the Master, to see whether the contract was for the benefit of the charity. Was such a reference according to the course of practice

at that time ? If the contract were void by reason of its duration, no circumstance could give validity to it. I am bound to suppose, that the Court was satisfied on these points before it pronounced the decree. Three years after the decree, the trustees executed the agreement. The question here will be not a mere abstract question, whether trustees [308] can, in any case, alien or demise for a long term, but whether alienation with the knowledge and under the decree of the Court, can by a succeeding Court be pronounced a breach of trust ? That is quite a new feature in the case, and if, in modern times, trustees constantly alien when proper means have been employed to ascertain that it is beneficial to the charity ; why are we to presume here, that the Court did not take measures to inquire whether this alienation was for the benefit of the objects of the trust ? Admitting that the Court was mistaken, was there a breach of trust in the trustees ? When the Court orders a conveyance, is that a mere nullity ?

It is said, that the proceeding on the face of it is a fraud. Fraud is *aliud actum aliud simulatum*, concealment, pretended hostility. Here the parties state openly, that they approve the contract, specify its terms, and submit it to the Court. This is an agreement for a long term, and at a fixed rent, but executed under the sanction of the Court ; and it must always be considered with reference to that circumstance, a most important circumstance whenever the question comes to be decided. Without anticipating the decision, I think that there will be great difficulty. It must be remembered, that this is not the case of mere alienation, but of trustees calling for the aid and sanction of a Court to guide them, and what they do is the act of the Court. It seems difficult to give to such a transaction the character of a fraud, or breach of trust ; and it is on that ground only, that the legal right can be qualified in equity.

Whether the rule is so imperative, that to alienation for so extensive a term no circumstance can give validity, no length of time, no acquiescence, no sanction of a Court, but that it is a manifest breach of trust in the Court and all parties concerned, is a question on which I express no opinion, because it seems to me, that the case is not now in a shape in which it is possible to form a decision. The proceedings in the former suit are wholly omitted in the information. Is the Court to investigate this transaction, without having put in issue that which constitutes the most important circumstance for establishing its validity ? This information attempts to set aside a decree, without putting it in issue ; praying that the lease may be cancelled without naming a decree under which it was executed. It is said that the suit was fraudulent. Those who impeach it must put it in issue, and state from what its invalidity arises. Is the Court to annul a decree for fraud, without the statement of a single circumstance of fraud ? Was any case ever heard of, in which, after a solemn decree directly on the very subject, with jurisdiction to bind the inheritance, with parties to be bound, and binding it in express terms to the full extent of the interest, another Court, at the distance of a century and a half, determined the contrary ? One judgment confirming, the other annulling, the same contract ; two inconsistent determinations on the records of the same court ; the first decree, commanding the trustees to execute the contract, and the subsequent decree, without the least notice of the former, declaring the contract void ? Whether the decree in this case can be impeached for fraud is a distinct question, but this suit does not seek to impeach it.

The case of *Hemsworth Hospital* cannot assist the present information. The history of the proceedings in that case is given in *Watson v. The Master, &c., of Hems[310]-worth Hospital* (14 Ves. 324) ; and it appears, that the hospital was restrained by its constitution from granting leases for more than twenty-one years ; and all the decrees proceeded on that foundation.

It is then said, that the *Attorney-General* was not a party, and that an information in behalf of a charity is not to be dismissed for defect of form. To a certain extent that doctrine is well founded ; the Court will grant relief according to the case made, as it appears on the whole record : but what appears on this record ? That there was a decree, in 1670, approving the agreement, and directing its execution ; but no suggestion of fraud ; that allegation is extrinsic to the record. All the cases show, that the Court is careful not to do injury to defendants, by overlooking error in form. Would no injury be done here ? The information denotes no intention to attack the decree ; and can the Court permit the *Attorney-General*

to raise a question in argument not put in issue in the pleadings? The record presents nothing to impeach the decree, the information not touching, or affecting to touch it; there is, therefore, a subsisting decree on the very point; how can the Court over-rule it without at least putting it in issue? The counsel for the information insist, that this was done in *The Attorney-General v. Cholmley*,<sup>(3)</sup> and other instances. Certainly, decrees in cases of ecclesiastical rectors have not prevailed against objections in modern times; but an ecclesiastical rector cannot, since the disabling statutes, even with the consent of the patron and ordinary, grant a lease for more than three lives; such leases, and all judgments intended to support them (stat. 43 *Eliz. c. 9, s. 8*), are expressly declared void. That is not the case with trustees of a charity; they have [311] the legal fee, not an estate for life like an ecclesiastical rector; whether beneficial or not beneficial, whether for the interest of the church or not, his contract, exceeding twenty-one years, is void by statute, as against his successors. No decree, therefore, could give validity to it beyond the interest of the parties. In *The Attorney-General v. Cholmley*, the agreement and the decree bound the party, but not his successors, and, with respect to them, was void on every principle of law. In that case the information impeached the validity of the decree, and prayed that it might be set aside. The whole merits of that decree were in issue, and the Defendant was apprised that the Plaintiff sought to impeach it; but the case fails, in application to the present, because it is impossible for any Court to give validity to a contract contrary to an act of Parliament, while a contract like this may be established by judicial authority. A lease for 150 years by an ecclesiastical rector, would be as void after the decree as without it.

In this case the decree was not made, like the decree in *The Attorney-General v. Cholmley*, in confirmation of the agreement; but expressly directed the performance of it, by the trustees, who were not previously bound by it, after the trustees and the other parties had transferred to the Court the responsibility, and had prayed, what they obtained, the sanction and indemnity of the Court.

As to the Attorney-General not being a party, he has no interest: his office is, to see that those who have the legal estate duly administer the property; but he would be no party to a conveyance, the legal fee being in the trustees, who are competent to convey. It is not necessary that the Attorney-General should be a party to a contract on this subject. It would, indeed, have been [312] more fit had he been a party to the suit; but if not, is the decree a nullity, and to be totally laid aside, the information not seeking to impeach it on that ground? If the information impeached the decree for want of proper parties to represent those interested, such a charge might require an answer from the Defendant, and inquiries how the decree could be sustained; but the difficulty here is, supposing every fact in favor of the trustees, to overthrow a positive decree, not impeached by the record, and pronounced directly on the contract. It seems impossible to sustain the information as at present framed.

July 30. The *Master of the Rolls* [Sir Thomas Plumer] intimated, that he retained the opinion which he had expressed on the hearing.

Bill dismissed without costs.

Reg. Lib. A. 1817, fol. 2124.

(1) The counsel here cited the following passage from the argument of the Solicitor-General Wedderburne, on the Duchess of Kingston's trial:—"A sentence obtained by fraud and collusion, is no sentence. What is a sentence? It is not an instrument with a bit of wax and seal of a court put to it; it is not an instrument with the signature of a person calling himself a register; it is not such a quantity of ink bestowed upon such a quantity of stamped paper. A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit: there is no judge; but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question, and, to use the words of a very sensible civilian on this point: *Fabula, non judicium, hoc est; in scena, non in foro, res agitur.*" 20 *Howell's State Trials*, 478, 479.

(2) *Blackston v. The Hospital of Hemsworth, Duke*, 49 ; see a farther account of the case in *Watson v. Hinsworth Hospital*, 2 Vern. 596. *Watson v. The Master, &c., of Hemsworth Hospital*, 14 Ves. 324.

(3) *Amb.* 510 ; 3 *Burn's E. L.* 439 ; 3 *Gwill.* 914 ; 2 *Eden*, 304 ; 7 *Bro. P. C. ed. Toml.* 34, and see *Jones v. Snow*, 3 *Gwill.* 1199. *Cartwright v. Colton*, 4 *Wood.* 88.

(4) " His Lordship doth order that the relator's information do stand dismissed out of this Court, as against the Defendant the Lord Bishop of *Lincoln*, with costs, to be taxed, &c., and doth order and decree, that it be referred to the said Master, to take an account of the value of the tithes which have accrued, arisen, and renewed, upon the several estates in the possession of the several Defendants, from the time of filing the said information ; " with directions for taking the accounts and costs. *Reg. Lib. A.* 1764, fol. 531.

[313] ARCHIBALD KENNEDY and HANNAH ELEANORA KENNEDY, Infants, by GEORGE ROBINSON, their next Friend, *Plaintiffs* ; ARCHIBALD Earl of CASSILLIS, ARCHIBALD Lord KENNEDY and ELEANOR his Wife, JAMES FARQUHAR, GEORGE HIBBERT, and JOHN INNIS, and HANNAH ALLARDYCE (out of the jurisdiction), and the Governor and Company of the BANK of ENGLAND, *Defendants.* July 15, [1818].

Injunction to restrain proceedings in the Court of Session in *Scotland*, dissolved under the circumstances.

The bill stated a deed of nomination dated 14th July 1800, executed by *Alexander Allardyce* of *Dunnottar*, in the county of *Kincardine*, nominating his wife, *Hannah Allardyce*, his brother, *James Allardyce*, since deceased, *James Farquhar*, *George Hibbert*, and *John Innis*, and the survivor, tutors and curators to his daughter, *Eleanor*, during her minority, and that *Alexander Allardyce* having died in November 1801, his daughter *Eleanor* being an infant, leaving real estates at *Dunnottar*, and personal estate, consisting, principally, of £30,000 stock of the Bank of England, the tutors and curators proved the deed of nomination or testamentary writing in the prerogative court of the Archbishop of *Canterbury*, and the bank stock was transferred into their names.

The bill then stated, that some part of the personal estate had been invested in the purchase of real estates, and that, at the time of filing the bill, there remained standing in the names of the four surviving curators, £15,300 bank stock ; a farther sum of £3825 like stock, arising from dividends accrued due on the former, since *Eleanor Allardyce* attained the age of twenty-one, standing in the name of *Alexander Allardyce*.

[314] The bill farther stated, that about the end of the year 1813, the Defendant, Lord *Kennedy*, eldest son of the Defendant, the Earl of *Cassillis*, then nineteen years of age, paid his addresses to *Eleanor Allardyce*, then about seventeen ; that after some proposals between Lord *Alloway*, as the friend of the Earl of *Cassillis*, and *Innis*, to which the Earl refused to accede, the curators prepared a memorandum, dated the 17th of March 1814, containing distinct proposals relative to the terms of the settlements, to be executed previous to the marriage, which, having been approved by *Eleanor Allardyce*, was delivered to the Earl of *Cassillis*, who, on the 25th of March, handed over to *Farquhar* a paper, in his own hand-writing, stating objections to several of the articles ; that the Earl afterwards proposed certain modifications, to which three of the curators, then in *London*, acceded ; but, on the 6th of April, the Earl intimated that he had some objections, and, on the 9th of April, addressed a letter to *Farquhar*, a part of which was in the following words : " Upon delivery of your propositions, matters to me wore so unfavourable an aspect, and being determined as to my line, in so far as I comprehend the propositions, I immediately sent for Lord *Kennedy*, delivered to him the whole of the papers or copies, and desired that he would himself go and talk over the matter with Miss *Allardyce* herself. I presume he is at *Dun.* or *Dunnottar*, about this time. I see no probability of my doing any good."

The bill, alleging that the Earl of *Cassillis* had formed a design, that Lord *Kennedy* should marry Miss *Allardyce*, without any settlement being previously executed, further stated, that Lord *Kennedy*, on his arrival at *Dun.* where Mrs. and

Miss *Allardyce* were then resident, represented to them, that *Farquhar*, *Hibbert*, and *Innis*, had proposed terms to the Earl to which he had declined to accede, but had laid before the curators his final propositions, on the basis of which he wished settlements to be prepared, and Lord *Kennedy* produced what he alleged to be a copy of such final propositions (the bill charging, that no such final propositions were ever sent by the Earl to the curators), and obtained the consent of Miss *Allardyce* and her mother thereto, assuring them, as he was authorised and instructed by the Earl, that settlements should be prepared, and were then in preparation, according to the terms of those propositions; that, in the faith that proper settlements would be executed on the 1st of *May* 1814, Miss *Allardyce*, without the concurrence of her curators, married Lord *Kennedy*, and that no settlement of her property had yet been executed.

The bill, submitting that the curators ought not to transfer the £15,300 bank stock, or to part with any of the property vested in them by the deed of nomination, until a settlement thereof had been made, in pursuance of the agreement, further stated, that Mrs. *Allardyce*, *Farquhar*, and *Hibbert*, intended to join in a transfer of the stock, and, altogether to divest themselves of the trusts reposed in them by the deed of nomination; and, that *Innis*, having declined joining in such transfer, or otherwise divesting himself of the trust, Lord and Lady *Kennedy*, in *November* 1817, caused a summons of the Court of Session, in *Scotland*, to be executed, and levied upon him, concluding, that *Innis* ought to be ordained and decreed to deliver to Lady *Kennedy* powers of attorney, to enable the Bank of *England* to transfer into her name, that part of the bank stock which belonged to her, and to execute and deliver all necessary conveyances and dispositions of her lands, and other estates and effects, or, in case he should decline so to do, that he should be decreed to pay to the pursuers £100,000, as the value of the stock and lands.

[316] The bill prayed, that the Earl of *Cassillis*, and Lord and Lady *Kennedy*, might be decreed to execute settlements, in conformity with the memorandum or proposals of the 17th of *March* 1814, subject to the modifications before mentioned, or on the terms of the final propositions alleged, by the Earl of *Cassillis*, to have been laid before the curators, and, to that end, that the Earl and Lord *Kennedy* might make discovery of such proposals, and that all necessary directions might be given for effectuating the said purposes; and that, in the mean time, Lord and Lady *Kennedy* might be restrained, by injunction, from proceeding in the summons, or to an action in the Court of Session, or from commencing or prosecuting any action or suit at law, or otherwise, against *Innis*, in respect to any of the matters aforesaid, and that the Governor and Company of the Bank of *England* might also be restrained from making any transfer of the sums of £15,000 and £3825, or any part thereof, without the order of the Court.

In the *December* 1817, the Plaintiffs, on an affidavit of *Innis*, verifying the allegations of the bill, moved that the Defendants, Lord and Lady *Kennedy*, might be restrained by injunction "from proceeding in the said summons, or to an action or suit at law, or otherwise, against the said *John Innis*, in respect to any of the matters aforesaid, and that the Governor and Company of the Bank of *England* might also be restrained from making any transfer of the said two several sums of £15,300, and £3825, or any part or portion thereof, without the order and direction of this Court; which, upon hearing the said affidavit and the six clerks' certificate read, is ordered accordingly, until the Defendants shall appear to, and fully answer, the Plaintiffs' bill, or this Court make other order to the contrary."

Reg. Lib. A. 1817, fol. 134. 17th *December* 1817.

[317] The answer of the Earl of *Cassillis* expressed a belief that none of the curators had consented to the modifications of their proposals suggested by him, and stated, that they afterwards made new proposals, materially different from the modified proposals; and that the Earl rejected their propositions, and thereby ended all communication with them; denied a design, that Lord *Kennedy* should marry Miss *Allardyce*, without any previous settlement; and stated, that the Earl communicated to Lord *Kennedy* his final proposals, and advised him to submit them to Miss *Allardyce* and her mother; and that, as he believed, Lord *Kennedy* assured Miss *Allardyce*, that settlements should be prepared in conformity to them, an assurance which he was authorised by the Earl to make. The answer farther stated, that a settlement had been executed on the 28th of *November* 1814, between Lord

*Kennedy*, with the consent of the Earl on the one part, and Lady *Kennedy* on the other part, the particulars of which were set forth, and which the Earl believed to be in exact conformity to the propositions made by him to the guardians.

The answer of Lord and Lady *Kennedy* was to the same effect.

July 15. On this day a motion was made to dissolve the injunction.

Sir *Samuel Romilly* and Mr. *Abercromby* for Lord and Lady *Kennedy*, and Mr. *Pemberton* for the Earl of *Cassillis*, in support of the motion.

The merits of the case are not now in question, but it may be useful for the Court to understand, that the ac-[318]-tion in the Court of Session is designed to compel, not merely a transfer of the bank stock, but an account of Mr. *Innis's* transactions as trustee.

On general principles, this injunction cannot be sustained. The Court of Session is an independent foreign tribunal, of competent jurisdiction, subject to appeal only, like this Court, to the House of Lords. The parties are domiciled in *Scotland*; the marriage was celebrated, and the property, as far as it has locality, is situated there. The question must be decided by the law of *Scotland*. The action, commenced in the Court of Session, enables that Court to administer complete justice among the parties; if the Defendant, *Innis*, has a good defence, he may there avail himself of it; any objection to the settlement may be there considered. This Court is bound to presume, that foreign tribunals will proceed regularly, and administer the justice of the case. There is no precedent of an injunction to restrain proceedings in an action in the Court of Session. Even if confined to the transfer of the bank stock, the injunction must be dissolved, as impeding the proceedings of a tribunal of competent jurisdiction. The Court of Session is a court of equity; and this Court never restrains proceedings in courts of equity, as the exchequer. In the suit instituted here, *Innis* cannot be compelled to account. If the Court of Chancery, by injunction, restrains proceedings in the Court of Session, that Court may, by interdict, restrain proceedings here, and the party will be unable to sue in either country. An article of the act of Union expressly prohibits such an interference with the jurisdiction of the Court of Session; declaring, "that no causes in *Scotland* be cognisable by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in *Westminster Hall*; and that the said Courts, or any other of the like [319] nature, after the Union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within *Scotland*, or stop the execution of the same. (5 Ann. c. 8, art. 19.)

The Lord Chancellor [Eldon]. The case presents two questions; 1st, Whether this Court has jurisdiction of the subject in dispute? 2d, Assuming that, whether it can interpose to restrain another Court which has jurisdiction also? That this Court has jurisdiction, I cannot doubt; but that will not authorise me in restraining another Court of competent jurisdiction.

The Solicitor-General [Gifford] and Mr. *Cullen*, for the Plaintiffs, against the motion.

The object of this suit is to prevent Lord *Kennedy* obtaining possession of the bank-stock standing in the name of the curators, without executing a proper settlement.

It is clear that this Court possesses concurrent jurisdiction. At the period of these transactions, Lord *Cassillis* was resident in *England*, the agreement was made in *London*, and part of the property, the bank stock, is here; the curators obtained possession of that stock in the character of executors in *England*. The Court of Session has no power to restrain the bank from transferring the stock; and that important object of the present suit cannot be accomplished by the suit in *Scotland*. During six months the parties have acquiesced in the injunction.

Mr. *Hart*, for the Defendants *Farquhar*, *Hibbert*, and [320] *Innis*, submitted to the direction of the Court. Sir *Arthur Pigott* for the Bank.

The Lord Chancellor [Eldon]. The bill is filed by the next friend of two infants, whom it represents to be English domiciled infants, against Lord *Cassillis*, and Lord and Lady *Kennedy*, none of whom it treats as out of the jurisdiction, not describing them as English, or as Scottish domiciled subjects; against *Farquhar*, against *Hibbert*, who live in *London*, against *Innis*, who lives in *Scotland*, no one of whom is charged to be out of the jurisdiction; the only person so described is Mrs. *Allardyce*. The bill states the right which it supposes the infants have to

a settlement for their benefit (a right, to a certain extent, unquestionable), and thus treating the parties as resident in *England*, except Mrs. *Allardyce*, proceeds to state the agreement made with respect to Scottish property, and also property, which, if it cannot be denominated Scottish, or English, must be administered by persons not subject to process of the Court of Session, namely, the Bank of *England*, and alleges, that the proceedings in the Court of Session were fraudulent and collusive, between the principal Defendant and others, including *Innis*, in whose name the stock stands.

The difficulties in the case, I certainly think, are not provided for by the act of union ; difficulties arising from transactions between persons resident in different parts of the island. We have a Court here which cannot affect persons resident in *Scotland*, and a Court there which cannot affect persons resident here. It appeared to me right to grant the injunction, on the allegation, that the suit in *Scotland* was collusive. I do not interfere with the merits, deciding on a principle which must regulate the jurisdiction of the Courts with regard to each other.

[321] The injunction has been construed somewhat too largely by Sir *Samuel Romilly* ; but I think it expressed so as to be understood to go much farther than the Court designed. I certainly meant to go no farther than the bank stock and purchased estates ; the stock standing in the Bank of *England*, which the proceedings of the Court in *Scotland* cannot affect, and, in the names of persons, three or four of whom are not bound to give effect to the suit in *Scotland*, more especially if they are not parties to it.

The suit in *Scotland* is of this kind. Lord and Lady *Kennedy* bring before the Court no person but *Innis*, and state, that other persons (for whom, I suppose, Mr. *Hart* has asked instructions how to act, which I cannot give them) have been colluding with him, and divested themselves of the purchased estates, and confine their prayer to relief against *Innis*, calling on him to account, and concur in executing powers of attorney and making conveyances. Taking the Court of Session to be a court of law and of equity, which it is, (1) yet, whether the property is to be administered according to English or Scottish notions of equity, which, in many material points, differ, must depend, when the cause is heard, on the national character of the individuals, and the character of the property which the decree affects ; and it may happen, that the relief given in the Court of Session, is not exactly the same as that given here. Supposing a bill filed in the Exchequer against all the trustees, call-[322]-ing on them to convey to the absolute use of Lady *Kennedy*, if that bill were dismissed, the decree so pronounced would not be such that the parties could have the benefit of it, in a suit instituted to protect the rights of the children. There might therefore be two suits proceeding in this country, and a dismissal of a bill in the Court of Exchequer, while the Court of Chancery is going on to give relief ; but that is not the view in which this case must be considered. It now appears that the suit in *Scotland* is *bona fide*, and the injunction is sought, not against the persons in whose name this bank stock stands, but against the Court of Session, which never can be made effectual. If you think proper, and you are entitled to ask for an injunction against individuals, that suit never can do you harm. I say nothing on the merits. The other trustees, not parties in the Court of Session, are parties in this Court, and must take notice of what passes here. If they choose, in case *Innis* is ordered by the Court of Session to transfer, to act in conjunction with him, it may be proper ; but you might move to restrain them from joining, which would not interfere with the proceedings in that Court ; but that must be by injunction against the Bank ; for, though I have had a good deal of difficulty in saying that you have a right to dissolve the injunction against the Bank, who are not amenable to the jurisdiction of the Court of Session, yet, if the Plaintiffs are entitled to an injunction against the Bank, I think it would be more properly asked in a suit to which the trustees are parties.

The act of union is sacred ; but I doubt how it is possible to apply the article cited to a case in which justice cannot be administered, unless the courts of both countries assist the parties. It is true, this court cannot "cognose, review, or alter the acts" of the Court of [323] Session ; but it will be difficult to do justice, unless the courts in *England* aid the courts in *Scotland*, and the courts in *Scotland* aid the courts in *England*.

The injunction must be dissolved ; but I desire it to be understood, that the



dissolution will not authorise the trustees, not parties to the suit in *Scotland*, to join in any transfer or conveyance.

"Whereas, by an order made the 17th day of *December* 1817, it was ordered, that an injunction should be awarded to restrain the Defendant, *Archibald Lord Kennedy*, and *Eleanor*, his wife, under the penalty of £100,000, to be levied upon their lawful goods and chattels, from proceeding in the summons, or to an action in the Court of Session, and from commencing or prosecuting any action or suit at law or otherwise, &c." (2 *Swans.* 316.) "His Lordship doth order, that the said injunction do stand dissolved, and that the Plaintiffs do pay to the Defendants, the Governor and Company of the Bank of *England*, their costs of this application to be taxed, &c."

Reg. Lib. A. 1817, fol. 1617.(2)

(1) The Court of Session may proceed as a court of equity by the rules of conscience, in abating the rigor of law, and giving aid, in proper cases, to such as in a court of law can have no remedy; and this power is inherent in the supreme court of every country, where separate courts are not established for law, and for equity." *Erskine, Principles of the Law of Scotland*, b. i. tit. 3, p. 29.

(2) An injunction to restrain proceedings in the Court of Session was granted in *Wharton v. May*, 5 *Ves.* 27, see p. 71; and recently in *Bushby v. Cloves*, 5 *Madd.* 297; and see *Lord Portland's* case, and *Grey v. The Duke of Hamilton*, cited *Eden on Injunctions*, p. 142; but in *Lowe v. Barker*, 1 *Ca. in Cha.* 67; *Nels.* 103; 2 *Freem.* 125, an injunction to restrain proceedings in a foreign court, was, after great consideration, refused. A suitor here, proceeding for the same matter in a foreign court, will be compelled to elect between the two jurisdictions, *Pieters v. Thompson*, *Coop.* 294.

The following cases, illustrative of the doctrine discussed in *Kennedy v. Lord Cassillis*, are extracted from *Lord Nottingham's MSS.*

"21st *February*, 28 *Car.* 2, 1675-6, *Sir George Carteret v. [324] Sir William Petty*. The bill set forth, that the Defendant had bargained and sold to the Plaintiff, a moiety of certain lands in *Ireland*, and that he did there cut down the woods, and commit other waste, and so prayed an account, and a partition: the Defendant demurred, because the freehold and inheritance of lands in *Ireland* ought not to be settled here. I ordered him to answer as to the account, but allowed the demurrer as to the partition; for wheresoever the Defendant may, by personal coercion, be compelled to perform the act decreed, there after answer put in, the Court shall proceed to a decree though the Defendant be in *Ireland*, and rely upon the justice of the King to compel him to be sent for over, to yield obedience, as was done in *Alderman Preston's* case of *Dublin*, and advised to be done by the council table, in the *Earl of Thomond's* case; for, otherwise there must be a failure of justice; because, in *Ireland* they are not bound to execute the decrees of *England*, upon a bill there preferred to have such execution, as was lately resolved in *Ireland*, and very justly, in the case of one *Savage*, and since in the case of the *Earl of Thomond*. And so it was resolved long since at the common law, that if a man be outlawed in *England*, and flee into *Ireland*, no *capias ullagatum* can follow him thither; of which see some ancient records in my manuscripts of *Mr. Noy's Collection*, fol. . . . And if it be said the Plaintiff may go over into *Ireland* and exhibit a new original bill against the man there, it is equal to a failure of justice; for by that time the case is well advanced there, the man may flee again out of *Ireland* into *England* or *Scotland*, so that there can never be any certain justice, but in the absolute power of the King, which can bring all his subjects into the proper place where they ought to render reason. But all this is to be understood of such cases where the imprisonment of the person is the most proper means to effect that which is decreed to be done, viz. the payment of money, making a conveyance, or the like. But where no obedience of the person imprisoned, or any act of his, can sufficiently execute such a decree, there it is in vain to hold such a plea; and that is this case: For, to a partition in Chancery it is necessary to award a commission to some neighbouring justices to divide the lands; if they refuse, there lies an attachment against them for such refusal; if they execute the commis-[325]-sion and return it, then there ought to be a decree, that the lands be accordingly conveyed, and that, till a conveyance, they may be so enjoyed; the consequence thereof is a sequestration,

and an injunction for the possession, and a writ of assistance to the sheriff: none of all which can be awarded into *Ireland*, nor supplied by the obedience of the person imprisoned here. So far the demurrer is good. (*Cartwright v. Pettus*, 2 *Ca. in Cha.* 214.)

"*January 28th*, 30 *Car. 2*, 1678-9, *Gold v. Canham*. The Plaintiff had received some money by bill of exchange, which belonged to the Defendant, but detained it in his hands upon pretence of some accounts between them, and being sued at law, exhibited his bill in this court to stay that suit; and because *Canham* was supposed to be insolvent, *ergo*, for want of other security, the money in question was brought into court, to abide the event of the cause at hearing: and now the scope of the Plaintiff's bill appeared to be a prayer of relief, upon an agreement made at the determination of a co-partnership; for the Plaintiff, being at *Leghorn*, had entered into a co-partnership with *Lee* and *Canham* in thirds, and being desirous to break off, it was agreed that 27,000 pieces of eight should be paid to the Plaintiff, which was done; and further, that the Plaintiff should be indemnified from any trouble which might happen to him, by reason of that co-partnership; and, in 1664, an instrument was drawn, and sealed accordingly. After this, the Plaintiff entered into a new co-partnership with *James Gold* and *John Gold*, and was forced, by sentence of the Court at *Florence*, to pay custom to the Great Duke, for goods imported during the time of the former co-partnership, and is also sued there, at this time, by *Mico*, for a debt due from that co-partnership, where the cause is still depending. To which the Defendant said, that there were no customs due to the Duke of *Florence* after seven years, and that *Mico's* pretences were groundless, and that there had been a reference of all differences to arbitrators, before whom the matter of the customs was not stood upon. *Cur. 1*, Let the Plaintiff receive back so much of the money brought into Court as may be adequate to the [326] sum paid on the sentence for custom, the justice whereof is not examinable here. 2, Let the Defendant take the rest, subject to the covenants of saving the Plaintiff harmless against *Mico*, &c. (*Gold v. Canham*, 1 *Ca. in Cha.* 311.)

"*June 10*, 30 *Car. 2*, 1678. Mr. *Cottington* presented a petition to the Lords in Parliament, praying to be relieved against a sentence given by the delegates in a matrimonial cause, wherein they adjudged, as the Court of the Arches had done before, that one *Signora Angela Margarita Gallina*, a very lewd woman, was the petitioner's lawful wife, and lawfully married to him at *Turin*; whereas, in *Turin*, she hath another husband yet living, and, though she were divorced from that husband by the sentence of the Archbishop of *Turin*, before the pretended marriage to the petitioner, yet he doubted not, but to make it appear, that this sentence was void, and the divorce null, and that she did still remain the wife of her husband at *Turin*, though he were also married to another wife, before the pretended marriage of the petitioner."

I said, the merits of this case, if the petitioner could come at it, were to examine a sentence of the Archbishop of *Turin*, by the laws of *England*; for, as we know not the laws of *Savoy*, so, if we did, we have no power to judge by them; and, *ergo*, it is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences. In *Wytred's* case, 5 *Jac.* ("1 *Roll.* 530, *B.*" *Wier's* case, cited as *Wibred* and *Wyer's* case, 2 *Keb.* 511, 610), a judgment given in *Holland*, for debt, was executed here, by the Admiralty of *England*, upon the person who fled from execution there, and this was allowed upon a *Habeas Corpus*, in *B. R.*, so long as the judgment there remained in force; wherefore, if the petitioner can, either by the laws of *Savoy* or of *Rome*, repeal that sentence at *Turin*, let him do so; but, till [327] that be done, it is not possible for the Arches or the delegates to give any other sentence than what they have given.

But I hope the merits of the cause shall never be debated here, for the main question at this time is, whether your Lordships have any jurisdiction in this case, or can take any cognisance of this matter? And this point makes it no longer to be Mr. *Cottington's* case, but the King's, whose sovereign power in all ecclesiastical causes is deeply concerned, and his ecclesiastical supremacy invaded, if this petition

be received ; for the petitioner ought to have applied himself to his Majesty for a commission of review, if there be cause for it, and not to this House, it being against law, and without all precedent, so to do. Whereupon the House referred it to the Committee of Privileges, and the King commanded me to attend the committee. At this committee the Lords, who were zealous to assert the jurisdiction of the House, caused divers precedents to be read, viz. *Tempore E. 1, Riley*, 135, 136 ; *Rot. Pl. 8 E. 2, No. 43* ; *5 E. 2, No.* ; *Petico Abbatis Rufford*, 8 *E. 2, No.* ; *provicario Ecclesiæ. sancti Buttolph, extra Aldersgate*, 4 *E. 2, No. 42, p.* ; *John Bland. Prynne's plea for the Lords*, 418, who cites *Rot. Claus*, 8 *E. 2* ; for a Legacy, 9 *H. 5, Rot. Plm. No. 12*, a prohibition for tithes, 2 *H. 4, Rot. Pl. No. 29*, where the *Brachium Seculare* did assist the ecclesiastical ; and 22d December 1640, Sir Robert Howard's case, where the Lords adjudged the Archbishop of Canterbury to pay £500 to Sir Robert Howard ; and Sir Francis Moor's Reports, 462. *Halliwell and Jervis's case*, 2 *Leon*, 126, 127. *Frankwell's case*, 4 *Inst.* 341. *Hollingworth's case*, touching the appeal by way of review ; and 2 *Roll.* 233, *Pl. 3* ; 4 *Inst.* 340, touching appeals by bill signed. None of all which did any way come near the point in question.

As little to the purpose were these points of law which the counsel of Mr. Cottington insisted upon, only to shew learning ; as, 1st, That all judgments given in Parliament are, in law, given by the King and Lords ; for which they cited 1 *H. 4, Rot. Parl. No. 74* ; and the Lords' Journal, 10th December 1621 ; 2d, For the generality of the Lords' jurisdiction they cited *Selden de Synedrüs*, b. 3, p. 8 ; 3d, That, originally, the Ecclesiastical Court, and the Civil Court, sat together, but by the Conqueror they were di-[328]-vided, by the advice and consent of the Bishops and Lords, *Selden's Analecta*, 129, 130 ; *Seld. Eadmer*, 167, 168 ; *Leges, H. 1, cap. 79* ; 4th, For the ground of the appeals to the King they cited *Assise de Clarendon*, 10 *H. 1, c. 8* ; 5th, That the Statute of 25 *H. 8*, had not taken away the King's power, *Hob.* 146. *Colt and Glover's case* ; 6th, That the King had consulted with the Lords in matters spiritual, for which they cited *Bundell Bren. Turn.* 17 *E. 1* ; 7th, That the King had prohibited appeals to the Pope by advice of the Lords, viz. in *Rot. Claus.* 8 *H. 3, M. 34, Dorso* ; 1 *E. 3, M. 9, Dorso* ; 14 *E. 3, Pt. 1, M. 41, Dorso* ; none of all which considerations did any way touch the point in question. At last my Lord Privy Seal cited a precedent, 30th May 1628, *Vaughan's case*, where the Earl of Clare reported from the committee of petitioners, that *Vaughan* claimed by a will, against which a sentence had been given and affirmed by the delegates, and prayed relief. The Lords, upon debate, directed the petitioner to apply himself to the King for a commission of review, and *Coventry Custos* promised to promote it. This being a precedent so full in the point, and yet so contrary to the inclinations of the Lord who cited it, gave great satisfaction. Then I opened the reasons of law upon which this point depended, and said they ought to prevail, though there had been precedents against it, as there are none in 500 years, and the latter precedent is for it. The reasons were, 1st, Because the statute of 25 *H. 8*, makes the sentence upon appeals final and definitive, and, though these words do not exclude the King's prerogative to grant a commission of review, for the *dernier* resort to the prince is not to be barred by general words, yet those words have this effect, that a commission of review is now purely matter of grace, and no man can demand it *ex debito justiciæ* (see *Franklin's case*, 2 *P. W.* 299, and the certificate of the Lord Chancellor in *Eagleton v. Kingston*, 8 *Ves.* 438) ; for constant experience shows that is often denied. 2d, From hence it follows, that the Lords have nothing to do to review these sentences, for the Lords sit here only to dispense right, not to dispense matters of grace, which the King reserves to himself. 3d, And it is [329] no kind of answer to say, the King is here virtually present, for that does not entitle us to dispense acts of grace for him, and we may as well pretend to grant pardons, or assume any other part of the government by virtue of this very dangerous distinction, as the late times showed us. 4, The inconvenience were intolerable ; for then we might as well review every probate of a will, and then no man could tell how to administer, for appeals below ought to be brought in fifteen days, but there is no time limited for appeals to Parliament, so the acts of an administrator are never safe, but will always be subject to a repeal here, which will make them null and void. 5, It would be yet more inconvenient in causes matrimonial, which, as they are more spiritual, so they have a more temporal consequence, and may tend to the bastardising of children. With these

reasons the committee was satisfied, but, when it came to be reported to the House, the Earl of *Essex* gave greater satisfaction, and wisely put it, not upon any original defect of power in the Lords, which was an unpleasant subject to speak of, but upon the Lords' voluntary departure with that power; for so he pressed the words of the statute 25 *H. 8.* "Final and definitive," that now the Lords were excluded by their own consent, though they were not specially named; and compared it to the statute of 27 *Eliz. c. 8.*, of errors, where the Lords, passing an act to make errors in *B. R.* reversible in the Exchequer Chamber, added a clause to reserve to themselves a power of examining the judgments given in the Exchequer Chamber, without which the Lords had been excluded; and, in 31 *Eliz. c. 1.*, did further provide, that for errors in *B. R.*, the subject might have election to sue in Parliament, without going to the Exchequer Chamber; for, till then, the Lords had excluded themselves of that privilege. And now, lately, in 19 *Car. 2.*, the act for rebuilding of *London* erects a judicature to determine controversies speedily and finally; so does the following act, *Car. 2.*, for rebuilding of *Southwark*; and no appeal can be to the Lords from any of these decrees, because the Lords are understood to have excluded themselves without being specially named; and, otherwise, *London* and *Southwark* could not have been rebuilt. Upon these reasons, the House agreed with the committee; [330] and now it is settled, that no appeals from the delegates can come before the Lords; and, in consequence of this resolution, the Lords, within a few days after, rejected the petitions of *Bamfield* and *Rogers*, and of *Cole* and *Mordant*, wherein relief was prayed against the probate of a will affirmed by the delegates. (*Saul v. Wilson*, 2 *Vern.* 118.)

SMITH v. FROMONT. July 18, [1818].

[S. C. 1 Wils. Ch. 472.]

Two persons having agreed to work a coach from *Bristol* to *London*, one providing horses for a part of the road, and the other for the remainder, and in consequence of the horses of one having been taken in execution, the other having provided horses for that part which had been undertaken by the first, and claiming the whole profits of the journey; the court refused an injunction against continuing to provide horses.

The bill stated, that the Defendant being the owner of two coaches travelling from *London* to *Bristol*, in 1814, sold to the Plaintiff the working of the coaches on a part of the road, namely, from *London* to *Hare Hatch*, the Plaintiff providing the horses to be employed, and paying to the Defendant a certain sum per mile, for the use of his coaches, and the clear profits of the whole journey between *London* and *Bristol* being divided in proportions specified; that the working of the coaches under the agreement was continued till 1817, when, in consequence of a temporary inability of the Plaintiff to provide horses on a part of the road between *London* and *Hare Hatch*, it was agreed that the Defendant should provide horses on that part, and receive a proportionate additional share of profits, until the Plaintiff should again be able to provide horses of his own; that the coaches were so worked till the 7th and 8th of *June* 1818, when, though horses provided by the Plaintiff were ready at the usual times and places, some persons, by the order of the Defendant, put to the coaches horses belonging to him, and prevented the Plaintiff working the coaches with his own horses; and that the Defendant had since [331] refused to permit the Plaintiff's horses to be used on any part of the road, or to allow to the Plaintiff his share of the profits, and had sent a written notice to the Plaintiff, that he should be no farther concerned with him in the coach business.

The bill prayed an account of the profits of the coaches worked by the Defendant in contravention of his agreement, and an injunction to restrain the Defendant from so working the coaches.

The allegations in the bill being supported by affidavit, the Plaintiff on this day moved for an injunction.

The affidavit in opposition to the motion stated, that the inability of the Plaintiff to provide horses, was the consequence of his horses having been taken in execution, under an extent for £3123, and a writ of *fiery facias* for £4900; that by such execu-

tions, of which the Defendant had no previous notice, the coaches were suddenly stopped, and the Defendant was subjected to great inconvenience and expense in procuring other horses to forward them; that some of the horses seized were sold, and advertisements were published for the sale of the rest; and the Defendant having been informed and believing that the other horses of the Plaintiff were about to be sold, purchased fresh horses for working the coaches the whole way; and that he believed that all the Plaintiff's horses were then in the custody of the Sheriff.

Mr. Hart and Mr. Raithby, for the motion.

Mr. Wetherel and Mr. Mascal, against the motion.

[332] The Lord Chancellor [Eldon]. The only instance that I recollect of an application to this Court to restrain the driving of coaches, occurred in the case of a person who having sold the business of a coach-proprietor from *Reading to London*, and undertaking to drive no coach on that road, afterwards established one. With some doubt whether I was not degrading the dignity of this Court by interfering, I saw my way in that case; because one party had there covenanted absolutely against interfering with the business which he had sold to the other. (*Williams v. Williams*, 2 Swans. 253.) This is quite a different case: the Defendant having received £700 as the consideration for giving up a part of the road which lay in the way from *London to Bristol*, the profits being divisible in the ratio of the distance which each party undertook to provide; the Plaintiff fell into embarrassments, which produced the seizure of his horses, and an advertisement for the sale of them by the Sheriff. While the Plaintiff is in this situation, the Defendant is bound by his agreement to undertake with persons at *Bristol* to bring them to *London*, and when they arrive at *Hare Hatch*, he is stopped by the Plaintiff's want of horses, and would be liable to an action by every individual within and without his coach, if it were not forwarded. But it is difficult to understand how such a case can be the proper subject of the jurisdiction of this Court by injunction. If I enjoin the Defendant from bringing horses to convey the coaches between the limits in question, I must enjoin the Plaintiff from not bringing horses there. I cannot restrain the Defendant, unless I have the means of assuring him that he shall find the Plaintiff's horses ready. I should otherwise enjoin him from doing that which if he omits [333] to do he will be liable to actions by every person whom he has undertaken to convey from *Bristol to London*; and should issue the injunction on the supposition that the Plaintiff would do that which he has not done, and which it seems he is not at present in a condition to do. The omission of this Court to interfere certainly leaves the parties in a very unpleasant situation, and their interest will be best consulted by a compromise. A question may arise, whether the Plaintiff, shewing that his horses were always ready, will not be entitled to the same profits as if they had been used? But in a case of this sort I cannot grant an injunction.

Injunction refused.

WYNSTANLEY v. LEE. *Rolls. Oct. 23, [1818].*

[See *Perry v. Eames*, [1891] 1 Ch. 667. Custom of London over-ruled by Prescription Act, 1832 (2 & 3 Wm. 4, c. 71), see sec. 3.]

Injunction to restrain obstruction of ancient lights refused, the nature of the alleged injury not requiring preventive interposition before a trial at law, and the legal right being doubtful. The presumption of a right, from twenty years undisturbed enjoyment of light, is excluded by the custom of *London*.

The bill stated, that the Plaintiffs were possessed of a house near the Exchange, in the city of *London*, separated, on the west side, by a court or passage, formerly called *Bartholomew Court*, of the width of eight feet, from a plot of land, being the site of an ancient building in the possession of the Defendants; and that the Plaintiff's house, as to so much thereof as abuts upon the said court, and is separated thereby from the premises of the Defendants, was, about ten years ago, built upon part of the site of two ancient dwelling-houses, which were taken down for that purpose, and in which there had been, from the time of the erection thereof after the great fire of *London*, divers windows looking into the court, and receiving light therefrom, and over the roof of the ancient building on the premises of the Defendants, which

windows, and the light thereof, the [334] occupiers of the dwelling-houses were entitled to enjoy free from obstructions; that, upon the erection of the house on part of the scite of the two ancient dwelling-houses, several windows were made looking into the court, and receiving light therefrom, and over the roof of the building on the premises of the Defendants, in the same manner as the ancient dwelling-houses, and that any erection on the premises of the Defendants, which would obstruct the light of the windows in the Plaintiff's building, would equally have obstructed the light of the ancient-dwelling-houses on part of the scite whereof the said building hath been erected; and that on the plot of ground in the possession of the Defendants, and divided from the premises of the Plaintiffs by the court, there was an ancient building, used as a wash-house, being only of the height of nine feet from the level of the court, which the Defendants had lately taken down, for the purpose of erecting a much larger and higher building upon the scite thereof, whereby, in case the intention of erecting the same should be carried into effect, the light of the windows in the Plaintiff's house would be wrongfully obstructed, and the house would be greatly injured and deteriorated in value, and the light of the windows of the ancient dwelling-houses on part of the scite whereof the Plaintiff's house hath been erected, in case the same had been still standing, would have been, in like manner, obstructed.

The bill, farther stating, that the Defendants were proceeding to the erection of the new building, and had given directions to their workmen for the immediate erection thereof, designing to build the same of much greater height and dimensions than their former building, so as to obstruct the light of the windows of the Plaintiffs' house, prayed, that the Defendants might be restrained and enjoined, by the decree of the Court, from [335] erecting or constructing any building whatsoever upon the plot of land in their possession, whereby the light of the windows in the Plaintiff's house, as the same were enjoyed previous to the taking down the ancient building upon the same plot of land, might be in any wise obstructed or prejudiced.

On the filing of the bill the Plaintiffs presented a petition for an injunction. The affidavit in support of the petition stated, in addition to the substance of the bill, that one of the Defendants had admitted to the deponent, his intention of erecting a building on the scite of the premises lately taken down, of much greater height and dimensions, and showed to deponent plans of the intended building, by which it appeared, that it would be erected so much higher, and of such larger dimensions, as nearly to darken the lights of the Plaintiffs' house; and that the Defendants had already laid the foundation of the intended building. The substance of the affidavits in answer is stated in the judgment.

Mr. W. D. Evans was heard in support of the petition, and Mr. James Stephen against it, in the absence of the editor.

The *Master of the Rolls* [Sir Thomas Plumer]. The first question is, whether, supposing the Plaintiffs to have established their legal right to remove the building begun by the Defendant, they have entitled themselves to the preventive interposition of this Court? The injury of postponing a building which the party is entitled to erect, may not, in every instance, be equal to the injury of permitting him to proceed with one which is a nuisance. Cases arise in which a court of equity, seeing that the injury might be irreparable, as where loss of [336] health, loss of trade, destruction of the means of existence, might ensue from erecting a building, would exercise its jurisdiction of preventing injury, without waiting the slow process of establishing the legal right, when delay would be itself a wrong. On the other hand, it may be perfectly clear, that the Plaintiff is entitled to succeed in an action of trespass, and yet a court of equity will not interpose by injunction; the nature or degree of injury not being such as to require that extraordinary relief, as in *The Attorney-General v. Nicholl* (16 Ves. 338). Upon this distinction, there clearly explained, between the principles on which a court of equity interposes by injunction, and those which govern courts of law in deciding on the legal right, after the injurious act is done, the *Lord Chancellor*, in that case, following the doctrine of *Lord Hardwicke* (1 Dick. 164, 165), dissolved the injunction, imposing on the Defendant, in the event of the Plaintiff succeeding at law, a condition which, in that event, he certainly could not have resisted. On these principles this application must depend; the Plaintiff is bound to show, not only a legal right to the enjoyment of the ancient lights, but that, if the building of the Defendant is suffered to proceed, such an injury will ensue as warrants the Court to interpose, and at once take possession of the subject by injunction.

It must not be forgotten, that the temporary suffering from delay, which has been principally urged for the interposition of the Court to prevent the intended building till the right has been decided at law, is not wholly on one side. The affidavit of the Defendants states, that by the injunction, if granted, they will lose the opportunity of covering in their building before the winter, and be deprived of the profit to result from it, estimated [337] at £100 *per annum*. And this important difference presents itself, that any loss which shall ensue to the Plaintiffs, may be compensated in damages, provided they ultimately succeed at law; whereas, in a contrary event, the loss of the Defendants must remain without redress, being the consequence of the act of the Court.

If the Court is in general governed by the principles which I have stated, certainly the reason is stronger on an application in this stage of the proceedings, on certificate of bill filed before answer; a stage in which the Court never interposes, unless the injury is of a nature so pressing as not to admit delay. It is departing from all principle to adjudicate rights when the pleadings are not before the Court, and the Defendants have not had an opportunity to state their claim by their answer. The Plaintiffs acted properly in giving notice to the Defendants to enable them to meet the application by affidavit; without which the Court would have postponed the discussion, and would not have been satisfied with *ex parte* evidence.

On the affidavits, the general outline of the Plaintiff's case is not disputed; that is, the vicinity of the houses, with an interval not exceeding nine or ten feet, the antiquity of the scite of the present house, subsisting in the place of an ancient building, and enjoying the same privilege of light. But the Defendants deny that the building which they have removed was, as it is described, a mere washhouse; they allege, that they are proceeding to build on the scite of ancient dwelling-houses, and controvert the evil which will result from the building if it proceeds, denying, in contradiction to the affidavits which support the petition, that the Plaintiffs' house will be materially injured. The averment that the Plaintiffs' windows will be wrongfully obstructed, is true, if any [338] portion of the light is wrongfully intercepted; but the Plaintiffs state, that their house will be greatly injured and depreciated. That was the allegation in the *Attorney-General v. Nichol*, which described a wrongful obstruction already done (in that respect stronger than this case), such "as materially to affect the value of the premises" (16 *Ves.* 339); here it is only said, that the premises will be greatly injured and deteriorated; there they were already injured, and that injury was to be aggravated. The effect on the value of the premises in that case, was held by the *Lord Chancellor* not a sufficient ground for interposing; here the fact is denied even to the extent alleged. The Defendants represent, that any diminution of light will not be attributable altogether to their building, the Plaintiffs having already surrounded their house with buildings erected on an open part of the court, and thereby obstructed the access of light, by which an additional structure is rendered injurious, as it would not have been without such previous buildings. In this way only can the effect of these buildings be fairly stated; that the Plaintiffs have thereby in part produced the injury of which they complain, and rendered a small addition possibly inconvenient.

The Plaintiffs have not stated precisely the injury to be experienced from the building of the Defendants. Some windows, I must suppose, will be obscured, but will the effect be prejudicial to the comfort of those residing in the house? It is said, that the building will be injurious to the house, but not that in the interval before the trial the comfort of those dwelling there will be affected. Then taking it for the moment to be true, though denied, that some injury will result, and not inquiring how far it arises from the Plaintiffs' own act, [339] but considering only the *quantum* of injury, the question is, whether a case is made for the interposition of the Court, to stay proceedings before answer, by this *festinum remedium*? I think the Plaintiffs have not so stated the injury to arise from the building, as to entitle themselves to an injunction.

But a material objection has been raised on the question of legal right. The houses are in the city of *London*, and on a former occasion, a custom of the city was certified by the recorder, "that if any one hath a messuage or house in the said city, near or contiguous and adjoining to another ancient messuage or house, or to the ancient foundation of another ancient messuage or house in the said city, of another person his neighbour there; and the windows or lights of such messuage

or house are looking fronting or situate towards, upon or over against, the said other ancient messuage or house, or ancient foundation of such other ancient messuage or house, of such other person his neighbour, so being near, adjacent, contiguous, or adjoining, although such messuage or house, and the lights and windows thereof, be, or were, ancient; yet such other messuage or house, or ancient foundations, so being near, adjacent, or adjoining, by and according to the custom of the said city, in the same city, for all the time aforesaid used and approved, well and lawfully may, might, and hath used, at his will and pleasure, his said other messuage or house so being near, adjacent, or adjoining, by building to exalt or erect, or, of new, upon the ancient foundation of each other messuage or house so being near, adjacent, or adjoining, to build and erect a new messuage or house, to such height as the said owner shall please, against and opposite to the said lights and windows, near or contiguous to such other messuage or house, and, by means thereof, to obscure and darken such [340] windows or lights, unless there be, or hath been, some writing, instrument, or record of an agreement, or restriction to the contrary thereof, in that behalf." (1) Supposing this custom to be applicable to the premises in question, there not only is no case made for equitable relief, but the Plaintiffs could not ultimately succeed in a court of law on the legal right.

It is then contended by the Plaintiffs, that, notwithstanding this custom, which, having been certified in 1757, must be considered as still subsisting, there is ground to presume a grant of a right to the enjoyment of the ancient lights on the Plaintiffs' premises. (2) It is rightly said, that the presumption of a grant would supersede the custom; *quilibet potest renunciare juri pro se introducto*; and it is argued, that possession during twenty years is equivalent to, and affords presumption of, a grant. I cannot accede to that argument. To admit it would be to abolish the custom, which could no longer be applicable to any case. The city would then be subject to the same rule as every other part of the kingdom. Before the expiration of twenty years, neither in the city, nor elsewhere, could any right arise to prevent such obstruction of light; and if, after twenty years, the citizens of *London* were as much restrained as the inhabitants of every other part of the kingdom, what becomes of the custom?

The technical answer to the argument is, that the Courts presume a grant in ordinary cases, because they presume, that the party would not have abstained, from [341] exercising his right of interference, knowing, that twenty years abstinence would extinguish it, unless he intended to permit the enjoyment; and, after the other party has been encouraged to rely on acquiescence, there is, on both sides, a strong ground to make possession the basis of right. Enjoyment during twenty years confers a property in light, under the technical form of presumption of a grant; but would that be a fair presumption in the city of *London*? No man occupying a house there, can suppose that he has an absolute property in his present share of enjoyment of the light, whatever that may be, but knows, that, by the law of the city, the owner of the adjoining house, or scite of houses, may build to any height, and to the obstruction of his light, and knows, therefore, that he can never be entitled to enjoy his light free from obstruction by the owner of the adjoining house, unless there is some writing between them. His title must be founded, not on parol, or enjoyment, but on writing; that is the law under which the owners of houses claim; they bought subject to that custom: each party, therefore, knows, that, without a writing, by the custom, his neighbour may build to the obstruction of his light; and, on the other hand, that he is safe in acquiescence, because, unless he has given a writing, his privilege remains. There is no ground therefore for presumption, from the acquiescence of one party, or the enjoyment of the other, without a written title. It would be too much to hold, that this custom may be altogether repealed, merely by the length of time during which one party has enjoyed, and the other acquiesced, supposing them citizens of *London*, residing there, and subject to its privileges and customs.

On both grounds, therefore, I think, that no case is made for the interposition of the Court. Supposing the right clear, no circumstances are stated requiring this [342] extraordinary interposition; but the right is not sufficiently clear, to enable the Court to interpose with safety. The Plaintiffs may try the right at law;



the Defendants now have notice of the objection to the building, and proceed at their peril.(3)

Injunction refused.

(1) *Plummer v. Bentham*, 1 Burr. 250, 251; see on this custom *Calthrop*, 1. *Hughes v. Keene*, Godb. 183; *Yelv.* 215; 1 *Bulstr.* 115. *Anon. Com.* 273.

(2) See *Lewis v. Price*, 2 Saund. ed. Williams, 175 a. *Dougal v. Wilson*, *Ibid.* *Daniel v. North*, 11 East, 372.

(3) See *Cherrington v. Abney*, 2 Vern. 646. *Bateman v. Johnson*, Fitzg. 106. *Fishmonger's Company v. East India Company*, 1 Dick. 163. *Attorney-General v. Bentham*, 1 Dick. 277. *Ryder v. Bentham*, 1 Ves. 543. *Norris v. Lord Berkeley*, 2 Ves. 452. *Attorney-General v. Doughty*, 2 Ves. Sen. 453. *Attorney-General v. Nichol*, 3 Mer. 687; 16 Ves. 338.

BIRD v. HUNSDON. *Rolls. Dec. 1*, [1818].

[S. C. 1 Wils. Ch. 456. See *Rishton v. Cobb*, 1839, 5 My. & Cr. 153; *Morley v. Rennollison*, 1843, 2 Hare, 581. For circumstances under which intention to grant a life estate by implication may be inferred, see *Humphreys v. Humphreys*, 1867, L. R. 4 Eq. 478; *Ralph v. Carrick*, 1877-79, 5 Ch. D. 995; 11 Ch. D. 873. Cf. also *In re Chamberlain*, [1894] 3 Ch. 603.]

A testator, having brothers and sisters, and several nephews and nieces, and having given a legacy to one of his brothers, directed his residuary estate to be invested in government security, the interest to be paid for the maintenance of *M.* as long as she lived single and without a child; and at her death the money to come to his brother's and sister's children; *M.*, although married and having a child, is entitled to the interest for life, not to the principal.

The will of *John Hunsdon*, dated the 10th of September 1800, after appointing his brother, *Peter Hunsdon*, and *Samuel Seabrook*, executors, and bequeathing to the former £50, and to the latter £30, and directing the payment of his debts, and the application of a sum for the maintenance of his father, and giving £30 to *J. Briggs*, and £10 to *J. Bird*, contained the following clause: "I also leave *Mary Brand*; wife of *Robert Brand* of *Hornchurch*, the sum of £10, and daughter of my brother, *Edward Hunsdon* and *Mary Brand*, equal share with all the rest. I also desire to leave *Mary Morris*, daughter of widow *Mary Morris* of *Bentry Heath*, the sum of £10, late wife of *John Morris*, and *Samuel Seabrook* to be her guardian, and put it out. And when my funeral, and all my just debts and legacies are paid, that the rest of money to be put into govern-[343]-ment security, and the interest to be paid duly to bring up and educate *Mary Morris*, daughter of widow *Mary Morris*, and *Samuel Seabrook*, her uncle, to be her guardian; and the said *Mary Morris* to have the said interest to maintain her as long as she lives single, and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children. All share alike, and their uncle *Peter* to be their guardian."

In February 1801, the testator died, leaving several brothers and sisters, and also several nephews and nieces, their children, of whom *Mary Brand*, the legatee, was one. *Mary Morris*, the daughter (having previously attained the age of twenty-one), on the 6th of October 1816, married *John Bird*.

The original bill filed by *Bird* and his wife against the surviving executor, the next of kin, and nephews and nieces of the testator, prayed a declaration, that under the will of the testator, in the events which had happened, the Plaintiffs were entitled to the clear residue of the personal estate of the testator. The answer submitted, that the interest of the money in question was given to *Mary Morris*, so long only as she should live single; and that all her right and interest ceased on marriage.

In consequence of the birth of a son, the Plaintiffs filed a supplemental bill, alleging, that by that event their right to the clear residue was established. The Defendants contended, that the event was immaterial, and claimed the same benefit as if they had demurred to the supplemental bill.

[344] Mr. *Horne*, and Mr. *Shadwell* for the Plaintiffs. *Mary Morris* is clearly entitled to the interest of the fund during her life; the bequest to the testator's nephews and nieces cannot in any event take effect till her death. The most

probable intention to be collected from this obscure will is, that she, the principal object of the testator's bounty, should receive the interest while she remained single, and become entitled to the principal on marriage and the birth of a child.

Mr. Hart and Mr. Treslove for the Defendants. The bequest in favour of *Mary Morris* is confined to the interest of the fund, and to the period during which she lives single and without a child. The intention of the testator might be reasonably limited to that period; when she ceased to be single, being maintained by her husband, she would no longer need his bounty, and if she became a mother without marriage, she would no longer deserve it.

The *Master of the Rolls* [Sir Thomas Plumer]. The first question on the construction of this will is, what is given to *Mary Morris*? The second, for what period?

On the first question, I am clearly of opinion, that nothing is given, or designed to be given, to *Mary Morris*, but interest. The testator having brothers and sisters in existence, made his will, evidently not intending any gift to the next of kin, as such, but intending a gift to his brother's and sister's children, who are not his next of kin. After disposing of several pecuniary legacies, he directed his executors to invest the residue of his personal property in government security, not stating in whose name the investment was to be made, [345] not specifying the name of the legatee; and, therefore, as it must be taken, intending the name of the executors. He then considers what is to become of the interest and dividends. To *Mary Morris* he means to appropriate the interest, and the interest only, of the residue so laid out. He directs the interest to be paid to her; and when it shall please God to call her, the money to come to his brothers' and sisters' children. The interest is given to her; and on her death, the money, that is, the capital, is to be divided among persons described; one of whom, he had previously declared, should have an equal share with all the rest; a declaration evidently supposing a period at which a division was to take place among them. The gift to *Mary Morris* contains no words entitling her to more than interest. On the first question, therefore, the Court observes in the will, the absence of words giving the capital to *Mary Morris*, and a positive declaration implying a gift of the capital to the nephews and nieces of the testator.

On the second question, for what period the interest was given to *Mary Morris*, it appears that the testator contemplated three periods: 1st, her minority; 2d, her remaining single, without a child; 3d, the interval between her marriage and death; and, I think, that without violence to the words, the Court may infer, that he meant to give the interest to her for her life. First, he gives it for maintenance, that is, during minority; and, again, for maintenance after minority, while she lives single, and has no child. To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favoured object, and the capital not given over till the death of that person, the Court is driven to the necessity of saying, either that there is intestacy during the remainder of her life, or that she is to take during [346] her whole life. The latter seems the more reasonable alternative. I cannot suppose that the testator meant to leave a partial interest in the property undisposed of; and that, on the marriage of *Mary Morris*, the dividends, during her life, should devolve on those for whom the will expresses no intention to bequeath more than a legacy of £50 to one.

The ulterior bequest cannot assist the Plaintiffs; for that is not to the next of kin, but to nephews and nieces; and they are unquestionably to wait till the death of *Mary Morris*. The only division which the testator contemplated, was one in which *Mary Brand* was to share as niece, and not one of the next of kin. The capital is expressly given to brothers' and sisters' children. The supposition, therefore, that the testator meant to die intestate, for the benefit of his brothers and sisters, is unwarranted.

I am of opinion, therefore, that, though there are no express words contemplating this third period, after marriage, and before death; yet, when the testator, foreseeing that interest must be payable to some one, because the money was invested in government security, producing interest, bequeaths that fund on the death of *Mary Morris*, it is not a violence to say, that he gives the interest to her during her life.

" His Honor doth declare, that, according to the true construction of the testator's will, the Plaintiffs are, in right of the Plaintiff *Mary*, entitled, during the life of the said Plaintiff *Mary*, to the interest of the clear residue of the testator's personal estate," &c.

Reg. Lib. A. 1818, fol. 734.

[347] CASAMAJOR v. STRODE. Dec. 18, 1818; May 19, 26, 1819.

[S. O. 19 Ves. 390, n.; 1 Wils. Ch. 428; Jacob. 630. See *Spencer v. Harrison*, 1879, 5 C. P. D. 103; *In re Searle*, [1900] 2 Ch. 833.]

Estates being sold by auction in lots under conditions, one of which expressed that they were subject to the perpetual payment of £120 a-year to the curate of *N.*, but that the same, and the perpetual annual payment of £20 to the hospital of *C.*, were in future to be charged upon, and paid by, the purchaser of lot 1 only; the purchasers of the other lots are entitled, not to an absolute exoneration, but to an indemnity from the purchaser of lot 1. Nature of the indemnity which they may require.

In pursuance of a decree in this cause, certain estates were sold by auction, on the 24th and 25th of *October* 1811, in forty-seven lots. The eighth condition of sale was expressed in these words: "The estates comprised in the foregoing particular, are subject to the perpetual payment of £120 a-year, to the curate or chaplain of *Northaw*; but the same, and the perpetual annual payment of £20 to the hospital of *Cheyne*, in *Buckinghamshire*, are in future to be charged upon, and paid by, the purchaser of lot 1 only." Lot 1 was purchased by *Patrick Thomson*; and five other lots, by *J. H. P. Schneider*. On the 11th of *November* 1815, a reference was directed to the Master, to inquire whether a good title could be made to the lots purchased by *Schneider*; and on the 26th of *July* 1816, by an order to which *Schneider* was no party, a further reference was directed to the Master, to approve a deed of indemnity from *Thomson* to the purchasers of the other lots, against the annual payments of £120 and £20. On the 7th of *May* 1817, the Master (having on the 3d of *March* certified his approbation of a deed of indemnity) reported, that a good title could be made to the lots purchased by *Schneider*. To this report *Schneider* excepted, insisting that the Master ought to have certified that a good title could not be made.

The deed of indemnity approved by the master (an indenture between *Thomson* of the first part; *Casamajor* and *Fowler*, trustees for sale of the estates, of the second part; all the purchasers at the sale, except *Thomson*, of the third part; and *P. A. Hanrott* and *J. Jones* of the fourth part), after reciting the title of the vendors, the particulars of the annual payments, amounting to £20 and £120, the decree and sale, the conveyance of lot 1 to *Thomson*, and the subsequent proceedings, witnessed, that *Thomson*, at the request of the trustees for sale, charged all the premises comprised in lot 1, with the payment of the annual sums, amounting to £20 and £120, in exoneration of all other tenements, &c., liable to the payment; and for better effectuating such charge, *Thomson* conveyed to *Hanrott* and *Jones*, their heirs and assigns, for ever, a clear annuity, or yearly rent-charge of £140, issuing out of the premises comprised in lot 1, payable quarterly; the first payment to be made on the 25th of *March* then next, with a power of distress, on non-payment for twenty days after any quarterly day of payment, and a power of entry and perception of rents, on non-payment during thirty days. The deed contained a declaration, that the rent-charge of £140 was granted upon trust, in case the several parties named in the schedule (the purchasers at the sale), or any of them, their, or any of their heirs or assigns, or any persons claiming under or in trust for them, or any other persons for the time being entitled to, or in possession of, the premises comprised in the several lots mentioned in the schedule, or any part thereof, should, at any time thereafter, be compelled to pay and satisfy the several annuities therein-before charged exclusively on the premises out of which the annuity of £140 was thereby granted, or any of them, or any part thereof respectively, or any arrears thereof, or should incur or sustain any costs, charges, damages, or expenses, on account thereof, then, from time to time, as the same should happen, upon trust, that *Hanrott* and *Jones* or the survivor, his heirs or assigns, should, from time to

time, when lawfully required, by and out of the yearly rent-charge thereby granted, by raising and levying the same, or any part thereof, under the powers therein contained, or by such other means as to them [349] should seem meet (but not until such notice as thereafter mentioned should have been given), raise and levy all and every such sum and sums of money, losses, costs, damages, and expenses whatsoever, as the several parties named in the schedule, or any of them, or any or either of their heirs or assigns, or any persons claiming under or in trust for them, or any other persons for the time being entitled to, or in possession as aforesaid, should have been compelled to pay, or have sustained or incurred as aforesaid; and all costs and expenses which *Hanrott and Jones*, or the survivor of them, or the heirs or assigns of such survivor, should have incurred, in or about levying and satisfying such monies as aforesaid, or otherwise in or about the execution of the trusts of the deed, and pay and dispose of the monies so levied accordingly, so as well and effectually in all things to indemnify the parties of the third part, their heirs, executors, &c., and all persons claiming under them respectively, or otherwise as aforesaid, their respective lands and tenements, goods and chattels, against the said yearly payments of £20, &c., respectively, and all arrears and future payments thereof, and all contributions, claims, and demands whatsoever on account thereof.

A further declaration followed, that no sums of money should be raised under the trusts, unless *Hanrott and Jones*, or the survivor of them, his heirs or assigns, should have previously given to *Thomson*, his heirs, appointees, or assigns, one calendar month's notice, or more, of his or their intention to raise the same, and of the amount to be raised; such notice to be in writing, signed by *Hanrott and Jones*, or the survivor of them, his heirs or assigns, and delivered to *Thomson*, his heirs, &c., or left at his or their usual or last place or places of abode; and that *Hanrott and Jones*, and the survivor, &c., should permit the persons for the time being [350] beneficially entitled to the premises thereby charged, with the rent-charge, to retain the rent-charge until the trusts before declared should arise or require to be performed, and also to retain and receive the surplus of the rent-charge, which should remain, and not be applied in or towards the execution of the trusts before declared. The deed also included a separate covenant by *Thomson* with each of the parties named in the schedule, their heirs, executors, &c., and with every such other person for the time being entitled, or in possession as aforesaid, that *Thomson*, his heirs, appointees, or assigns, should, from time to time, pay and satisfy the several annuities of £20, &c., when they should become due, and effectually indemnify the several parties named in the schedule, their heirs, executors, &c., and all persons claiming under, or in trust for them, and all persons for the time being entitled, or in possession, as before-mentioned, and their respective estates and chattels, and especially the lands purchased by them at the said sale, against all the annuities, and all arrears and future payments thereof, and against all actions, suits, claims, loss, charges, and expenses, &c., by reason of non-payment of the annuities, or any part thereof, by *Thomson*, his heirs, appointees, or assigns, or any distress or other proceedings, claim, or demand, on account of the same.

Other clauses authorised the trustees to retain their expenses out of the trust-money, and empowered a surviving trustee to appoint new trustees.

Mr. *Wetherell*, and Mr. *Shadwell*, for the exception. (*Note*: The argument and judgment on the first application, *ex relatione*.) The stipulation, that the annuities "are in future to [351] be charged upon, and paid by, the purchaser of lot 1 only," entitles the purchasers of the other lots to an absolute exemption from the charge. They claim, not indemnity, but exoneration. For this purpose, the vendors are bound, if no other means of exoneration exist, to obtain a private act of parliament. An act might be obtained for extinguishing the annuities, in consideration of an equivalent, by analogy to acts authorising exchanges by ecclesiastical persons, before Lord *Egremont's* act (55 *Geo.* 3, c. 147) dispensed with the occasional interposition of the legislature. The liability to a rent-charge is an objection to the title.

Admitting that the purchasers are not entitled to exoneration, the indemnity provided by this deed is inadequate. An annuity of amount only equal to the original annuities, and payable to trustees, affords no provision for the expenses to which the purchasers may be subjected, by the neglect of the trustees, to pay the sums as they become due: nor are the means for securing payment of the annuity adequate; a power of entry, and distress, and perception of rents; a term should have been created. The annuity being limited to the heirs of the trustees may vest in an

infant. A covenant is not a sufficient security. The indemnity to the purchasers is limited to the case of payment by compulsion; and the covenant for raising the costs is personal only, and will not run with the land. *Brewster v. Kitchell*. (1)

Mr. *Benyon*, Mr. *Bell*, and Mr. *Hodgson*, for the report. The conditions of sale require the vendors only to [352] charge the annuities on lot 1, not to exonerate the remainder of the estates. The particulars give express notice to the purchasers, that the annual sums are to remain as subsisting charges. As rent charges, if the persons entitled to them released a part of the lands, the whole would be extinguished; and they are payable to ecclesiastical persons, who are not capable of executing a valid release, and for extinguishing whose claims no act of parliament could, consistently with the orders of both Houses, be passed. There is no person competent to consent to such an act.

The purchasers of the other lots, therefore, can claim only an indemnity from the purchaser of lot 1; such an indemnity as he can give without rendering his interest not marketable. His covenant operates as a grant, and charges the land, in equity at least; and the benefit of it, regarding something issuing out of the lands sold to the other purchasers, runs with their estate. *Spencer's case* (5 Co. 16). The amount of the indemnifying rent-charge is sufficient; lot 1, the largest lot, being subject to contribute its proportion of the original rent-charges, the indemnity must always exceed the amount of the damage. It is the duty of the parties indemnified to keep the indemnity in constant operation; they have no title to be protected against the consequences of their own neglect. The creation of a term of years, an unusual provision in deeds of indemnity, would have rendered lot 1 unmarketable. If the rent-charge should become vested in the infant heir of a trustee (an inconvenience against which provision is made by the power for appointing new trustees), his guardian might distrain.

The case of *Hays v. Bailey* (*Sugden, Law of Vendors*, 356, mentioned by the *Master of the Rolls*), is distinguishable from [353] the present; the nature of the title there exposed the purchaser to litigation.

The *Master of the Rolls* [Sir Thomas Plumer]. My present opinion is, that the purchasers having bought with knowledge that all the estates were charged with inalienable annuities, are not entitled to require an exoneration by act of parliament. The fair import of the eighth condition of sale is, an indemnity *inter se*, not as against the owners of the rent-charge, who were no parties to the transaction. The proper exoneration is exoneration *inter se*, which was all that could be considered attainable. There is no agreement that a new estate shall be substituted to the curate and hospital, instead of the present annuities. The purchasers are informed, that there is a charge over the whole estate in favour of persons incapable of alienating it, and the express stipulation is, that the purchaser of lot 1, shall pay the whole. The nature of the arrangement is, that the charges are to remain as affecting the whole estate; but that the purchasers of all the other lots are to be indemnified by the purchaser of the first lot. This principle being settled, the rest is mere mechanism. The annuity, and all costs and expenses, not only of the trustees, but of any purchaser, in consequence of the neglect of *Thomson*, must be charged on lot 1. The indemnity must certainly include all costs. But the Court is not at present in a situation to pronounce an order; the question cannot be decided in the absence of *Thomson*. He must be brought before the Court.

March 19, 1819. A petition having been accordingly presented by *Schneider*, praying that *Thomson* might be ordered to perform the eighth condition of sale, by causing the [354] annual payments to be in future charged upon and paid by, the owners of lot 1 only, the cause was again mentioned.

Mr. *Wetherell* and Mr. *Shadwell*, for the exceptions. The vendors ought to have obtained an act of parliament for exonerating the estates. The indemnity is insufficient; providing for payment of the annuities only, and not of costs; not securing a succession of competent trustees, and not creating a term of years.

Mr. *Benyon*, Mr. *Bell*, and Mr. *Hodgson*, for the report, relied on the opinion of the Court on the former argument; and insisted that the creation of a term, a chattel-interest, to secure a rent-charge in fee, would be contrary to principle.

Mr. *Preston* for *Thomson*. The deed is prepared on the modern plan of creating an indemnifying rent-charge; the ancient course to create a power of distress, has been relinquished in deference to the objection, that a power of distress supposes a rent. The amount, equal to the annuities, becomes an effectual indemnity

against costs, by the due payment of a part of the annuities ; should a subsequent non-payment occur, the trustees would be authorised to levy the whole arrear of the indemnifying rent-charge ; and the surplus, after payment of the annuities, would be applicable in discharge of costs. The creation of a term which would render the estate of the purchaser of lot 1 unsaleable, cannot be required.

*March 2. The Master of the Rolls* [Sir Thomas Plumer]. Having already expressed an opinion, which I still [355] retain, that it was not the design of the eighth condition of sale to impose an obligation on the vendors to the extent contended for, it may be satisfactory to re-state the grounds of that opinion. The single question is, on the construction of that condition ; whether it was intended to impose an obligation of exonerating the estates not comprised in lot 1, from the annual payments previously chargeable on them, or in a more limited sense, to protect the purchasers of those estates by an indemnity from the purchaser of the first lot. The words are not so explicit as to exclude doubt ; but, if capable of two constructions, the larger construction of complete exoneration against the persons entitled to the annuities, or the more limited construction of exoneration to one class of purchasers by arrangement *inter se*, in determining which is the right construction, the Court must consider the subject-matter, and the parties. Does the stipulation refer to a discharge which could be made by the persons stipulating, or to a discharge in which the payees of the annuities must join ? On the latter supposition, the vendors, trustees for the purpose of selling, voluntarily imposed on themselves an obligation which would have the effect of frustrating the whole sale. The persons entitled to the annuities were not competent to consent to a perpetual exoneration of the estates, on any terms, however beneficial ; and the attempt to procure an act of Parliament, with no party able to consent, no fund to provide an equivalent, or to defray the expenses of the act, would have been exposed to insuperable impediments. In the choice of a construction, I cannot assume that the vendors gratuitously involved themselves in these difficulties. The terms of the condition suppose the continuance of a charge which, as far as concerns the parties entitled to it, affects the whole estate, but against which the purchaser of one part is to exonerate the purchasers of the [356] rest. Such an exoneration is certainly not complete. Some liability still remains ; but the stipulation is expressly confined to an exoneration which might be effected by conveyances among the parties. Such seems the reasonable construction, and conformable to the practice in similar cases. Where an estate is sold subject to a liability, as for the repairs of a chancel, the liability is frequently transferred to one lot ; but no one ever heard of an act of Parliament for that purpose. That such an agreement amounts to an undertaking to procure an act of Parliament, is a proposition that requires strong authority, in opposition to frequent practice and the constant understanding of conveyancers.

Of the two constructions of which the words are susceptible, that which I have stated seems the most reasonable and must be considered as sanctioned by practice ; and is such as will finally, in substance, and for all useful purposes, though not, perhaps, literally for all purposes, constitute an indemnity, and provide an ample fund for immediate repayment of whatever the parties may be called on to pay. The purchasers of all the last but the first are substantially exonerated, and the words of the contract are satisfied.

The remaining question, which the prayer of this petition particularly presents to the consideration of the Court, is, admitting that indemnity alone was intended, does the proposed deed accomplish that purpose ? The purchasers have a right to be protected to the full extent to which protection can be given, by an arrangement imposing liability on one lot alone. *Schneider's* situation is extraordinary ; he was no party to the reference in 1816 for settling the deed of indemnity, and has hitherto had no opportunity of suggesting any objection to its provisions. Considering that the deed was designed to secure [357] his estate from an annual payment of £140, to which it remains liable, it is certainly reasonable that he should have an opportunity of being heard upon it, before the Master. It has, however, been settled in his absence ; and the present question is, whether it is free from objection. It is not the duty of the Court to settle the deed, and, for that purpose, to travel through every clause ; but, if some inaccuracies appear, and means of rendering it more effectual occur, the petitioner is entitled to be heard before the Master.

Some of the objections which have been alleged are not of much weight ; as, that a term of years should be created instead of a rent-charge in fee : the contrary would have afforded a stronger objection, namely, an indemnity limited to a number of years. It is clear that a right of entry and distress, to reimburse to the purchasers the annuity paid, and the costs incurred by them, might be granted, without the creation of any estate in the lands on which the distress was to be exercised ; as in the case, somewhat resembling the present, stated from *Moore*, in 6 *Viner*, 393, pl. 11 (*Allen v. Givers*, *Moor.* 179, 185 ; and see *Bro. Abr. Distresse*, pl. 1. *Vawser v. Jeffery*, 2 *Swans*. 274) : but here is a perpetual rent-charge in fee, with power of entry, and distress, and perception of rent, till the arrears are paid. A stronger objection, and not entirely removed, is, that a rent-charge, merely co-extensive in amount with the original annuities, is not sufficient. Under the terms of this deed, the purchasers of the rest of the estates are not to call on the owner of lot 1, until they have been compelled to make payment ; but all resistance to the demands of the owners of the original rent-charges, every distress and litigation, must be attended with expense ; on the death of the two persons appointed trustees, an expense may be incurred [358] in ascertaining their heir. It is difficult to maintain that by providing to the extent of the rent-charges, sufficient provision is made for costs and expenses. All charges are to be paid from £140 a-year : that can hardly be considered an adequate security. What objection is there to give a right of distress for that sum, and so much more as may be necessary to provide for all expenses ? That seems requisite to complete indemnity.

It is suggested that some part of the original rent-charges has been already paid, and that the indemnifying rent-charge is therefore an accumulating fund : that is for the consideration of the Master, in determining whether an addition should be made, either in the phrase, or in the amount, for securing a complete indemnity against every liability to which neglect or resistance may give occasion in any future time. The number of the trustees is also a subject of doubt. Before any steps are taken for the indemnity of the purchasers, notice is to be given by the trustees, or their heirs, to the owner of lot 1 ; if they are absent from the kingdom, or if any difficulty arises in determining who is heir, or if the heir is an infant, what remedy have the purchasers ? A better provision should be made for the nomination of trustees, with the concurrence of the persons interested in the trust.

Some of these inconveniences may be removed by increasing the number of trustees, and authorising the purchaser called on for payment, to give notice, instead of the trustees ; and rendering it imperative on the trustees immediately to levy the amount stated in the notice. It will deserve consideration, also, whether the deed of indemnity should not be in some way notified to all future purchasers of lot 1, as by an indorsement on the purchase deed ; and whether the purchasers of the rest of the estates should not have copies of it, in order to know to whom they must resort for indemnity.

I do not say what weight is in these observations ; still less that these are the only observations to be made. The deed seems extremely well framed, but may admit some improvement to render it a better security for the petitioner, who was not present when it was discussed before the Master.

I think, therefore, that the eighth condition of sale ought to receive the limited construction which I have stated ; but in carrying it into execution, the Court is bound to secure to the purchasers every possible indemnity. The deed should be again submitted to the Master, that the petitioner may have an opportunity of specifying what alteration he proposes.

His Honor [Sir Thomas Plumer, M. R.] doth order, that the exception taken by the said *J. H. P. Schneider* to the Master's report, dated the 7th day of May 1817, so far as relates to the title of the premises purchased by him, be overruled. And it is ordered, that it be referred back to the said Master, Sir *John Simeon*, Bart., to review his report dated the 3rd of March 1817, as to approving of the deed of indemnity in the petition mentioned. And it is ordered, that the said Master do revise, and if he shall judge necessary, alter, the said deeds in such manner as the said Master may think proper. And it is ordered, that the said *P. Thomson* do perform the eighth condition of sale in the petition mentioned, for causing the annual payments in the petition mentioned, to be charged upon, and paid by, the owners of lot 1 only, by executing such deed of indemnity, when so revised or altered, or as finally settled

[360] by the said Master, as he shall direct. And any of the parties are to be at liberty to apply to this Court as there shall be occasion."

Reg. Lib. A. 1818, fol. 1896.

(1) 1 *Salk.* 198; 5 *Mod.* 368; *Comb.* 466; *Ca. Temp. Holt*, 175; 1 *Lord Ragn.* 322; 12 *Mod.* 170. The majority of the judges in this case seem to have held that the land would be charged.

*Ex parte JENNINGS in re DAWSON.* April 7, June 25, 27, [1818].

Equitable mortgages of a bankrupt's estate are not comprehended within the general order of the 8th of *March* 1794. On the petition of an equitable mortgagee, the Court may, in the first instance, decide the validity of his claim, and that decision is conclusive on the commissioners.

The petition stated, that after the order pronounced by the *Vice-Chancellor* on the former petition (1 *Madd.* 331) a *qui tam* action was brought by one of the assignees against the petitioner, to recover penalties for the usury alleged to have been committed in the transactions in which the petitioner's debt originated; and the Plaintiff having been nonsuited, the petitioner obtained judgment; and that the petitioner, attending before the commissioners to prove his debt, desiring to waive all claim to the renewed lease, and the counsel for the assignees proposing to examine the petitioner touching the alleged usury, on his objecting, a difference of opinion arose among the commissioners, whether they were at liberty to enter upon such examination. The petition prayed an order on the commissioners to permit the petitioner to prove his debt of £5000, and interest, and that he might be ordered to receive dividends thereon *pari passu* with the other creditors under the commission, the petitioner waiving, for the benefit of the bankrupt's estate, all claim to the renewed lease; and that the expense attending the several meetings before the commissioners, and of the petition, might be paid by the assignees out of the bankrupt's estate; and that a public meeting [361] might be forthwith called by the assignees at the expense of the bankrupt's estate, for the proof of the petitioner's debt.

Sir *Samuel Romilly* and Mr. *Cullen*, for the petition, insisted, that the *Vice-Chancellor* having declared the petitioner entitled to the benefit of the mortgage, the commissioners were not at liberty to receive objections to his proof; that the great seal has an original jurisdiction to decide on the validity of debts claimed under a commission of bankrupt; and that, after an order had been pronounced, it was too late to allege a defect of jurisdiction. They referred to stat. 34 & 35 *Hen.* 8, c. 4, never expressly repealed, and to stat. 21 *Jac.* 1, c. 19, s. 9, as conferring on the commissioners powers which must have been previously exercised by the great seal.

Mr. *Hart*, and Mr. *Montagu*, against the petition, contended, that the commissioners possessed exclusive original jurisdiction on the question of proof, and that the great seal could not receive a petition for impeaching or establishing a debt, except on appeal from a previous judgment of the commissioners. They cited *Ex parte King* (11 *Ves.* 417), *Ex parte Roscoe* (2 *Rose*, 345), *Anon.* 30 *Apr.* 28 *Car.* 2 (1 *Ca. in Cha.* 275) (the first case in which the *Lord Chancellor* assumed an appellate jurisdiction on questions of proof of debts), *Ex parte Wright* (2 *Ves. Jun.* 41), *Ex parte de Tastett* (1 *Ves. & Bea.* 280), *Ex parte Wilson* (1 *Cox*, 308), *Ex parte Schmaling* (1 *Buck.* 93), *Ex parte Moody* (2 *Rose*, 413) (a case in which the question was, not whether the debt was provable, but who should prove).

[362] The *Lord Chancellor* [*Eldon*]. Prior to *Lord Rosslyn's* order (*March* 8th, 1794. 4 *Bro. C. C.* 548), the course, with legal mortgages, was the same which is now observed with equitable mortgages; each person claiming as mortgagee applied, in the first instance, to the great seal. Every objection to the mortgage was open to those who thought proper to oppose a petition of that kind; and if it appeared that the consideration of the deed was usurious, the *Lord Chancellor* must have dismissed the petition, declaring, that the party could not claim as a creditor under the deed. The necessity of coming to the great seal, in the first instance, arose out of the nature of the transaction; for if the mortgagee went, in the first instance, before the commissioners, they might indeed take an account of what was due, but could make no arrangement for payment by sale of the estate. The great seal seems not to have originally entrusted the commissioners with transactions of that kind. The course



was so constant of an application here, and a reference to the commissioners, that Lord *Rosslyn* thought himself authorised to pronounce a general order, which, of necessity, imposed on the commissioners the duty of examining questions which had been formerly examined by the great seal. Lord *Rosslyn* did not include, in that order, equitable mortgages (*Ex parte Payter*, 16 Ves. 434); they are objects of more difficult consideration. The question, whether a writing or agreement operates as a mortgage, is not so easy as, whether a mortgage-deed is a mortgage. But, as before that order, the claim of a legal mortgagee might have been opposed, on the ground that the consideration was usurious, and the deed therefore a nullity; so, on the petition of parties claiming as equitable mortgagees, not having the benefit of that order, it may be objected, that [363] the consideration was usurious, and the Court is competent to decide that question; and seeing a clear case of vicious consideration, is bound to negative the claim; with the power, in doubtful cases, of directing an issue, or, by special order, delegating the inquiry to the commissioners. Should the Court erroneously decide in favour of the mortgage, the error may be rectified on re-hearing; but I have no notion that the jurisdiction can be questioned. If, in the first instance, the parties meet before the Court, on the agitation, and for the decision, of a question involving the validity or nullity of the mortgage, the commissioners have nothing to do with that question, except by special order. When the parties come here, stating, in answer to a petition to go before the commissioners to have an estate subject to an equitable mortgage sold, that not merely on the true construction, it is not an equitable mortgage, but that the consideration is not good, and the Court decides that question, the commissioners are bound by the decision. That is all that I mean to decide. *Prima facie*, if a deed of mortgage, for a sum ascertained, is produced, the Court takes that sum to be due; if, before the general order an objection, that the consideration was usurious had been made to the petition of a legal mortgagee, and the Court had sustained the objection, the petition must have been dismissed: and an order on the petition of an equitable mortgagee has the same effect as an order on the petition of a legal mortgagee before the general order.

The order of the *Vice-Chancellor* having decided that the debt is not usurious, the commissioners cannot agitate that question; if the parties are dissatisfied with the decision, their course is to present a petition to displace that order.

[364] July 6, 1818. "I do order, that the said commissioners, or the major part of them, do permit the petitioner to prove his said debt of £5000 and interest, under the commission issued against the said *W. Dawson*, and that the petitioner be paid dividends thereon, *pari passu* with the other creditors seeking relief under the said commission, the petitioner hereby waiving, for the benefit of the said bankrupt's estate, all claim to the said renewed lease. And I do order, that the costs attending the said several meetings, before the said commissioners, the costs of the meeting of the said commissioners for the proof of the debt directed by this my order, together with the costs of, and occasioned by, the present application to me, be paid and borne out of the estate and effects of the said bankrupt: such costs to be settled by the said commissioners, in case the parties differ about the same." Orders in Bankruptcy, Lib. 149, p. 13-22.

[365] NICLOSON v. WORDSWORTH. June 24, 25, 1818.

Bill by a vendee for specific performance, insisting that the vendors could not make a good title, dismissed with costs. Effect of a disclaimer by a trustee, and of a release with intent to disclaim.

The bill, filed on the 25th of June 1817, stated, that in December 1816, the Defendants *Christopher Wordsworth* and *William Wordsworth*, caused to be advertised for sale by auction, two closes of freehold land, which, in the particulars of sale, were described to be part of the estate of *Richard Wordsworth*, deceased, and to be offered to sale by *C. Wordsworth* and *W. Wordsworth*, as devisees in trust named in the will of *R. Wordsworth*, who were thereby directed and empowered to sell the same; that one of the conditions of sale purported, that the highest bidder being the purchaser should be let into possession on the 25th of March then next; and another, that he should pay a deposit of 10 per cent., which should be forfeited if he did not perform the conditions of sale; that the Plaintiff was declared the purchaser, and signed [366] the following memorandum:—"Be it remembered, that the above-mentioned

premises comprised in the above-mentioned two lots, were, this day, struck off and sold to *John Nicloson* of, &c., the highest bidder, at the price or sum of £305; and the said *J. Nicloson* doth hereby promise and agree to perform the conditions above contained on the part of the purchaser; and the said *W. Wordsworth*, on behalf of himself, and the said *C. Wordsworth*, hereby agrees to perform the conditions on the part of the vendors, as witness, &c." That the Plaintiff paid £30, 10s. as a deposit, and was let into and still retained possession of the premises, and had, on the faith of the agreement, expended considerable sums of money in draining the lands, and otherwise in the improvement thereof; that *Charles Wordsworth* and *W. Wordsworth* having delivered an abstract of the title to the premises, the counsel of the Plaintiff advised, that they could not alone convey the premises, or give a discharge or acquittance for the purchase-money, and that the Plaintiff would be bound to see to the application of the purchase-money to the purposes and upon the trusts of the will of *R. Wordsworth*, from whom *C. Wordsworth* and *W. Wordsworth* derived their title, unless the contract was carried into execution under the direction of the Court; that the Plaintiff was willing to execute the contract, and had requested *C. Wordsworth* and *W. Wordsworth* to procure all proper parties to join in the conveyance and receipt; and that *C. Wordsworth*, and *W. Wordsworth*, and *Thomas Hutton*, a third Defendant, had caused an action of ejectment to be brought against the Plaintiff to recover possession of the premises.

The bill, charging that *T. Hutton* was a trustee only of the premises, and suffered his name to be used in the action at the instance of the other Defendants, prayed the specific performance of the agreement, and that the [367] Defendants might be decreed to make and execute, and procure to be made and executed to the Plaintiff, a good and sufficient conveyance of the premises, with a good title, and make, and procure to be made, to the Plaintiff, a sufficient discharge of the purchase-money, or that such purchase-money might be paid into the bank in the name and with the privity of the accountant-general; the Plaintiff offering to perform the agreement on his part, and to pay the remainder of the purchase-money, on having the premises duly conveyed to him with a good title. The bill also prayed an injunction against proceeding in the action of ejectment.

The answer of the Defendants stated the will of *Richard Wordsworth*, dated the 6th of May 1816, devising the premises to the Defendants and their heirs, in trust to sell, and apply the money produced by such sale in aid of the personal estate, towards payment of his debts, funeral expenses, and certain legacies, with a declaration, that the receipts, in writing, of his trustee or trustees for the time being, should be a good discharge to the purchaser of the premises, and that it should be lawful for the trustee or trustees for the time being, by any writing or writings, to appoint a new trustee or trustees, in lieu of any trustee or trustees who should die, or desire to be discharged, or refuse, or decline, or become incapable, to act, and appointing the Defendants his executors, and *Jane Wordsworth*, widow, his executrix; that *Jane Wordsworth*, and the Defendants *C. Wordsworth* and *W. Wordsworth*, alone proved the will; but that the Defendant *Hutton* renounced probate, and declined to act in the trusts of the will, and executed an indenture of release, bearing date the 23d of December 1816, and made between *Hutton* and *C. Wordsworth*, whereby *Hutton* bargained, sold, released, quitted claim, and conveyed to *C. Wordsworth* and *W. Wordsworth*, their heirs [368] and assigns, all and singular, the lands, tenements, and real estate of *R. Wordsworth*. The answer admitted the sale as stated in the bill, and submitted that *C. Wordsworth* and *W. Wordsworth* could alone make an effectual conveyance, and give to the Plaintiff a sufficient discharge of the purchase-money of the premises.

The common injunction having been obtained for want of an answer, and the common order *nisi* for dissolving it after answer, on this day cause was shown by Sir *Samuel Romilly* and Mr. *Roupell*, for the Plaintiff.

The release executed by the Defendant *Hutton* was an acceptance of the estate devised to him, and he is therefore a necessary party to the conveyance. The deed admits, that an estate vested in him; of that estate he is trustee; and it is not competent to him, after he has assumed that character, to renounce it without performance of its duties: for this reason the release cannot operate as a disclaimer. *Crewe v. Dicken* (4 Ves. 97).

Mr. *Bell* and Mr. *Shadwell*, for the Defendants, insisted, that, in a court of equity,

at least, the intention of the parties determined the effect of the instrument, and a release, with the purpose of disclaiming, would be equivalent to a disclaimer.

The *Lord Chancellor* [Eldon]. The question comes before the Court in a singular shape. I understand that *Hutton* was not a party to the contract; the Plaintiff therefore cannot insist on his being a party to the conveyance. If the suit had been [369] instituted by the Defendants against the Plaintiff, the Court must have decided the question, whether the Defendants could make a good title; but, is the form of the record such that any judgment can now be pronounced? The Plaintiff has filed the bill for specific performance; himself insisting that his vendors cannot make a good title. I can say only, that if he does not choose to take the title which they can give, he can have no decree. To raise the question properly on the record, the Defendants should have been Plaintiffs. The injunction must of necessity be dissolved if the Plaintiff will not accept the title of the Defendants. When, on a bill by a vendee, for specific performance, it appears that the Defendants cannot make a good title, there is no farther question in the cause, than who is to pay the costs. If the Plaintiff insists that the title is not good, he cannot resist the ejectment of those who were previously in possession of the land. Rejecting the title, he must relinquish possession.

The question is curious as a point in conveyancing. It seems to have been taken for law, from an older period than the date of *Crewe v. Dicken* (4 Ves. 97), and sanctioned by Lord *Hale*,<sup>(1)</sup> that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other. If, therefore, the party executes a simple instrument, and, under his hand and seal, declares that he disclaims, that is, dissents from [370] being a trustee, the fact must be taken to be, that he is no trustee; but in *Crewe v. Dicken* the difficulty occurred, that instead of doing this, the party conveyed his estate to the other trustees. Lord *Loughborough* thought that that was different from a mere disclaimer, because he could not execute a release without having assented to the conveyance to himself. In that case there were also specialties; the individuals were particularly described, and the directions for the form of the receipt were such as made it impossible that a proper receipt could be given, unless the trustee, who had disclaimed, joined. If the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer, that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a court of equity. If the contract were mine, and I approved the bargain, I should abide by it; but that opinion will not assist the party.

June 25. The *Lord Chancellor* [Eldon]. Either the Plaintiff must take such title as the parties with whom he has contracted can give him, or he cannot have a conveyance. If the vendors had been Plaintiffs, the Court must have determined whether the title was good; here the purchaser claims specific performance, at the same time insisting that his vendors cannot make a good title. If I could have considered this deed as a mere deed of disclaimer, then, on the authority of Lord [371] *Hale*,<sup>(1)</sup> and subsequent cases, though I do not understand the principle, I might have held that the two other trustees could make a good title; but a release, referring to an interest which the releasor supposes to be in him, introduces the doubt in *Crewe v. Dicken*. The question is, whether the three parties must join in the conveyance and receipt? A release is the instrument of a person who thinks that he has something to part with; it is not a mere dissent or refusal to concur. I argued the case of *Crewe v. Dicken* on various grounds; and I recollect that the words relative to the receipt were very special.

The more one examines the distinction between disclaimer and release, the less one sees the worth of it. In this will the testator declares that the receipt of the trustee or trustees for the time being, shall be a sufficient discharge; but the shape of the record is such, that I cannot decide the question. My opinion is, that if a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad for the Court to act upon. What is the thing called a disclaimer? I have seen some prepared by the ablest conveyancers in a form like this: "I hereby declare that I have disagreed, and hereby

disagree, &c., and hereby disclaim, &c." What is the effect of that? That is sufficient. I can find no case which has decided, nor can I see any reasons for deciding, that where the intent of the release is disclaimer, the inference that the releasor has accepted the estate shall prevent the effect of it. The decree in *Crewe v. Dicken* did not proceed on that point only: the words describing the persons by whom the receipt was to be given were very special; in that case, if two out of the three trustees had died, the third having previously released to them, beyond doubt [372] that survivor must, under the words, have given the receipt, though he did not continue trustee. I think there is no case in which judgment has been pronounced on the distinction between a disclaimer and a release, and that where the intention is disclaimer there ought to be no distinction. I understand the operation of a release with intent to disclaim, but it is difficult to know what that thing called a disclaimer is.

The case in *Ventris* is an assignment of a lease to two persons, one of whom expresses his dissent; but if we consider the difficulty attending conveyances to uses, I think that we shall be compelled to say, that Lord *Hale's* doctrine will not apply, and that the party cannot disclaim in the case of a conveyance to uses, except by release with intent of disclaimer. I am aware, however, that, from the practice of conveyancers, if I were to say that, on any difficulty in principle, a disclaimer could not be effectual, I should shake titles innumerable. (2)

The following decree was taken by consent: "It appearing to the Court, that the release bearing date the 23d of December 1816, was meant to operate as a disclaimer, His Lordship doth declare, that the Defendant *T. Hutton* is not a necessary party to the conveyance: and it is ordered, that the Plaintiff's bill be dismissed with costs: and it is ordered, that all proceedings in the ejectment be stayed, the Plaintiff undertaking to complete the purchase."

Reg. Lib. B. 1817, fol. 1323.

(1) *Smith v. Wheeler*, 1 *Vent.* 128; 2 *Keble*, 772. *S. M.* being possessed of a term of years, assigned it on certain trusts, to *B. & C.*, of whom *B.* dissented; the Plaintiff claiming under a demise by *C.*, recovered. The dictum of Lord *Hale* is thus reported by *Ventris*, "*C.* is a good lessor, for the other trustee's disagreement makes the estate wholly his." (1 *Vent.* 130.) And by *Keble* in these words; "The assignment being of a chattel is in both the assignees, till the disagreement of *B.*, and then is wholly in *C.*" 2 *Keb.* 774.

(2) See in addition to the cases cited, *Littleton*, sect. 684, 685; Stat. 21 *H.* 8, c. 4; *Co. Litt.* 113 a. *Bonifant v. Greenfield*, *Cro. El.* 80; *Godb.* 77. *Anon.* 4 *Leon.* 207. *Hawkins v. Kemp*, 3 *East*, 410. *Towns v. Tickell*, 3 *B. & A.* 31; and *Thompson v. Leach*, 2 *Vent.* 198; *Carth.* 211, 250; 3 *Mod.* 296; 2 *Salk.* 616; *Show. P. C.* 151; 3 *Lev.* 284; 1 *Show.* 296; *Rep. Temp. Holt*, 665.

### [373] BUTLER v. BULKELEY. June 30, July 18, 1818.

On a bill for discovery, and a commission to examine foreign witnesses in aid of an action at law, a motion that the Plaintiff might communicate to the Defendant the interrogatories exhibited by him, was refused.

The bill was filed by the Plaintiff in an action at law, praying a discovery and a commission for the examination of witnesses abroad in aid of the action.

A motion was made in behalf of the Defendant, that the Plaintiff might communicate to the Defendant the interrogatories exhibited by the Plaintiff.

Mr. *Heald* in support of the motion. Without a knowledge of the Plaintiff's interrogatories, the Defendant will be unable to cross-examine with effect. A plaintiff at law may obtain a commission for the examination of witnesses abroad, by two methods—an application to the court of law, or a bill in equity. In the first case, the practice requires him to communicate his interrogatories to the Defendant (1 *Tidd's Practice*, 312); what reason can be assigned for relieving him in equity from an obligation imposed by obvious principles of justice?

Mr. *Bell* against the motion. By the universal practice in equity, one party is not entitled to see the interrogatories exhibited by the other, but must judge by the record, to what point the evidence of his antagonist will apply. There is no distinction, nor any reason for distinction, in this respect, between a suit for relief in equity, and a mere bill for discovery and a commission.

The *Lord Chancellor* [Eldon]. The ancient course in *Westminster Hall* was, to apply [374] to this Court, for commissions for the examination of witnesses in foreign countries ; and the courts of law borrowed that proceeding from this court : but in no suit in equity has one party been permitted to see the interrogatories exhibited by his antagonist. The constant practice through all time has been, to grant commissions without communication of the interrogatories. At law, indeed, that communication is required ; but I believe that the courts of law established that practice under an erroneous belief that it prevailed here. The proceeding in aid of an action at law by a commission for the examination of witnesses, is far more ancient in this Court than in courts of law ; and I find no instance in which a production of the interrogatories has been ordered.

Mr. *Heald* suggested, that the case contained special circumstances, the instrument on which the action was founded being a forgery, executed by chemical means.

The *Lord Chancellor* [Eldon]. There is no rule of practice in this Court which will not yield to special circumstances ; but the allegation of such circumstances must be verified by evidence.

Motion refused.(1)

(1) On commissions to examine witnesses in foreign countries, see *Bowden v. Hodge*, 2 Swans. 258, and the cases there cited ; to which may be added *Campbell v. Scougal*, 19 Ves. 552.

[375] RICHARD HAWKINS, and MARY, his Wife, and JOHN HAWKINS, *Plaintiffs*, and JOHN LUSCOMBE LUSCOMBE, MARGARET MANNING, JOHN HURRELL LUSCOMBE, Heir of the surviving Trustee, and JOHN LUSCOMBE, *Defendants*. July 16, 17, 18, 1818.

Estates being devised to trustees and their heirs, upon trust, to permit *M. M.*, *M. C.*, and *J. J.*, to reside in a mansion house, and receive part of the rents, in recompense of the maintenance of *J. L. M.* (eldest son of *M. M.*), till he attained 21, or died, and subject thereto, to the use of the trustees and their heirs, in trust for *J. L. M.*, until he should attain 21, or die, and to the intent that the rents might be accumulated, and after he attained 21, to the use of him and his assigns, during his life, he taking the testator's surname of *L.* ; remainder to the use of the trustees, and their heirs, during his life, to support contingent remainders ; remainder to the use of his first and other sons, taking the surname of *L.*, in tail male ; remainder to the use of the second and every other son of *M. M.* by her present husband ; remainder to her first and every other son by any future husband, in tail male, taking the surname of *L.* ; remainder to the use of the trustees and their heirs, during the life of *M. M.* upon trust for her separate use ; remainder to the use of the trustees, and their heirs, during the life of *M. C.* upon trust for her separate use ; remainder to her first and other sons taking the surname of *L.* in tail male, with ulterior remainders, and a proviso, that the heirs male of the bodies of *M. M.* and *M. C.* claiming under the will, should, on taking possession of the estates, assume the surname of *L.*, and, within three years, procure their name to be altered by act of Parliament, or some other effectual way ; and in case they should neglect to obtain an act of Parliament, or some other authority as effectual, for three years after being in possession, then the use and estate limited to the person so neglecting should cease and become void, and the estates should vest in the persons next in remainder, as if the person so neglecting were dead without issue ; *J. L. M.*, in 1794, having attained 21, taken possession of the estates, and assumed the name of *L.*, but neglected to obtain an act of Parliament, or any other authority for the use of that name, and having had a son born in 1806, and *M. M.* having died without other sons ; on a bill by *M. C.*, insisting that *J. L. M.* had forfeited the estates, the Court refused to appoint a receiver, or, infants (who are not bound by admissions) being interested, to direct a case.—What uses are executed in the trustees ?—*Quære*.

The original bill, filed on the 12th June 1817, stated, that *John Luscombe*, deceased, by his will, dated the 3d of February 1774, devised (subject to certain annuities and legacies) unto *Thomas Whinyeats*, *Thomas Coplestone Prideaux*,

and *Roger Prideaux*, and their heirs, certain messuages, tenements, and hereditaments, upon trust, to permit his nieces, *Margaret Manning* and *Mary Creed* (afterwards *Mary Hawkins*), and *Juliana* [376] *Jutsham*, and the survivors and survivor of them, her executors or administrators, to inhabit a mansion-house described, and take the rents and profits of a part of the premises as a recompense for their care, maintenance, and education of the testator's cousin, *John Luscombe Manning*, afterwards *John Luscombe Luscombe*, son of *M. Manning*, who he willed should live therewith, and be well provided for and maintained by them in all respects suitable to his condition, during so many years as should expire, until he should attain the age of twenty-one years, or die, which should first happen; and subject to the said trust-estate, as to the whole of the premises, to the use of *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, in trust for *John Luscombe Manning*, until he should attain twenty-one or die, which should first happen, and to the intent that the same might, in the mean time, be set out at yearly rents, and that the clear rents and profits, after a deduction for repairs, &c., should, from time to time, be invested in the public funds, and the interest thereof accumulated and made principal money, for the benefit of *John Luscombe Manning*, until he should attain the age of twenty-one years, when the same should be transferred or paid over to him for his own use; and in case of his death, in the meantime, the same should go to his executors or administrators to the time of his death; and immediately after he should attain the age of twenty-one years, then to the use of him and his assigns, during the term of his natural life, without impeachment of waste, he taking and using the testator's surname of *Luscombe* as, and for, and instead of his own surname; subject, as to part of the premises, to several annuities, and, as to other parts, to certain terms of years; remainder to the use of the trustees and their heirs, during the life of *John Luscombe Manning*, upon trust, to support contingent remainders, but nevertheless to permit him and his assigns to receive the rents and profits during his life, and immediately after his decease [377] to the use of the first son of the body of *John Luscombe Manning*, lawfully to be begotten, taking and using the testator's surname of *Luscombe* as and for his and their own surname, and of the heirs male of the body of such first son lawfully issuing, taking and using the testator's surname as, for, and instead of his and their own surname; with remainder to the use of the second, third, and every other son of the body of *John Luscombe Manning*, &c., in tail male, taking and using the testator's surname of *Luscombe*, &c.; remainder to the use of the second, third, and every other son on the body of *Margaret Manning* lawfully begotten, or to be begotten, by *R. Manning*, her then husband, and in default of such issue, &c., to the use of the first, second, and every other son on the body of *Margaret Manning* lawfully to be begotten by any aftertaken husband or husbands, in tail male, taking and using the testator's surname of *Luscombe*, &c.; remainder to the use of the trustees and their heirs during the life of *Margaret Manning* (subject as aforesaid), upon trust, and for the sole, distinct, and separate benefit of her, exclusive of her said husband and every other husband which she should have, and to the intent that the trustees, and the survivors and survivor of them, and his heirs, should receive and take the rents and profits of the premises, and pay the clear produce of the same, after deduction and allowance, from time to time, for taxes, repairs, &c., unto and into the hands of *Margaret Manning*, and her only, for her own sole and separate use and benefit, distinct and apart from her then present or any other after-taken husband or husbands, and her receipt or receipts alone, from time to time, to be sufficient discharges for the same, notwithstanding her coverture; and after the decease of *Margaret Manning*, to the use of the trustees and their heirs, during the life of the testator's niece *Mary Creed*, afterwards *Mary Hawkins* (subject as aforesaid), upon trust, for her sole, distinct, and separate benefit, whether sole or [378] under coverture, and to the intent that the trustees, and the survivors and survivor of them and his heirs, should receive the rents and profits of the premises, and pay the clear produce of the same (after such deduction and allowance as aforesaid), unto and into the hands of *Mary Creed*, whether sole or under coverture, and her only, for her own sole and separate use, distinct and apart from any husband or husbands which she might have, and her receipt and receipts, from time to time, to be good and sufficient discharges for the same, notwithstanding coverture; and immediately after her decease to the use of the first son of her body, lawfully to be begotten, using and taking the testator's surname of

*Luscombe, &c.*, and of the heirs male of the body of such son lawfully issuing (subject as aforesaid), with remainder to the use of the second, third, and all and every other sons of the body of *Mary Creed*, in tail male ; with divers remainders over, with the ultimate remainder to the use of the testator's right heirs ; and other tenements and hereditaments the testator devised to *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, upon trust, for *John Luscombe Ryan*, until he should attain the age of twenty-one years, or die, which should first happen, and to the intent that the premises, or such part or parts of the same as should not be out in lease, should be set out at a yearly rent or rents, until *J. L. Ryan* should attain the said age, or die, and the clear rents and profits of the premises, after a deduction for all rates, taxes, &c., or as much thereof as the trustees, or the survivors or survivor of them or his heirs, should in their discretion see fit, should be applied towards the maintenance and education of *J. L. Ryan*, and for placing him out apprentice, &c., and the surplus should be invested in the public funds, or placed out at interest, in the names of the trustees, on real or personal security, and the interest thereof applied for the purposes [379] aforesaid, or otherwise accumulated, to be made principal-money for the benefit of *J. L. Ryan*, until he should attain that age, when the whole should be transferred or paid to him for his own use, after such deductions as aforesaid, and also after a full allowance of all sums paid or disposed of for or on his account, or in case of his death, before he should attain that age, then for the benefit of his executors or administrators to the time of his death ; and immediately after he should have attained the age of twenty-one years, then to the use of him and his assigns for his life, with remainder to the trustees and their heirs, during his life, upon trust, to preserve contingent remainders, but to permit *J. L. Ryan* and his assigns to take the rents and profits of the premises to his and their own use, during the term of his life, and immediately after his decease to the use of *John Luscombe Manning* and his assigns, during the term of his life, without impeachment of waste, except voluntary waste in houses and buildings ; remainder to the use of the trustees and their heirs, during the life of *John Luscombe Manning*, upon trust, to preserve contingent remainders, but to permit him and his assigns to take the rents and profits of the premises, during his life, and after his decease to the use of such persons respectively and in such order and course, and for such estate and estates, &c., as the other premises were limited, subsequent to the limitation to the trustees for the life of *John Luscombe Manning*, to preserve contingent remainders ; and other tenements and hereditaments the testator devised to *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, to the use of *Juliana Jutsham* and her assigns, for her life, without impeachment of waste, except waste in houses and buildings ; with remainder to the use of the trustees and their heirs, during her life, upon trust, to preserve the contingent uses and estates thereafter limited, but to permit her and her assigns to receive the [380] rents and profits of the premises, during her life, and after her decease, to the use of *John Luscombe Manning* and his assigns, for his life ; with like remainder as in the former devises.

The will contained the following proviso :—" Provided always, and it is my express will, and I do hereby empower, direct, and appoint, that the heirs male of the several body and bodies of the said *M. Manning* and *M. Creed*, and that the said *J. L. Ryan*, and the heirs male of his body, and each and every of them respectively claiming, or that shall claim, by, under, or in virtue of this my will, or any of the limitations, directions, or devises herein contained, any right, estate, or title in or to the capital messuage, and tenement, &c., or any other of the lands or hereditaments comprised in the first devise of this my will contained, not bearing the surname of *Luscombe*, shall, when and as soon as he or they, or any of them, shall be respectively in possession of the same premises, or any part thereof, under, or by means, or in virtue of this my will, take upon him or themselves the name of *Luscombe*, and use the same as, for, and instead of his or their own surname as aforesaid, and shall within three years then next after, get and procure his or their own name or names to be altered and changed to my name of *Luscombe*, by act or acts of parliament, or some other effectual way for that purpose, and shall for ever after have, use, and bear on all occasions the said surname of *Luscombe*, for him and them, and the heirs male of his and their body and bodies as aforesaid ; and in case any or either of the heirs male of the body of the said *M. Manning*, or *M. Creed*, or the said *J. L. Ryan*, or the heirs male of his body, or any or either of them respectively, who shall be

in possession of the said capital messuage, &c., or any part thereof, by, under, or in virtue of this my will, shall not use and take my said surname, but shall neglect to [381] get an act of Parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he, she, or they shall be in possession of the same as aforesaid, that then and in such case the use and estate hereby given, devised, or limited, of and in the same premises, to and for the benefit of such person or persons so neglecting to get, or not getting, such act of Parliament, or other authority as aforesaid, shall cease, and become void, as if no such use or estate had been hereby given, devised, or limited; and the same premises, and every part thereof, shall, immediately upon and after the expiration of the said three years, go over to and descend upon, and vest in, such person or persons as shall be next in remainder or reversion, or unto and upon whom the said premises are hereby settled, given, devised, or limited, in the same manner, to all intents and purposes, as if such person or persons so neglecting to change his or their surname or surnames was, were, or had been dead without issue of his or their body or bodies, any thing herein contained to the contrary notwithstanding; upon this express condition, nevertheless, that such person so to take, do and shall also take my said surname, and get an act of Parliament, or such other effectual authority for so doing as aforesaid, otherwise the said capital messuage, &c., and all other the premises first hereby devised, shall go over to the next person to whom the same are limited as aforesaid, who shall so take my surname as aforesaid."

The bill further stated, that by a codicil, dated the 8th of *June* 1777, the testator appointed *J. Luscombe* a trustee; and died on the 3d of *July* 1776; that *J. Luscombe Ryan* died in the lifetime of the testator, and *J. Jutsham* in *November* 1787; that *J. Luscombe* survived his co-trustees, and died in *August* 1811, leaving *J. Luscombe* his eldest son and heir; and that *M. Creed*, in *June* [382] 1779, intermarried with *R. Hawkins*, by whom she had two sons, *John Hawkins* and *Abraham Mills Hawkins*, who had both attained the age of twenty-one years; that *John Luscombe Luscombe* in the will named *John Luscombe Manning*, was the only son of *Margaret Manning*, and that, upon his attaining the age of twenty-one years, on the 28th of *April* 1794, he entered into the possession of the premises devised, including those devised to *J. L. Ryan* and *J. Jutsham* for life; but he did not thereupon take and use the name of *Luscombe*, instead of his own surname, nor did he, within three years then next after, procure his own name to be changed to the name of *Luscombe*, by act of Parliament, or any other effectual way; and he never, in fact, took or used the surname of *Luscombe*, or in any manner procured his name to be altered or changed to the surname of *Luscombe*, until he attained the age of forty years, or thereabouts; that, by reason of such breach of the condition in the will, the estate and interest of *John Luscombe Luscombe* in the devised premises became void, and *Margaret Manning*, as the next person in remainder, became entitled to the same for her life; that *John Luscombe Luscombe* did not marry until he was of the age of twenty-five years, and that *J. Luscombe*, his eldest son, was born in *December* 1806.

The bill also stated, that at the time when *John Luscombe Luscombe* entered into possession of the devised premises, there were large quantities of timber trees standing and growing thereon, and that he and *Margaret Manning*, or one of them, had since caused the same to be cut and felled, and sold considerable quantities thereof, and converted the money arising from the sale thereof to their own use; and that *Margaret Manning*, or *John Luscombe Luscombe*, by her authority, intended to cut other timber standing or growing upon the devised premises.

[383] The bill, charging that *J. L. Luscombe* and *Margaret Manning*, or one of them, had committed and suffered divers acts of waste and spoil on the premises, and felled divers timber trees standing and growing thereon, and other trees likely to become timber, prayed an account of all timber cut or felled upon the premises since the death of the testator, and the money produced by the sale thereof, and of all other acts of waste, since that time, committed upon the premises; and that the Defendants might be decreed to account for the same; and that *Margaret Manning* and *J. L. Luscombe* might be restrained by injunction from cutting any timber, or trees likely to become timber, upon the premises, and from committing any other waste or spoil thereon.

The supplemental bill, filed on the 9th of *December* 1817, stated the death of *Margaret Manning* since the institution of the suit, having appointed *Harriet*



*Manning* executrix of her will, and leaving *J. L. Luscombe*, her only son ; that, by means of her decease, the Plaintiff *Mary Hawkins* became entitled to an equitable estate for life in the devised premises, and that *John Hurrell Luscombe*, with the consent of *Margaret Manning*, permitted *J. L. Luscombe* to continue in possession of the premises during the life of *Margaret Manning* ; that, since the filing of the original bill, *James Yates*, *Samuel Holditch Hayne*, and *John Hawker*, Defendants, claimed some interest in the premises by virtue of some indenture, whereby they pretended that the premises, or some interest therein, were assigned to them by *J. L. Luscombe*, or by some other person, in trust for his creditors.

The supplemental bill, charging that the title-deeds, and other papers relating to the premises, were in the possession of the Defendants, some or one of them, [384] prayed, that the Plaintiffs might have the relief prayed by the original bill, and that the Defendants, *J. L. Luscombe*, and *J. H. Luscombe*, and *J. Yates*, *S. H. Hayne*, and *J. Hawker*, might account for the rents and profits of the premises received by them, or either of them, or for their use, since the decease of *Margaret Manning*, and that it might be referred to one of the Masters, to appoint a proper person to receive the rents and profits, with directions to pay the same over to *Mary Hawkins* for her life ; and that an account might be taken of all the timber cut or felled upon the premises since the death of the testator, *J. Luscombe*, and of the money produced by the sale thereof, and of all other acts of waste since that time committed upon the premises, and that the Defendants might be decreed to account for the same ; and that the Defendants, *J. Yates*, *S. H. Hayne*, and *J. Hawker*, might respectively be declared to have no interest in the premises, and be decreed to deliver up to the Plaintiffs all deeds, papers, and writings in their or either of their power, custody, or possession, relating to the premises ; and an injunction against *J. L. Luscombe*, and *J. Yates*, *S. H. Hayne*, and *J. Hawker*.

The answer of *J. L. Luscombe*, to the original bill, stated, that upon attaining the age of twenty-one years, in April 1794, he entered into possession of the premises devised to him, including those devised to *J. L. Ryan* and *J. Jutsham* for life, but denied that he did not take and use the name of *Luscombe* instead of his own surname, or that he never took or used the surname of *Luscombe*, or in any other manner procured his name to be altered or changed to the name of *Luscombe*, until he attained the age of forty years, or thereabouts ; admitted that he did not, within three years next after entering into possession of the premises, procure his own name to be [385] changed to the name of *Luscombe*, by act of Parliament, but the same was altered or changed in the manner thereafter mentioned ; and stated, that when he entered into possession of the premises, there were large quantities of timber trees standing and growing thereon, and that he had since caused such parts thereof, as thereafter mentioned, to be felled and sold, and applied the produce of such sales in paying two legacies of £500 and £500, bequeathed by the testator to *Elizabeth Martin Manning*, and *Mary Manning*, and also in repairing and improving the premises, and in planting trees thereon, and denied that he threatened or intended at present, either by the authority of *Margaret Manning* or otherwise, to cut any timber then standing or growing upon the premises, except such timber as might be necessary for the repairs thereof, although he claimed the right of cutting timber under the will ; denied that he had ever committed or suffered any act of waste or spoil on any part of the premises, but, on the contrary, had taken great care not to cut, or cause to be cut upon the premises, any saplings or trees likely to become timber. The answer further stated, that when he was of the age of fifteen or sixteen years, and at school, he took and used the surname of *Luscombe* instead of his own surname of *Manning*, and had ever since used the surname of *Luscombe* only, upon all occasions ; and in April 1791, when he was of the age of eighteen years, he was entered a commoner, and afterwards admitted a gentleman commoner, at *Pembroke college, Oxford*, under the surname of *Luscombe* ; and in 1794, when he came of age, he settled the accounts of the trustees of the devised estates, and gave all receipts and vouchers, in respect thereof, under the surname of *Luscombe* only, and that he had since held, in the surname of *Luscombe* only, a lieutenant's commission, and afterwards a captain's commission, in His Majesty's *North Devon* regiment of militia, and also a com-[386]-mission as a deputy-lieutenant in the county of *Devon* ; and that in April 1796 a parish apprentice was bound to him under the name of *J. L. Luscombe* ; and in 1797

he, under the surname of *Luscombe*, married his present wife ; and in 1803 he was also made a freeman of the borough of *Plymouth* under that surname ; and in *June* 1813 he obtained His Majesty's license for him and his issue to continue to use the surname of *Luscombe* only ; and that license was, in *June* 1813 recorded in the College of Arms ; and that since he was of the age of fifteen or sixteen years, in all his correspondence, he had signed, and used, and received letters under the surname of *Luscombe* only. The answer submitted that he ought not to be restrained from cutting such fir, or other timber and trees in the devised premises, as he might think proper.

By his answer to the supplemental bill *J. L. Luscombe* admitted, that he was in the possession and receipt of the rents and profits of the premises, and that the title deeds and other papers relating thereto were in his power ; and stated, that the Plaintiffs *R. Hawkins* and *Mary* his wife, before he came of age, repeatedly told him, that there was no occasion for going to any expense about changing his name, and that he had already done all that was necessary, and that such was the opinion of the late Mr. Justice *Buller*, whom they had consulted upon the subject.

*July* 16. On this day the Plaintiffs moved for a receiver.

Sir *Samuel Romilly* and Mr. *Hampson* in support of the motion. The Defendant *J. L. Manning*, in the pleadings named *J. L. Luscombe*, not having complied with the condition of the will, has forfeited the interest limited by it to him [387] and his issue, and the Plaintiff *Mary Hawkins* is entitled to the possession of the estates. The Court will either entertain the suit, in order to decide the question itself, or will direct arrangements for obtaining a legal decision, and in either case will not suffer the Defendant to retain the estate, but will appoint a receiver.

The testator requires that the heirs male of *Margaret Manning*, claiming under his will, shall immediately on coming into possession take his surname, and, within three years, procure his name to be altered by act of Parliament, or some other equally effectual authority. A mere assumption of the name, without authority, is clearly not a compliance with this provision. The forfeiture is annexed to the omission to obtain some effectual authority within three years.

The Lord Chancellor [Eldon]. The question then is, whether the party forfeits, not only for himself, but for his issue, and who are the persons to take on that forfeiture.

Argument for the motion resumed.

The proviso (the words of which are direct and positive, not words of inference), is not repugnant to the previous clause of gift. The limitations to the trustees to support contingent remainders, on determination of the particular estate, by forfeiture or otherwise, in the life of the tenant for life, are not designed to apply in case of forfeiture by non-compliance with the proviso for assuming the name. The forfeiture destroys those remainders which, in another event, the estate of the trustees would support. A condition inflicting forfeiture on the children, for the omission of the parent, [388] may be unjust, but is not repugnant. The Defendant had no issue till many years after the forfeiture.

The legal estate is in the trustees. It is true the express trust is only till the Defendant attains twenty-one, but the whole legal fee having been conveyed to them, to the use of them and their heirs, subsequent words denoting an intention to vest the legal fee in other persons cannot have that effect. The Plaintiffs, therefore, are not in a situation to try the question at law ; and though the Court will not compel the Defendant to put the question in a course for legal trial, it will, if he refuses, appoint a receiver. The proper mode will be to agree on the statement of a case.

They cited *Corbet's case* (1 Co. 83), *Co. Litt.* 327 a, note 2. *Nichols v. Sheffield* (2 Bro. C. C. 215), *Doe v. Heneage* (4 T. R. 13, see *Doe v. Hicks*, 7 T. R. 433), *Carr v. Errol* (6 East, 58), *Stanley v. Stanley* (16 Ves. 491).

Mr. *Heald* against the motion. The Court will not, by a summary order on motion, eject a party who has had possession during twenty years since the alleged forfeiture. The general rule is, that possession is not changed pending the decision of the principal question in the cause ; and on that principle the Court, in the recent case of *Cholmondeley v. Clinton*, refused to order payment into court of money arising from the sale of timber.

The question may be tried at law : during the minority of the Defendant, the legal estate was in the [389] trustees, but on his majority it passed to him, *Good-*

*title v. Whitby* (1 Burr. 228). The father having assumed the name of *Luscombe* long before the birth of a son, that son would be born a *Luscombe*, and by that name would take under the limitation. The Defendant, if the clause of forfeiture applies to him, which may be questioned (for the words are, heirs male of *Margaret Manning*, a description not in strictness applicable to him then living during her life), has complied with it; an assumption of a name, and constant use of it for all purposes, is as effectual a change as if authorized by act of parliament or licence under the sign manual. (See *Gulliver v. Ashby*, 4 Burr. 1929, p. 1940. *Leigh v. Leigh*, 15 Ves. 92, p. 100). If the name has been assumed, the mode of assumption is immaterial. There is no means of compelling the continued use of a name; though assumed under an act of Parliament, it may be renounced. The proviso as construed by the Plaintiffs, is repugnant, destroying the estate of the heir of the Defendant, which had been expressly limited on the forfeiture of the life-estate: an express limitation cannot be defeated by words of inference.

Sir *Samuel Romilly*, in reply, distinguished the case of *Cholmondeley and Clinton*, as involving an extremely doubtful question, agitated after long delay, and when the legal estate was in a mortgagee; while, in the present instance, the bill was filed within six months after the Plaintiff became entitled.

The Lord Chancellor [Eldon]. Under the original limitations, every person taking the estate, except *Mary Manning* and *Mary Creed*, is to assume the name of *Luscombe*; but the clause of forfeiture requires every person, without exception, to assume that name. The infancy of some of the parties [390] may present difficulties in the admission of facts, for obtaining the judgment of a court of law; but, considering the nice distinctions in decided cases, I cannot determine the effect of such a will. At present I entertain doubt, whether any person could sustain an ejectment under the clause of forfeiture, without having assumed the name of *Luscombe*, and if so, whether they can file a bill here in any other name.

July 17. In reference to the doubt intimated by the Lord Chancellor, Sir *Samuel Romilly* suggested, that the Plaintiff was not bound to assume the name before taking possession, and might therefore declare in ejectment, or institute a suit, in another name, using the name of *Luscombe* on entering on the estate, and obtaining an act of Parliament within three years.

July 18. The Lord Chancellor [Eldon]. I am of opinion, that I cannot order a receiver in the present stage of a case which involves so much nicety. On referring to the authorities, I have some doubt whether the legal estate is still in the trustees, at least for any other purpose than for securing the estate to the separate use of the Plaintiff *Mary Hawkins*, formerly *Mary Creed*. On that supposition, if an ejectment were brought, there could be no defence, provided that a forfeiture has occurred. It has been suggested, that any difficulty may be removed by directing a case; but the forfeiture, if any forfeiture has been incurred, affecting the issue, who are infants, I know not how admissions can be made. The question must therefore be decided on the hearing of the cause.

[391] The Lord Chancellor [Eldon]. If the Defendant has forfeited for himself and his issue, a legal estate must be in the trustees, because they are to hold for the separate use of *Mary Creed*, now *Mary Hawkins*.

Sir *Samuel Romilly*. The whole legal estate being in the trustees, the Plaintiff cannot proceed at law.

The Lord Chancellor [Eldon]. I doubt whether the whole legal estate is in the trustees, if the condition is not broken. In a case in the seventh volume of the Term Reports, (1) of a devise to trustees and their heirs, with limitations to uses, the Court held, that the legal estate was in the trustees throughout; but, as it seems to me, for this reason, that there being various trusts for the separate use of married women, after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end; and they relied on the non-repetition of a legal estate (see *Doe v. Hicks*, 7 T. R. 433), [392] there being a gift to the wife of one of the parties; and if there had been a repetition of the legal estate, after every trust for a married woman, they would not have held the whole legal estate to have been in the trustees.

Sir *Samuel Romilly* observed that, in this case, the words are, to the trustees, "to the use of them and their heirs," which must vest the legal estate in them.

The Lord Chancellor [Eldon]. Those words are extremely important. But

here is a forfeiture, if at all, of the estates of the tenant for life, and of his infant children; and how can facts be stated in a case so as to bind infants? (2)

The case was not mentioned again. (3)

(1) Probably *Harton v. Harton*, 7 T. R. 652. "Whether this be a use executed in the trustees or not must depend upon the intention of the deviser, which is to be collected from the will. This provision, it appears, was made in order to secure to the several *femes covert*s a separate allowance, free from the controul of their husbands; to effectuate which it is essentially necessary that the trustees should take the estate with the use executed, otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object that the deviser had in view." Lord *Kenyon*, p. 653, 654. See *Neville v. Saunders*, 1 Vern. 415. *South v. Alleyne*, 5 Mod. 63, 101; 1 Salk. 228; Comb. 375. *Jones v. Lord Say and Sele*, 1 Eq. Ca. Abr. 383; 8 Vin. Abr. 262; 3 Bro. P. C. ed. Toml. 457.

(2) See *Eccleston v. Petty*, Carth. 79; 3 Mod. 258; Comb. 156. *Leigh v. Ward*, 2 Vent. 72. *Wrottesley v. Bendish*, 3 P. W. 237. *Thurston v. Nutton*, *ibid.* n. E. *Legard v. Sheffield*, 2 Atk. 377. *Copeland v. Wheeler*, 4 Bro. C. C. 256. *Redesdale on Pleadings*, 254. *Lucas v. Lucas*, 13 Ves. 274. *Cowdell v. Tatlock*, 3 Ves. & Beam. 19. *Savage v. Carroll*, 1 Ball & Beatt. 553. *Cowling v. Ely*, 2 Stark, 366.

(3) An ejectment was afterwards brought, and the Court of King's Bench decided, that *John Luscombe Luscombe* had not incurred a forfeiture. *Doe v. Yates*, 5 Barn. & Ald. 344.

[393] *Ex parte SMYTH*. In the matter of THOMAS SMYTH, a lunatic. July 25, 1818.

An act of Parliament having authorized the vicar of C. to grant leases of the glebe lands, with the consent of the patron in writing, the patron being lunatic, a petition by the committees of his person and estate, for a reference to the Master to inquire whether it would be fit that they, on his behalf, should consent to a lease, was refused.

The petition of Sir *William Smyth*, Bart., and the Reverend *Edward Smyth*, clerk, committees of the lunatic's estate, stated, that, under a commission in the nature of a writ *de lunatico inquirendo*, dated the 13th of January 1816, *Thomas Smyth* had been found a person of unsound mind, and that the custody of the person of the lunatic had been granted to the petitioner Sir *William Smyth*, Bart., and the care and management of his estate to both the petitioners; that, by an act of Parliament made in the 53d year of the reign of *George the Third*, entitled, "An act to enable the vicar of the church of *Camberwell*, in the county of *Surrey*, for the time being, to grant leases of certain parts of the glebe belonging to the said vicarage," it was enacted, that, from and after the passing of the act, it should be lawful for the petitioner *Edward Smyth* and his successors, vicars of the said church, by indenture or indentures sealed and delivered by the vicar of the church for the time being, to demise or lease, with the consent, in writing, of the bishop of the diocese, and the patron of the vicarage, for the time being, all or any parts of the glebe lands described in the schedule to the act, for any term or number of years not exceeding ninety-nine years in possession, unto any person or persons who should be willing to build upon the glebe lands, or to repair or improve the future houses or buildings to be erected thereon, or to erect or build any house or houses or other buildings in lieu and stead thereof, so as there should be reserved by every such lease or demise the best yearly rent that could be reasonably obtained for the premises therein comprised, payable, half-yearly or oftener, to the party making such [394] lease or demise, and his successors, and so as every such lease or demise be made without taking any sum, or other thing, by way of fine (except as in the act is excepted); that the petitioner *Edward Smyth* was the vicar of the church of *Camberwell*, and, in pursuance of the act, had agreed with *Henry George* to grant a lease of part of the premises described in the schedule to the act; and that the lunatic was patron of the vicarage.

The petition prayed a reference to the Master, to inquire and certify, whether it would be fit and proper that the petitioners, as committees of the estate of the lunatic, and on his behalf, should consent to a lease to be granted to *H. George*, of part of the premises described in the schedule in the act of Parliament; and also a reference to inquire and certify, from time to time, whether it would be fit

and proper that the petitioners, as the committees for the time being of the lunatic's estate, should consent to any lease to be granted in pursuance of the act of Parliament, of all or any parts of the glebe lands described in the schedule thereto.

Sir *Samuel Romilly* for the petition. The design of the provision in the act was to prevent improvident leases by the vicar : the purpose for which it required the consent of the patron will be sufficiently secured by the consent of the committee, under the sanction of the Court.

The *Lord Chancellor* [Eldon]. Unless the act requiring the consent of the patron in writing authorizes the committee to consent for him, I cannot sanction a lease with the consent of the committee.

Order refused.

[395] VAUGHAN v. WORRALL. Nov. 7, 1817 ; July 24, 30, 1818.

Persons who, with the knowledge of the Plaintiff, had entered into a subscription to defray the costs of the suit, having been examined by the Plaintiff, the Defendant, on an application as soon as he obtained a knowledge of that fact, was permitted to exhibit new interrogatories to the witnesses for the purpose of proving it ; and a motion by the Plaintiff to discharge that order, or obtain leave for exhibiting new interrogatories, to prove the execution of releases to the former witnesses, and for re-examining the former witnesses on the former interrogatories, was refused, with costs.

The Plaintiffs, trustees under an act of parliament for building a new church at *Clifton*, entered into a parol agreement with the Defendant for the purchase of land on which the church might be built ; the bill prayed specific performance of that agreement ; and the only question was, whether the Plaintiffs had undertaken to cause a footpath which crossed the Defendant's grounds to be closed, the Plaintiffs insisting that the Defendant's solicitor abandoned that part of the agreement. The Defendant having filed his answer with despatch, a joint commission was issued for the examination of witnesses. Before publication passed, the Defendant discovered that witnesses examined on behalf of the Plaintiff had entered into a subscription to defray the expenses of the suit, and that *Osborn*, the Plaintiff's principal witness, was the solicitor in the cause, and had agreed to bestow his attendance and personal labour gratuitously, and to advance-£100 towards the cost.

On the motion of the Defendant (2 *Madd.* 322), the *Vice-Chancellor*, on the 22d of August 1817, pronounced the following order :—

" This Court doth order, that the said Defendant be at liberty to exhibit fresh interrogatories for the examination of *J. Osborn* and *T. Whippie*, two of the Plaintiff's witnesses, as to their being interested in the subject-matter of this suit ; and it is ordered, that the Plaintiffs be at liberty to cross-examine the said two witnesses, as to the said interrogatories only ; and, by consent, it is ordered, that the Defendant be at liberty to take out a new commission, for the purpose aforesaid, directed to the com-[396]-missioners named in the former commission ; but the said commission is to be at the expense of the Defendant." (Reg. Lib. B. 1816, fol. 1715.)

A motion was now made, on behalf of the Plaintiffs, before the *Lord Chancellor*, that the order of the 22d of August might be discharged, or " that the evidence given in this cause by *J. Osborn* and *T. Whippie*, named in the said order, might be suppressed, and that the Plaintiffs might be at liberty, on the execution of the commission thereby directed, to examine the said *J. Osborn* and *T. Whippie* to the several matters they have been previously examined to in this cause ; and for that purpose to exhibit, under the said commission, the first interrogatories exhibited on the part of the Plaintiffs under the former commission, and also to exhibit proper interrogatories to examine other witnesses to prove proper releases and discharges to the said *J. Osborn* and *T. Whippie*, from any thing which might affect their competency as witnesses in this cause."

Nov. 7, 1817. On this day Mr. *Leach* and Mr. *Wilbraham* were heard in support of the motion, and Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *C. Romilly* against it.

The *Lord Chancellor*, remarking that all the ancient forms of interrogatories included a question whether the witness was or not interested in the event of the suit ; and that such was the course of proceeding in every court where examination was conducted by written interrogatories ; and referring to the practice of purga-

[397]-tion in Scottish courts,(1) postponed judgment till he had read the order and the interrogatories. (From Mr. *Merivale's* notes.)

The case was again mentioned.

July 24, 1818. Mr. *Bell*, Mr. *Wetherell*, and Mr. *Wilbraham*, in support of the motion. No precedent can be produced of a re-examination to interest, after the commission has been closed, and the depositions returned. Objections to the competence of a witness are discouraged by the Court, and are therefore not permitted, if the proper opportunity, namely, the time when the witness is offered for examination, has been suffered to pass. It would be extremely dangerous to permit the party to reserve this objection till the effect of the examination is known. According to the ancient practice, by cross-examination to the merits, objections to competence are waived,—a point of familiar occurrence in tithe causes. If re-examination is allowed at all, it must be to the whole case; and the Court continually allows re-examination to the merits before publi[398]-cation; as, where depositions are suppressed because the interrogatories are leading,(2) or the depositions were produced to the commissioners ready prepared—*Shaw v. Lindsey* (15 *Ves.* 380); so in *Cholmondeley v. Clinton* (3 *Mer.* 81), the last case on the subject. The effect of the *Vice-Chancellor's* order is to deprive the Plaintiff of the witness's evidence. Should it appear that the witnesses were disqualified by interest at the time of the past examination, the Plaintiff may qualify them by releases, and will then, conformably to the practice at law, be entitled to a re-examination.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *C. Romilly*, against the motion. The order of the *Vice-Chancellor* was perfectly of course; it is the daily practice, after witnesses have been examined on interrogatories, to permit the exhibition of new interrogatories before their depositions have been published—*Harrison's Practice* (p. 273).

Liability to the costs of the suit is clearly an interest which disqualifies—*Phillips* on Evidence (ch. 5, sect. 1, p. 60); and the objection to the competence of the witness is not waved by cross-examination in ignorance of his interest in the suit; it is sufficient to object as soon as knowledge of that fact is obtained—*Needham v. Smith* (2 *Vern.* 463), *Scott v. Fenwick* (3 *Gwill.* 1255), *Perigal v. Nicholson* (*Wightw.* 64), *Moorhouse v. De Passau* (*Coop.* 300; 19 *Ves.* 433). The modern distinction is, that the proper time for examination to competence is before publication; but the exhibition of interrogatories to credit, is permitted after publication [399]—*Callaghan v. Rochfort* (3 *Atk.* 643), *Purcell v. M'Namara* (8 *Ves.* 324), *Wood v. Hammerton* (9 *Ves.* 145), *Carlos v. Brook* (10 *Ves.* 49), *Mill v. Mill* (12 *Ves.* 406), *Stokes v. M'Kerrall*.(3) By the present practice at law, the objection to competence prevails at whatever period of the examination it is discovered—*Phillips* on Evidence.(4)

The second object of this application, liberty to re-examine the witnesses after the execution of releases, requires authority. On principle it cannot succeed. The rules of law presume an influence from interest; the evidence given under that influence, could not be altered by the witness after he had received a release. Such a recantation would subject him to infamy at least, if not to other penalties of perjury. The cases of re-examination on the same interrogatories, are confined to instances in which the original examination is defective by reason of some accidental error—*Sandford v. Paul* (2 *Dick.* 750; 3 *Bro. C. C.* 370; 1 *Ves. Jun.* 398), *Rowley v. Ridley* (1 *Cox.* 281), *Kirk v. Kirk* (8 *Ves.* 280, 285; see *Bott v. Birch*, 5 *Madd.* 66).

The *Lord Chancellor* [*Eldon*]. There is no doubt that, of late years, courts of justice have struggled to convert objections to the competence of a witness into objections to credit (see *Lee Rep. Temp. Hardwicke*, 360; 1 *T. R.* 300; 3 *T. R.* 32); and recent decisions [400] (which, though it is difficult always to understand the grounds, are substantially right) establish this, that if the witness has no interest in the event of that cause, though his answer to the question may be evidence for or against him in another cause, that is not an objection to his competence; (5) but I have never known that doctrine applied to a case in which a bill has been filed in this Court, and the witnesses have engaged to pay the costs of the proceedings; there, neither the Plaintiff nor the witnesses could be otherwise than aware that they had an interest in the event of that suit.

It is said, that the commission having been returned, objections to competence are too late. The party may, indeed, waive the objection to competence; and in a case in which it is not made reasonably clear, that at the date of the examination of

the witness, the party had not a knowledge of the objection to competence, I should be inclined to hold that he has waived it ; but it is here alleged, that the Defendant was not, at the time of the examination, aware of the incompetence ; and in reply to the objection that he comes too late, the Defendant says, the moment it is discovered that a witness has an interest, his evidence is destroyed, and that being destroyed, and to be struck out, how is it to be restored at law or in equity ? I know not what is the practice of courts of law. When, after the witness has been cross-examined to the bone, on the last question it appears, that he has an interest in the suit, the judge must say, that no attention could be given to his evidence ; but whether they permit a release to be given, and the witness to be asked the general question, " Is all that you [401] have said to-day true ? " or the examination to be repeated, is that of which I am not informed. At a late period of my life, however, I certainly remember no such instance.

It is a novelty to me to hear it said, that if it appears that a witness was interested at the time of the examination, this Court knows any such practice as that, a release being given, the witness may then be re-examined. (*Callow v. Mince, Prec. in Cha.* 234 ; 2 *Vern.* 472.) I believe that that never was done in any well considered case. When, with knowledge that there might be an objection to the testimony, and not requiring on the one hand, or giving on the other, a release, the parties take their chance of interested testimony, it would lead to mischief beyond calculation, if they were permitted, should the objection transpire in the progress of the cause, to release and re-examine, when it is almost morally impossible that the witness should be relieved from the influence which previously prevailed in his mind. Such a practice would be still more dangerous in equity than at law, where the witness stands before a tribunal which knows all that he has said, and can sift his evidence. In equity, one deposition will be suppressed and the other divulged. That is, in my opinion, a material objection to suffering these witnesses to be re-examined.

It is nothing to allege that, on an issue, they would be examined : that is the course of the Court ; and they might be examined with reference to their depositions here. It is enough to say that practice sanctions that, and I know no practice which sanctions this. Unless I mention it to-morrow, you will consider the motion as refused.

[402] July 30. The *Lord Chancellor* [Eldon]. I take this to be a case in which the party who examined the witnesses knew at the time that they had an interest. Without prejudice therefore to the question, in a case where neither the Plaintiff nor the Defendant knew the fact of interest in the witness, my opinion is, that as I can find nothing in this Court analogous to the practice at law of giving a release to a witness to qualify him for re-examination, the party cannot re-examine these witnesses to the merits.

Motion refused with costs. (*Note* : On the re-examination before the master, of witnesses examined previously to the decree, see *Smith v. Graham*, 2 *Swans.* 264.)

(1) " All witnesses, before they are examined in the cause are purged of partial counsel, that is, they must depose, that they have no interest in the suit, nor have given advice how to conduct it ; that they have got neither bribe nor promise, nor have been instructed how to depose ; and that they bear no enmity to either of the parties. These, because they are the first questions put to a witness, are called *initialia testimonii*. Where a party can bring present proof of a witness's partial counsel, in any of the above particulars, he ought to offer it before the witness be sworn ; but, because such objection, if it cannot be instantly verified, will be no bar to the examination, law allows the party in that case, to protest for *reprobator*, before the witness is examined ; i.e. that he may be afterwards allowed to bring evidence of his enmity, or other inability." *Erskine*, Principles of the law of *Scotland*, book 4, tit. 2, s. 14.

(2) See *Spence v. Allen, Prec. in Cha.* 493 ; *Gilb. Rep. in Eq.* 150. Lord Arundell v. Pitt, Amb. 585. *Mentill v. Payne*, 3 *Anstr.* 923.

(3) 3 *Bro. C. C.* 228, and see *Russel v. Atkinson*, 2 *Dick.* 532. *Watmore v. Dickenson*, 2 *Ves. & Bea.* 267. *White v. Fussell*, 19 *Ves.* 127.

(4) *Cha.* 5, sect. 8, p. 130. *Cha.* 8, p. 267, 268. Compare Lord Lovat's trial, 18 *Howell, State Trials*, 596, 597. *Abrahams v. Bunn*, 4 *Burr.* 2251. *Turner v. Pearle*, 1 *T. R.* 717. *Howell v. Lock*, 2 *Campb.* 14.

(5) The distinction is between an interest in the question, and an interest in the event of the suit ; the latter alone disqualifies. 1 *T. R.* 302 ; 3 *T. R.* 36 ; 7 *T. R.* 603. *Phillips on Evidence*, cha. 5, sect. 1.

ANN PAXTON GEE, *Plaintiff*, and WILLIAM PRITCHARD and WILLIAM ANDERSON, *Defendants*. July 17, 28, [1818].

[See *Springhead Spinning Company v. Riley*, 1868, L. R. 6 Eq. 558; *Mulkern v. Ward*, 1872, L. R. 13 Eq. 621; *Prudential Assurance Company v. Knott*, 1875, L. R. 10 Ch. 145. See also, with note, *Pope v. Curl*, 1741, 2 Atk. 342.]

Letters written by the Plaintiff to the Defendant, having been returned by him, with a declaration that he did not consider himself entitled to retain them, the publication of copies taken before the return without the knowledge of the Plaintiff, was restrained by injunction, though represented by the Defendant as necessary for the vindication of his character. The jurisdiction to restrain the publication of letters is founded on a right of property in the writer.

The bill stated, that *William Gee*, late of *Beddington Park*, in the county of *Surrey*, deceased, the late husband of the Plaintiff, for many years before, and at the time of his death, resided in the mansion of *Beddington Park*; that the Plaintiff had not any issue [403] by *William Gee*, and after their marriage *William Gee* informed the Plaintiff, that there was a boy whom he maintained, and intended to educate and bring up, and that he was desirous that the boy should reside at *Beddington* during the vacations from school, and that he intended to educate him and procure him a living in the church or to place him in some other respectable situation in life; that the Plaintiff having great affection for her husband, and being desirous to comply with his wish in that respect, consented to receive the boy, whose name was *William Pritchard* (the Defendant, the Rev. *William Pritchard*), and he was accordingly brought to the house at *Beddington*, and spent his vacations there; that *Pritchard*, after that time, and while he remained at school, was brought to *Beddington*, as his home during the vacations, or times of recess from school, and after he quitted school, and was a student at the University of *Cambridge*, and until his marriage in the year 1810, he was permitted by *William Gee* and the Plaintiff, to return to and reside at *Beddington* as his home; that *William Gee*, by having *Pritchard* frequently at his house on such occasions, had, and showed great fondness for him, until some time before his death, and the Plaintiff also entertained a good opinion of *Pritchard*, and had great regard for him, which she often expressed to him by letters and otherwise, and she at all times paid him great attention, and shewed him great kindness.

The bill further stated, that *William Gee* died in July 1815, having first, by his will, divided his property between the Plaintiff and *Pritchard*, and made such provision for *Pritchard* therein as he thought proper and just; that, for many years during the time the Plaintiff was so acquainted with *Pritchard*, she was in the habit of writing letters to, and receiving letters from him, on various family and other subjects, some of them of a [404] private and confidential nature, and some as the Plaintiff believes, relating to his morals and conduct in life, and containing advice to him; that for some time past the Plaintiff had had great reason to be displeased and dissatisfied with *Pritchard* and his conduct, and in consequence thereof they had ceased to be on terms of friendship; and *Pritchard*, from resentment, as the Plaintiff believed, had threatened and intended to print and publish copies of the letters which were so written by the Plaintiff to him, or extracts therefrom; and wrote a letter to the Plaintiff, dated the 14th of May 1818, containing the following passage:—"My life, as far back as memory serves, more particularly from my first residence at *Beddington*, together with the grounds I had for being differently situated, viz. your professions contained in your letters, will be published in the middle of June."

The bill charged that *Pritchard* was proceeding to print and publish, or cause to be printed and published, the letters of the Plaintiff, or true copies or copy thereof, and extracts therefrom, and that he and the Defendant *Anderson* had caused public notice thereof to be given, by advertisement in the newspapers, and otherwise, and particularly in a newspaper called *The Morning Post*, on Friday the 9th of July, in the words following: "In the press, and speedily will be published, by *William Anderson*, bookseller, *Piccadilly*, 'The Adopted Son, or, Twenty Years at *Beddington*,' containing Memoirs of a Clergyman, written by himself, and interspersed with interesting correspondence"; and that *Anderson* was printing and about to publish the same, or some work in which the letters, or copies thereof, or extracts therefrom, were introduced.



The bill also charged, that the Plaintiff never consent-[405]-ed or agreed that the letters, or any of them, or any extracts or extract therefrom, should be published ; and, in answer to an alleged pretence of the Defendant *Pritchard*, that the letters were his private property, and that he was entitled to print and publish them, or to make such use of them as he might think proper, charged, that the letters were wholly written and composed by the Plaintiff, and were not the property of *Pritchard*, but of the Plaintiff, and that *Pritchard* had not even a joint, or partial, or any property whatever therein, and that *Pritchard*, if he ever had any interest in the letters, had parted with the same, for that he some time since sent to the Plaintiff a parcel of letters and papers, accompanied by a letter from him, stating, that the parcel contained the original letters which the Plaintiff had so written to him (the parcel of letters being then in the Plaintiff's possession) ; but the Plaintiff charged, that *Pritchard* before he sent to the Plaintiff the parcel of original letters, and without the consent of the Plaintiff, took, or caused to be taken, a copy thereof, from which copy so taken he intended to print and publish copies or extracts.

The bill further charged, that the Defendants were, or were to be, jointly interested in the profits, if any, which should be made or produced by the sale of the publication, or that *Anderson* had, or was to have, some joint interest or concern with *Pritchard* in the publishing and sale of the letters or work ; that the publication of the letters, by the Defendant, was a breach of private confidence, or violation of the right and interest of the Plaintiff therein, and was intended to wound her feelings, and could have no other effect.

The bill prayed, that the Defendants might be respectively restrained by injunction from printing or publishing the original letters, or any copies or copy of the original letters, so written by the Plaintiff, or any ex-[406]-tracts or extract therefrom, and might be decreed to deliver up to the Plaintiff, or to destroy, the original copy of the letters so taken or made by the Defendant *Pritchard*, and all printed and other copies thereof, or of any extracts therefrom, which they might respectively have in their possession or power.

The allegations of the bill being verified by affidavit, a motion was made for an injunction, which the *Lord Chancellor*, after inquiring for an instance of an injunction issued against the person to whom the letters were addressed, granted on the authority of *Thompson v. Stanhope* (*Amb.* 737).

"It was therefore prayed, that the Defendants may be respectively restrained, by the order or injunction of this Court, from printing or publishing the said original letters, or copies or copy of the original letters written by the Plaintiff, or extracts or extract ; which, upon hearing, &c., is ordered accordingly, until the Defendants shall appear to, and fully answer, the Plaintiff's bill, or this Court make other order to the contrary."

Reg. Lib. A. 1817, fol. 1819.

July 28. On this day a motion was made, on behalf of the Defendant, to dissolve the injunction.

The affidavit of the Defendant, in support of the motion, stated, that he was the natural son of *William Gee*, the late husband of the Plaintiff, and that about nineteen years ago, and when he was of the age of eleven years, he was, with the consent of the Plaintiff, and with her knowledge of the relationship between himself and Mr. [407] *Gee*, taken into Mr. *Gee's* house, and from that time till Mr. *Gee's* decease, was uniformly treated by him as his son, and was placed by him, and at his expense, under the tuition of a clergyman, who lived a few miles from *Beddington* Park, and during his vacations he went to, and resided at *Beddington* Park, as his proper home ; that in the year 1806 he was sent by Mr. *Gee* to *St. John's College, Cambridge*, where he was, by Mr. *Gee's* direction, entered at first as a pensioner, and afterwards as a fellow commoner ; and that during the whole time, from the period at which he was so received into Mr. *Gee's* house, until the time of his death, he was uniformly treated by Mr. *Gee* as his son, and with the greatest kindness and indulgence, and was introduced by him into the society in which Mr. *Gee* lived, which was of the first rank in the neighbourhood of his residence, and was always given to understand by Mr. *Gee*, that he was to be provided for by him, as if he had been his son by marriage, and therefore the Defendant conceived he should succeed to the bulk, or a large portion of his property, and that, in forming his acquaintance and connexion in the world, he was to act as having such expectations ; that from the time when he was so taken into the

house of Mr. *Gee*, until Mr. *Gee's* death, he was always treated and regarded by the Plaintiff as her adopted son, and she, during the whole of that time, declared the greatest love, and regard, and esteem for him, and wrote to him, and also to his wife, previous to and subsequent to their marriage, a great number of letters expressive of such sentiments, and the Defendant, at her invitation, always treated her as his mother, and called her by that name.

The affidavit further stated, that in the year 1815 Mr. *Gee* died, having, by his will, made some provision for the Defendant during the life of the Plaintiff, and having bequeathed the sum of £17,000 to the Defendant, or his [408] family, after the Plaintiff's death, provided she did not, by any deed or will, otherwise dispose thereof; that the provision made by the will, independent of the sum of £17,000, was very inadequate to the expectation Mr. *Gee* had held out to the Defendant; but that he was perfectly certain, that in making such inadequate provision, and also in making the bequest of £17,000 to the Defendant or his family, subject to alteration by the Plaintiff, Mr. *Gee* was fully persuaded, from the affectionate conduct and great regard exhibited by the Plaintiff to the Defendant, that the Defendant might safely depend for his future support on her affection; and that Mr. *Gee* wished to put it in the Plaintiff's power to evince, by something more than words, her affection and regard to the Defendant; that immediately after the decease of Mr. *Gee*, a great alteration took place in the conduct and deportment of the Plaintiff to the Defendant; and it was, by the direction of the Plaintiff, suggested to the Defendant within a few days after Mr. *Gee's* death, that the Defendant was no longer to call her by the name of mother, as circumstances were altered; and that she had for some time not only withdrawn her regard from the Defendant, but treated him with great contumely, and expressed herself concerning him in the most injurious and opprobrious terms; that the Defendant having, as well during the life of Mr. *Gee*, as since his decease, entertained such expectations as were authorized by the conduct and expressions of Mr. *Gee*, and of the Plaintiff herself, and having, in his intercourse with his neighbours and acquaintance, conducted himself as having such expectations, and having in his conversation occasionally alluded to the same, and especially having, upon his marriage, represented to his wife and her parents, that he had such expectations, the Plaintiff had, as the Defendant had been informed and believed, stated or represented [409]-ed, that neither herself nor Mr. *Gee* ever gave the Defendant any reason to entertain any such expectations, and that, therefore, the Defendant's representations in that respect were wholly without foundation, or to that effect: from which circumstance, and from the great influence with which the large property of the Plaintiff, in the country, and her great character invested her, doubts had been entertained of the Defendant's veracity in such his representations; that he had never committed any act to forfeit the regard and esteem of the Plaintiff, nor was there any thing in his moral or prudential conduct, or in his conduct to the Plaintiff, that could justify her withdrawing her regard and esteem from him, and treating him in the injurious manner above-mentioned; but notwithstanding, the Defendant found, that from the alteration in the behaviour of the Plaintiff towards him, reports and suspicions had prevailed in his neighbourhood, that the Defendant had been guilty of some gross act or acts of misconduct, or that he had acted without due deference to the Plaintiff, or Mr. *Gee*, and especially, that the Defendant's marriage was contrary to their wishes; whereas both the Plaintiff and Mr. *Gee*, at and long previously to the time when the Defendant's marriage took place, approved thereof, in the most unqualified terms.

The affidavit proceeded to state, that the Defendant was the rector of *Walton on the Hill*, and many of his parishioners were tenants of the Plaintiff; and from the alteration in the Plaintiff's behaviour to the Defendant, he found himself greatly hurt and lowered in the estimation of his parishioners, and felt it absolutely necessary to lay a statement of the circumstances of his case and conduct before the public, which, supported by the letters of the Plaintiff as necessary documents to authenticate the statement, he conceived to be the only means of [410] vindicating his character and conduct to his parishioners and acquaintance, and the noblemen and gentlemen with whom he had been in the habit of associating; and he accordingly had written and prepared such a statement, under the title mentioned in the bill, which, with the permission of the Court, he intended to publish and distribute

gratuitously, among his acquaintances and neighbours, but which he never intended should be sold, nor had he the least view to gain a profit on such publication; that he had therein no vindictive object nor motive of resentment, nor any wish to lay open or publish to the world any of the Plaintiff's secrets, or to wound her feelings, or to compel or induce her to comply with any applications made to her by the Defendant, nor any other object than the Defendant's own vindication; that the letters, and parts of letters, which he intended to publish, related solely to the Defendant and his wife, as connected with the Plaintiff and Mr. *Gee*; and that several of the facts before stated he could have supported, by inserting some of the Plaintiff's letters; but, in deference to the decision of the Court in granting the injunction, he had forbore so to do.

The farther affidavit of the Plaintiff, in opposition to the motion, stated, that *William Gee*, the late husband of the Plaintiff, and the reputed father of the Defendant *Pritchard*, by his will, among other things, gave to *Pritchard* the sum of £4000, which he had received, and also, during his life, the interest of the sum of £6000 (which he had also received from time to time), and after the Defendant's death he gave the £6000 for the benefit of the wife and children of the Defendant; and he also gave the sum of £17,000 to trustees, in trust, to pay the interest to the Plaintiff for her life, and after her death, to pay the principal to such persons, and in such manner as she should appoint; and if she made no appointment, [411] then, upon trust, to pay out of the dividends thereof an annuity of £100 to *H. S.* for her life, and subject thereto to pay the dividends to *Pritchard*, and after his death for the benefit of his wife and children.

The affidavit of the Plaintiff further stated, that she considered the provision so made by the will of Mr. *Gee*, compared with his fortune, an adequate provision for the Defendant, and as much as the Defendant had, or as Mr. *Gee* gave him, any reason to expect; that she believed the reason why Mr. *Gee* gave to her a power of disposing of the sum of £17,000 after her decease, was to give her a check upon his conduct, and to enable her to withhold all benefit thereof from the Defendant, if, by his conduct, he should not, in her opinion, entitle himself to the same, and that such power was not given to her to evince, by more than words, her regard to *Pritchard*; that *Pritchard* was never given to understand from her that he had reason to expect Mr. *Gee's* fortune, and that, in a letter written by him to her, so late as the 16th of *February*, he admitted the same; she denied that she had treated *Pritchard* with great contumely, or that she had expressed herself in any injurious and opprobrious terms concerning him; but she said, that having great reason to be displeased and dissatisfied with his conduct, she had expressed such her displeasure and dissatisfaction.

The affidavit proceeded to state, that since the death of Mr. *Gee*, the Plaintiff procured for the Defendant the presentation to the rectory of *Walton on the Hill*, of the annual value of about £400, of which he was then in possession as incumbent; and she had also, on his representation of having incumbered himself with debt, given to him the sum of £4500 to enable him to pay his debts, and had since given to him other large sums of money; [412] that *Pritchard* still continued to apply to her for money, and pressed her to allow him to receive the interest of the sum of £17,000, and to give up to him her life interest therein, with which she refused to comply.

The affidavit expressed her belief, that *Pritchard* had been induced to threaten to publish the letters which she had written to him, for the purpose of compelling or inducing her to comply with such application, and not of vindicating his character and conduct; that, on the 18th of *March*, she received a letter from him, addressed to her, whereby he expressed himself, amongst other things, as follows:—“I allude to the interest of the £17,000, which, if you will allow me, without further comment, to receive the interest of, at *S. W's.*, I shall give you no further uneasiness, either by my presence or by further application”; that the letter mentioned in the bill to have been written by *Pritchard*, and sent to her with the original letters which she had formerly written to him, was dated the 6th of *April* then last; and therein, after accusing himself of ingratitude to the Plaintiff, and apologizing to her for his past conduct, he begged her forgiveness, and disclaimed or abandoned all right to the letters, as being unworthy of the sentiments and expressions of kindness contained in them.

Mr. *Hart*, Mr. *Wetherell*, and Mr. *Sidebottom*, in support of the motion. This

injunction cannot be supported, except on the general principle, that the writer of a letter is entitled at any time to restrain the publication, and to recover the possession from the person to whom it was addressed. No such principle has ever been recognized in the jurisprudence of this country, and is negatived by the only [413] recent decision on this subject, *Lord and Lady Perceval v. Phipps* (2 Ves. & Beam. 19). In *Hudson's Treatise on the Court of Star Chamber* (2 Collect. Jurid. 1-239), no trace is found of any interference of that tribunal, by injunction or otherwise, on the subject of letters, unless the publication was libellous.

The *Lord Chancellor* [Eldon]. It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes; excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime—an exception arising from that peculiar jurisdiction of this Court.

Argument in support of the motion resumed.

An attempt will be made to sustain the injunction, on the ground that the publication of the letters will be painful to the feelings of the Plaintiff.

The *Lord Chancellor* [Eldon]. I will relieve you also from that argument. The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the Court.

Argument in support of the motion resumed.

The injunction then must rest on one of two grounds: [414] 1. That the Plaintiff possesses, in the letters, a property either general or literary; 2. That the publication of them is a breach of trust.

It will be difficult to establish that letters may be the subject of literary property. The cases of *Pope v. Curl* (2 Atk. 342), and *Thompson v. Stanhope* (Amb. 737), render it doubtful to what extent the Court recognizes the doctrine of property in letters. Thus *Pliny's* letter are said to have been written or revised for publication. (*Plin. Epist. l. 1, ep. 1.*)

The *Lord Chancellor* [Eldon]. My predecessors did not inquire whether the intention of the writer was or was not directed to publication. The difficulty which I have felt in all these cases is this: If I had written a letter on the subject of an individual, for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord *Hardwicke* and Lord *Apsley*. The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot. (1)

[415] I understand the *Vice Chancellor*, in the case of *Lord and Lady Perceval v. Phipps* (2 Ves. & Beam. 19), not to have denied *Lady Perceval's* property in the letters, but to have inferred, from the circumstances, that she had authorized, and for that reason could not complain of, the publication.

Argument in support of the motion resumed.

Letters between public functionaries on public business, or between private individuals on private business, where the nature of the subject discussed made it evident that the correspondence could not be designed for publication, may constitute an exception.

The *Lord Chancellor* [Eldon]. Are the cases which establish the jurisdiction founded in a right to restore the property, or to restrain the publication? I think that the decisions represent the property as qualified in some respects; that by sending the letter, the writer had given, for the purpose of reading, and, in some cases, of keeping it, a property to the person to whom the letter was addressed, yet, that the gift was so restrained, that *ultra* the purposes for which the letter was sent,

the property was in the sender. If that is the principle, it is immaterial whether the publication is for the purpose of profit or not. If for profit, the party is then selling, if not for profit, he is giving, that, a portion of which belongs to the writer. I doubt [416] whether the Court has proceeded so far as to decree the restoration of letters; for the principle on which it interferes recognizes a joint property in the writer and the person to whom they are addressed.

Argument in support of the motion resumed.

It is clear that the Defendant was entitled to retain the letters, and retaining, to read and show them to his friends or to strangers. These modes of publication there is no pretence for restraining: upon what principle then can the publication by printing be restrained? An equity, or *jus proprietatis*, in the Plaintiff, must apply equally to every mode of publication, and, confessedly, not authorising the restraint of some modes, cannot by any rational distinction authorise the restraint of any mode. The argument is the same, whether the supposed right of the Plaintiff is founded in property or breach of confidence.

The *Lord Chancellor* [Eldon]. Does the common injunction ever go so far? When the Court enjoins a Defendant from publishing the book of another, has it ever restrained him from reading it, or showing it to his friends? Such an injunction will not prevent the Defendant from carrying the book to a reading-room, or reciting it in public company; (2) but is that a reason for not restraining publication? The usage limits the extent of the jurisdiction.

Argument in support of the motion resumed.

Admitting that the right of property in the person receiving the letter is qualified, the question whether that right of property includes a right of publication must depend on the circumstances of each case. Whenever the writer is entitled to the restoration of the letter, the party from whom he is entitled to recover it can have no right of publication. The exclusive property in the manuscript includes every right of using it, and, among other uses, for the purpose of publication. But where the correspondent is entitled to retain the manuscript, great difficulty occurs in restricting his right of publication.

In this case the Defendant was unquestionably entitled to retain the letters; and he is now entitled to publish them for the vindication of his character. The cases of *Pope v. Curl*, and *Thompson v. Stanhope*, proceed, on the supposition, that the person in possession of the letters was the depositary only, and not the proprietor; but whenever the person to whom they are sent is entitled to retain them, being proprietor of the substance on which they are written, he is proprietor of their contents, and may therefore publish them. The injunction in ——— *v. Eaton* (13 April 1813. 2 *Ves. & Beam.* 23, 27) was granted on the fact of purchase of the letters by the writer from the Defendant.

On the ground of breach of trust, of which there is no evidence, the injunction could not be maintained; this Court interferes with publications only as the subject of property—*Southey v. Sherwood* (2 *Mer.* 435). The injunction in the *Earl of Granard v. Dunkin* (1 *Ball & Beat.* 207) was founded on a right of property in the receiver of the letters.

The *Lord Chancellor* [Eldon]. The question is, what is the conduct of the Plaintiff, [418] which, by the Defendant's affidavit, is represented as his justification in the publication of the letters? If the Court possesses jurisdiction by reason of a right of property, and if the principle of the decision in *Lord and Lady Perceval v. Phipps* would require me to declare, that, notwithstanding that right of property, the Plaintiff's conduct had been such, that she was not entitled to the interference of the Court, the Defendant is at liberty to insist on either or both of those points; provided that he is not concluded by the act which *Lord Apsley* so strongly censured, of returning the originals and retaining copies. That act is particularly stated in the bill as an abandonment of property. If the Defendant had any right of property, it was in the originals. He has not averred that the letters will prove the statement in his affidavit, though that is to be inferred. The Defendant might destroy the letters (see 3 *Wooddeson Lectures*, 415), and so destroy the Plaintiff's expectation of profit from them.

Sir *Samuel Romilly* and Mr. *Roupell* for the injunction. It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property possesses such a right

of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication.(3) [419] It is not necessary that they should be written for profit: Dr. *Paley* having prepared sermons designed for gratuitous distribution among his parishioners, the Court held that his executors possessed a property in them, and, at their instance, interfered to restrain the publication by a bookseller. The question here is, whether the Defendant has established that he is about to publish these letters for purposes essential to justice? Without that proof he cannot avail himself of the decision in *Lord and Lady Perceval v. Phipps*, a decision which admits much remark. No such case is established by his affidavit, and for the purpose of establishing one, a course more effectual than any affidavit would have been the production of the intended publication. The publication, not of a simple narrative of facts, but of a novel, is an extraordinary expedient for the vindication of character.

The *Lord Chancellor* [Eldon]. The decision of the *Vice Chancellor* proceeded on the principle, that in that case the publication was necessary for the purposes of justice; the letter of the Defendant, written in *April*, is decisive, that the publication here is not necessary for those purposes. What occasion was there for the Defendant to inform the public, that he intended certain papers for distribution among his private friends?

Argument for the injunction resumed.

The present decision will constitute a most important precedent. If, on these affidavits, the injunction is dissolved, no man can be restrained from publishing the letters which he has received from another; all that will be necessary to authorize the publication, is a quarrel, and an assertion, that the disclosure is required for the vindication of his character. When the Defendant re-[420]-turned the originals, clandestinely retaining copies, he abandoned all right of property in the letters.

The *Lord Chancellor* [Eldon]. This case came originally before me on a motion made *ex parte* by the Plaintiff Mrs. *Gee*, the widow of the father of the Defendant, who is represented in the pleadings as his illegitimate son. The affidavit of the Defendant states his introduction in that character; that he was known and received as a son, and treated by his father and his wife with great kindness; the affidavit seems to intimate some dissatisfaction with the representation made in the bill, of the circumstances of his introduction; that is, perhaps, not very material, not a matter which much blends itself with the consideration that I must give to the subject: but his introduction is certainly represented differently in the bill and in his affidavit. It is stated, that the Plaintiff entertained a great kindness for him, and that she expressed that kindness by letters in the life of his father. I collect from the last affidavit, that Mr. *Gee* gave to the Defendant a legacy of £4000; the interest, for life, of £6000, devoting the principal of that sum for the benefit of his children; and that he gave to the Plaintiff the interest of £17,000 for her life, with a power, which, under the circumstances, appears to me not unfit, to appoint that sum, not by deed merely, but by deed or will; and I am bound to take it to be his pleasure, that she should have the power, during the whole course of her life, of judging to whom, at her death, it should devolve; an absolute power, of the exercise of which no person has any right to complain. The testator also declares, that if his widow does not think proper to make a different disposition, that sum shall go to the Defendant; but as, between the Defendant and the Plaintiff, the rule by which I am governed, [421] is the will of his father. I understand that it was the intention, that he should have the living which he now has, which was in the gift of Mr. *Gee's* brother, but not vacant at his death: the Plaintiff contends, that she in some sense obtained it for him; it is not going far to conjecture, that if she had opposed, it would not have been given to him. The Defendant had thus received £4000 from his father's bounty, and the interest of £6000, and had this contingent right in £17,000, with the prospect of the rectory.

The Plaintiff represents, that during many years she had addressed to the Defendant letters of a private and confidential nature; that she afterwards had reason to be dissatisfied with his conduct, and they had ceased to be on terms of friendship; and as evidence of his intention to publish the letters, her affidavit states the advertisement. The Defendant represents, that he neither did nor does intend to publish the letters for profit; and insists, that it is too hard a criticism to infer from the words, "to publish," after this explanation, that he must be understood to mean publication

for sale ; and yet I cannot but think, that the Defendant will, on reflection, admit, that if it was his intention merely to give these letters to his friends and relations, it was not prudent to announce his intention by advertisement. The advertisement thus held out to the public, though of a publication intended only for private circulation, has this effect, that those who see the publication know its nature, but those who saw only the advertisement, might have been led to believe, that there was something in the letters more to the disadvantage of those concerned, than they really contained ; and I cannot think this is a prudent course.

It has been said, that the bill contains no allegation of a right of property : but there is an express charge, that [422] by returning the originals, the Defendant *Pritchard* abandoned any right of property which he might have had in the letters. The Defendant *Anderson* has not filed any answer or affidavit ; but I am bound, by the affidavit of the Defendant *Pritchard*, to believe, that he did not intend to publish the letters for sale.

With reference to charges of wounding feelings, looking at the jurisdiction of the Court to be, if not entirely, mainly, relative to the question, whether the Plaintiff has or has not, property, I shall trouble myself no farther than by simply stating the circumstances of the case as they appear in the affidavits : if they prove a breach of trust, a violation of a pledge which has been given to the Plaintiff, concerning these letters, that is not the ground on which I profess to proceed ; but it is necessary to refer to this for the purpose of pointing out the extreme difference between this case and the case of *Lord and Lady Perceval v. Phipps*.

The argument of Mr. *Wetherell* has confirmed doubts which have often passed in my mind relative to the jurisdiction of this Court over the publication of letters ; but I profess this principle, that if I find doctrines settled for forty years together, I will not unsettle them. I have the opinion of Lord *Hardwicke* and of Lord *Apsley*, pronounced in cases of this nature, which I am unable to distinguish from the present. Those opinions have been acquiesced in without application to a higher court. If I am to be called to lend my assistance to unsettle them, on any doubts which I may entertain, I will lend it only when the parties bring them into question before the House of Lords.

The statement of the Defendant's affidavit I take to be true, as I must have taken his answer. I cannot trust myself with any such question, as whether Mr. *Gee* should [423] have left to him a larger fortune ; what were the expectations that he might form in consequence of what passed between him and his father, is a point on which I cannot enter. The provision made by the will is that which this Court is bound to say, as between the father and the son, must be considered proper. The Defendant may most honestly entertain an opinion that more was intended ; but when I see such a power given to the widow, I must understand that his father meant that, to the time of her death, her will should be free.

Supposing the affidavit of the Defendant to have stated, with a great deal more precision, the representations which seem to him to call in question his veracity, and in consequence of which he is under a belief that it becomes him to set himself right in the opinion of the world, the Plaintiff's representations, that the Defendant's marriage was disapproved by herself and her husband, and so as to all the rest ; it would have been a more welcome duty to have considered, first, Whether the Court has jurisdiction on this subject ; secondly, Whether the motives which the Defendant states to have led to this publication were so created by the Plaintiff's conduct, that I ought to follow the example of the *Vice Chancellor* in *Lord and Lady Perceval v. Phipps*, and to say, that, let it be ever so clear that the Plaintiff has either a sole or a joint property in the letters, the Court will not interfere between the parties ; but the affidavits state a transaction with regard to the letters, with no part of which am I acquainted, except what appears in the affidavits. Repeating that the testator had left £17,000 to the discretion of the Plaintiff, that she had given to the Defendant £4000 since the testator's death, and had, at least in her own judgment, been instrumental in obtaining the living which he now holds, her affidavit, asserting her husband's intention to intrust to her a con-[424]-troul on the Defendant's conduct (and I take the facts to be, that she had given to him various sums, and that he continued to press for money), proceeds to state, that the Defendant returned her letters, having first taken copies, and now threatens to publish them. Whether that is an act which, if it can be done, ought to be done, the Defendant is to

decide. I am to decide whether it can be done. If it is supposed, that by reading the letters any impression may be made on my mind different from that which I am about to state, I will forbear to state it, till I have read them ; otherwise I am now ready to proceed.

The counsel for the Defendant intimated, that they had read one of the letters and thought it unimportant.

The *Lord Chancellor* [Eldon]. I am of opinion, that the Plaintiff has a sufficient property in the original letters to authorise an injunction, unless she has by some act deprived herself of it. Laying out of the case much of what Mr. *Wetherell* has urged with so much ingenuity, I say only that though a letter is a subject of property, capable of being much more largely dealt with, in communication, than books, as, by reading to others, repeating passages, &c., yet the Court has never been alarmed out of the practice of granting injunctions relative to letters to the extent to which it grants them in the case of books, because persons may assemble others, and read and recite to them ; it is not deterred from giving that relief because it cannot give other relief more effectual.

In stating what Lord *Hardwicke* says on the subject, though I cannot at the moment refer to cases, I state that which, in cases, has been handed down as the law of [425] the Court. In *Pope v. Curl*, Lord *Hardwicke* went out of his way to state what he thought the doctrine on the subject of letters. Though the letters of eminent men, no one can suppose that they were all meant for publication ; there are many passages in *Swift's* letters which he would be unwilling to have published. Lord *Hardwicke* says, " Another objection has been made by the Defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver ; but I am of opinion that it is only a special property in the receiver : possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever to publish them to the world." If he had stopped there, doubt might have been entertained whether the receiver was not at liberty to publish them to the world, but he proceeds, " for, at most, the receiver has only a joint property with the writer." (2 *Atk.* 342.)

No one can read the case of *Thompson v. Stanhope* without seeing that this was understood at that time to be the doctrine of the Court. Publication was there advertised in *November*, and the application to the Court not made till *March*, and on that circumstance Lord *Apsley* proceeded in recommending the arrangement which he afterwards mentions : " The executors cannot be said to have given their consent, though his Lordship thought they would have done better if they had applied earlier, before the expense of printing was incurred." (*Amb.* 739, 740.) That is a strong part of the case. Those were letters of two classes, written by a father to his son ; one class relating to the characters of individuals. The communication being made by letter is *prima facie* evidence, that that is all the communication which, on the subject of those characters, the writer intends to make. So of what [426] relates to education : though they concern public characters, and a public subject—education, no one can maintain, that those discussions found in private letters gave to the person who received the letters a right to carry into public the opinions of the writer on those public characters, and the system of education. Lord *Apsley* therefore granted the injunction, observing, that the Defendant " did very ill in keeping copies of the characters, when Lord *Chesterfield* meant that they should be destroyed and forgotten." Lord *Apsley* also cites the case of Mr. *Forrester*, (4) which certainly does not apply to letters. I believe the parties came to a compromise.

The doctrine is thus laid down, following the principle of Lord *Hardwicke* : I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff ; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

Such is my opinion ; and it is not shaken by the case of *Lord and Lady Perceval v. Phipps*. I will not say that there may not be a case of exception, but if there is, the exception must be established on examination of the letters ; and I think that it will be extremely difficult to say where that distinction is to be found between pri-[427]-vate letters of one nature, and private letters of another nature. For the purposes



of public justice publicly administered, according to the established institutions of the country, the letters must always be produced ; I do not say that of justice administered by private hands ; nor do I say that there may not be a case, such as the *Vice Chancellor* thought the case before him, where the acts of the parties supply reasons for not interfering : but that differs most materially from this case. In *April* last, the Defendant having so much of property in these letters as belongs to the receiver, and of interest in them as possessor, thinks proper to return them to the person who has in them, as Lord *Hardwicke* says, a joint property, keeping copies of them without apprising her, and assigning such a reason as he assigns for the return. Now I say, that, if in the case before the *Vice Chancellor*, Lady *Perceval* had given to *Phipps* a right to publish her letters, this case is the converse of that ; and that the Defendant, if he previously had it, has renounced the right of publication.

On these grounds the injunction must be continued. Motion refused.

(1) "Equity is a roguish thing : for law we have a measure, know what to trust to ; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot ; what an uncertain measure would this be ! One Chancellor has a long foot, another a short foot, a third an indifferent foot ; 'tis the same thing in the Chancellor's conscience." *Selden*, Table Talk.

(2) Acting a dramatic composition on the stage, is not a publication, within stat. 8 Ann. c. 19 ; but injunctions have been granted to restrain acting as an invasion of copyright. *Morris v. Kelly*, 1 Jac. & Walk. 481.

(3) "At etiam literas quas me sibi misisse diceret, recitavit, homo et humanitatis expers, et vitæ communis ignarus. Quis enim unquam, qui paululum modo bonorum consuetudinem nosset, literas ad se ab amico missas, offensione aliqua interpo sita, in medium protulit, palamque recitavit ? Quid est aliud tollere a vita vitæ societatem, quam tollere amicorum colloquia absentium ? Quam multa joca solent esse in epistolis, quæ prolata si sint, inepta esse videantur ? Quam multa seria, neque tamen ullo modo divulganda ?" *Cic. Phil. ii.*

(4) "In the case of *Mr. Forrester v. Waller*, 13 June 1741, an injunction for printing the Plaintiff's notes, gotten surreptitiously without his consent, was granted." 4 Burr. 2331. In *Donaldson v. Beckett*, 2 Bro. P. C. ed. Toml. 129, is enumerated among other "injunctions for printing unpublished MSS. without licence from the author, 13 June 1741. *Forrester v. Waller*, for *Forrester's Reports*." *Id.* 138.

The following case is extracted from Mr. *Merivale's* MSS.

[428] CHARLES WHITTINGHAM, JOHN ARLESS, and JOHN POOLE, Plaintiffs ; THOMAS JONATHAN WOOLER and JOHN WELLS, Defendants. Dec. 4, 8, 1817.

The bill stated, that *Poole* composed, and was the author, and sole proprietor, of a farce called, "Who's Who ; or, The Double Imposture," the copy-right of which, on the 26th of November 1815, he sold to *Whittingham* and *Arless* for fourteen years (no formal assignment being executed, but the purchase-money being paid), and which, on the 30th of November, was published and sold by them, having been entered at Stationers' Hall. That the Defendants, printers and publishers in partnership, published a periodical work called *The Stage* ; in numbers XIII. and XIV. of which they inserted considerable portions of the farce, and threatened to publish the rest without license ; and that they sold many numbers, and had others in their possession ready for publication. The bill prayed an injunction against printing, selling, or publishing any other numbers, &c., or any work containing the whole, or any part of the farce ; an account of the several numbers of XIII. and XIV. which have been sold, and the expenses attending the same, and the several sums received by the Defendants in respect of such sales, and payment of what was due on the balance, waving penalties. On the 13th of December 1815, the following injunction was granted by the *Vice Chancellor*, on motion supported by affidavit : "This Court doth order, that an injunction be awarded against the said Defendants *T. J. Wooler* and *J. Wells*, to restrain them, and their respective servants, agents, and workmen, from printing, publishing, selling, or causing, to be printed, published, or sold, any numbers or number, copies or copy of numbers XIII. and

XIV. of volume III. of the said work or publication, called *The Stage* ; and also from selling, or causing to be sold, and from printing and publishing, or causing to be printed, published, or sold, any other numbers or number of the said work, or any work or publication containing copies, or the substance, of the whole, or any part or parts of the [429] said farce, called "Who's Who, or The Double Imposture," without the consent of the said Plaintiffs C. W. and J. A., until the said Defendants T. J. W. and J. W. shall fully answer the Plaintiff's bill, or this Court make other order to the contrary.

Reg. Lib. B. 1815, fol. 104.

The answer of *Wooler* denied partnership with *Wells* ; admitted publication, without licence, of divers parts of the farce, with some differences not merely colourable, but required for the purposes of criticism ; admitted sale of 160 copies, and 40 remaining unsold, when, being served with the injunction, he desisted from selling ; the receipts of the sale amounting to £2, 16s. 8d., and the expenses being equal to the profits ; stated, that *The Stage* was a periodical publication, appearing in numbers twice a-week, at threepence a number ; a critical work, partaking of the nature of a review and magazine, the object being to communicate theatrical information, announce plays for representation, criticise performances, review the pieces, and introduce leading scenes to notice ; and that, for the purpose of illustrating his remarks, it has been the custom of the Defendant to introduce the whole, or parts, of the pieces commented ; that, in Number X. an outline, or plot of the piece, was given ; in Numbers XI. and XII. no notice taken of it ; but in Number XIII., the Defendant being desirous of illustrating his remarks, introduced a small part of the third scene of act I., with a few slight unintentional alterations, and other small parts, with considerable intervals. The answer submitted, that the extracts were not designed nor calculated, to injure the sale of the original work, which consisted of forty pages ; the extracts occupying six or seven ; being disjointed, not continuous.

The bill having been dismissed against *Wells*, on the motion of the Plaintiffs, on this day the cause was heard at the Rolls.

Dec. 4. Mr. Hart, Mr. Bell, and Mr. Horne, for the Plaintiffs, insisted that they were entitled to a perpetual injunction and an account, citing *Macklin v Richardson* (Amb. 694).

[430] The Defendant, who argued his own case, cited *Dodsley v. Kinnersley* (Amb. 403).

The Master of the Rolls. I will myself compare the two works, in order to avoid the expense of a reference to the Master.

Dec. 8. The Master of the Rolls [Sir Wm. Grant]. The first thing to be noticed in this case is the circumstance that a cause of such a nature should have been brought at all to a hearing, as to which no instance of the sort can be now recollected to have ever before occurred.\* In the case of *Miller v. Taylor* (4 Burr. 2303, 2417), where every question relating to matters of copy-right was fully canvassed and investigated, Mr. Justice Willes is stated to have remarked, that for sixty years before that time there had not been more than two or three causes of this description brought to a hearing ; and the reason of this he states to be, that if the injunction is acquiesced in, it is seldom worth the Plaintiff's while to go on for the account. (4 Burr. 2324.) In the present case, the Defendant has never tried to get rid of the injunction which had been already obtained ; and yet it is thought of importance enough to bring the whole cause to a hearing. Of what moment it can be I am wholly at a loss to conceive. To perpetuate the injunction which has been obtained against the sale of these two threepenny numbers, is the first great purpose for which it is thought so indispensably necessary to call for this solemn interference of the Court. The other purpose, one of kindred importance, is to have an account of the profits arising from the sale, amounting, as sworn by the answer, to the sum of £2, 16s. 8d. Now, suppose the Plaintiffs were entitled to the whole, and not merely to a proportional part, of these profits, the amount is much below the sum for which this Court entertains jurisdiction.

With regard to the injunction that has been granted, I should think it of course to have granted it upon the original application ; for it was sworn that the Plaintiff's work had been inserted in that publication. But the Defendant has since given an explanation which alters the case. He says, that the publication

is in the nature of a magazine or review, consisting of criticisms, and extracts to serve as a foundation for the criticisms ; and, on a motion to dissolve the injunction, the question would have been, Whether the Defendant had transgressed certain allowed limits which are not easily defined ? I should think, in such a case, that he had not transgressed those limits. It may, perhaps, be fair enough to say, that if the Defendant had inserted in one number a criticism, and in a following number mere specimens, that would be the case of an unprotected plagiarism ; but here the Defendant has given no entire act or scene, but only broken and detached fragments of the piece in question.

The case of *Macklin v. Richardson* (Amb. 694) will be found directly adverse to this, when the principle is sufficiently adverted to ; and the judges who granted the injunction in that case would, in compliance with the same way of reasoning, have refused it in this. It was there argued, that it was not a case of abridgment or extract only, but professedly the work itself, one whole act of which was published, and the other intended to be so ; and Lord Commissioner *Smythe*, upon that ground, distinguished it from the case of *Dodsley v. Kinnersley* (Amb. 403), which was a case of extracts merely. Here the extracts in question amount to no more than six pages out of forty.

In *Wilkins v. Aikin* (17 Ves. 422) nothing was decided, but the case was sent to law, and the injunction was to be maintained in the meantime, with liberty to sell, the Defendant undertaking to account according to the event of the action. But to support a decree for a perpetual injunction, the Court requires that there shall be nothing like doubt in the case.

Upon the whole, I am of opinion that the bill must be dismissed with costs.  
Reg. Lib. B. 1817, fol. 141.

\* *Manley v. Owen*, 8th April 1755, 4 Burr. 2329, was brought to a hearing, and a perpetual injunction decreed. 13 Ves. 502. The case of *Gay's* works, in 1737, is mentioned as one in which the injunction was made perpetual. 1 Bl. 305. And in *Dodsley v. Kinnersley*, Amb. 403, the cause was heard, and the bill dismissed.

[432] MARSHALL v. HOLLOWAY. Feb. 28, March 7, 10, May 26, 30, July 1, 4, 1818 ; April 20, 1820.

[See *Ferrand v. Wilson*, 1845, 4 Hare, 377. Followed, *Christie v. Gosling*, 1866, L. R. 1 H. L. 298. See *Holloway v. Webber*, 1868, L. R. 6 Eq. 523 ; *Martelli v. Holloway*, 1872, L. R. 5 H. L. 542. Followed, *Browne v. Collins*, 1872, 21 W. R. 222. See *Tewart v. Lawson*, 1874, L. R. 18 Eq. 495.]

Devise and bequest of real and personal estate on trust, to invest the rents and profits, and annual proceeds, while any person beneficially interested in the real and personal estate, by virtue of trusts afterwards declared, should be under 21, for the purpose of accumulation ; and, subject thereto, in trust for the eldest son then living of the testator's daughter C., for life ; remainder to his first and other sons, in tail, with like remainder to the other living sons of C. ; with remainder to the eldest living daughter of C., for life ; remainder to her first and other sons in tail, with like remainder to the other living daughters of C. ; remainder to every other son of C., in tail ; remainder to the daughters of the testator's eldest grandson ; with remainder to the daughters of his other living grandsons ; remainder to the daughters of his eldest granddaughter, as tenants in common in tail, with like remainder to the daughters of his other living granddaughters ; remainder to the daughters of C., as tenants in common in tail, with cross-remainders in tail : and an ultimate limitation to the testator's heir and next of kin ; with a proviso, that such persons as should be entitled to an estate in tail in the real estate should not be absolutely entitled to the personal estate before 21, which should, in the mean time, be subject to the trusts before declared : the eldest grandson, an infant, takes a vested estate for life ; the trust of accumulation is void, and the infant entitled to maintenance. Prospective and retrospective allowance to trustee for trouble.

By his will, dated the 2d of September 1813, *Thomas Holloway*, after some pecuniary legacies, devised and bequeathed all his real and personal estate to  
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*S. Marshall, V. Lawes, and F. Croft*, their heirs, executors, and administrators, upon trust, to convert his personal estate into money; and after payment of his debts and legacies, "to lay out and invest, in their names, the clear surplus monies arising from my personal estate in the purchase of stock in some of the government or parliamentary funds, or upon real securities in *England*; and, in like manner, to lay out and invest the dividends, interest, and annual proceeds of such stocks and securities, and the rest of my personal estate, and also the clear yearly rents and profits of my real estates, from time to time, as, and when, and so often, and during all such times, as any person or persons beneficially interested in, or entitled to, any real and personal estates, under the trusts hereinafter declared thereof shall be under the age of twenty-one years, adding all such investments to my personal estate, in order to accumulate the same; and upon further trust, as, and when each and every of my grandchildren, who shall not become entitled to my real and [433] personal estates, or some part or share thereof, under the trusts hereinafter declared, shall attain the age of twenty-one years, to raise and pay out of my personal estate, to each and every such grandchild not so entitled, the sum of £1000; and, subject to the trusts hereinbefore declared, as, to, for, and concerning all my freehold, copyhold, and leasehold, and real and personal estates"; and the stocks and securities to be purchased as aforesaid, upon trust, for the eldest son, then living of his daughter *Catherine*, then of the age of five years, during his life; and from and after his decease, upon trust, for the first and every other son of his body, lawfully to be begotten, and the heirs of their bodies, with like remainder to his second and third (who was the youngest then living) grandsons; and in failure of such issue, upon trust, for his granddaughter, the eldest daughter of his daughter *Catherine*, during her life: and from and after her decease, in trust, for her first and every other son, and the heirs of their bodies, with like remainder to his second and third (or youngest living) granddaughter; and on failure of such issue, in trust, for all and every other the son and sons of his daughter *Catherine*, lawfully begotten, successively, according to seniority, and the heirs of their respective bodies; and on failure of such issue, upon trust, for all and every the daughter and daughters of his eldest grandson, as tenants in common, and the heirs of their respective bodies, with benefit of survivorship, with like remainders to the daughters of his second and youngest grandsons; and on failure of such issue, upon trust, for all and every the daughter and daughters of his eldest granddaughter, as tenants in common, and the heirs of their respective bodies, with benefit of survivorship, with like remainders to the daughters of his second and youngest granddaughters; and "in failure of such issue, upon trust, for all and every other the daughter and daughters of my said daughter *Catherine*, lawfully begotten, or to [434] be begotten, and hereafter to be born, if more than one, as tenants in common, and the heirs of their respective bodies; and failing issue of any such after-born daughter or daughters, then, as to her or their share or shares, upon trust, for the other daughter and daughters of my said daughter *Catherine*, hereafter to be born, if more than one, as tenants in common, and the heirs of their respective bodies; and in failure of such issue, upon trust, for my right heirs and next of kin, according to the nature and tenure of the said trust estates, respectively: Provided always, and I declare it to be my will and meaning, that such person or persons as shall, under this my will, be entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estates until he, she, or they, respectively, shall attain the age of twenty-one years; and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate tail in possession in my real estate, under the trusts aforesaid; and, in the mean time, the said leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof, notwithstanding any thing hereinbefore contained to the contrary."

The will then directed, that the testator's grandchildren, and every person who should become entitled to the possession, or the receipt of the rents and profits, of his real and personal estates, should, within a year after attaining the age of twenty-one years and so becoming entitled, assume the surname and arms of *Holloway*; and empowered the trustees to renew the leases of the leasehold estates, and the several tenants for life, when they attained the age of twenty-one years, and became actually entitled to the possession of the estates or receipt of the rents, to grant leases. By three codicils the testator devised property purchased since the date of the will upon the same trusts, and bequeathed some legacies.

The bill filed by *S. Marshall* and *V. Lawes* stated the death of the testator on the 22d of January 1816, leaving *Ann Holloway*, his widow, *Catherine Martelli* (wife of *Horatio Martelli*), his only child and heiress-at-law, and next of kin, and *Charlotte Ann Martelli*, *Anna Isabella Martelli*, *Catherine Ansley Martelli*, *Horatio Francis Kingsford Martelli*, *Charles Henry Ansley Martelli*, *Thomas Chessher Martelli*, of the respective ages of seventeen, fifteen, fourteen, nine, five, and three years, and *Mary Anne Martelli* (born after the date of the will), his grandchildren; and the birth of *Elizabeth Martelli*, another daughter of *Horatio* and *Catherine Martelli*, since the testator's death.

The bill farther stating that the Defendant *Faithful Croft* declined to prove the will, or act as trustee, and, being the person best acquainted with the testator's affairs, had been employed by the Plaintiffs as their agent, prayed that the Defendants might respectively set forth the rights and interests which they claimed in the real and personal estate of the testator, and that the will and codicils of the testator might be established, and the trusts thereof performed and carried into execution, and that the rights of the several parties in his real and personal estate might be ascertained, and that the Plaintiffs might be indemnified in carrying into execution the trusts of the will and codicils, respectively, the Plaintiffs offering to account for the personal estate and rents possessed by them, and to act in the execution of the trusts of the will, on being indemnified; and in case the Court should be of opinion that the Defendant *Faithful Croft* ought to be discharged from being a trustee, then that proper directions might be given for that purpose, and for his conveying or re-[436]-leasing the testator's real estates, and for ascertaining the compensation to be made to him for his time and trouble in the conduct of the testator's affairs.

Feb. 28, March 7, 10. A petition was presented for an allowance for maintenance of the infant children of Mrs. *Martelli*.

Mr. *Hart*, Mr. *Roupel*, and Mr. *Raithby*, in support of the petition.

The Lord Chancellor [Eldon]. The Court has never gone farther than this, that though the words of the will do not authorise the application of interest to the maintenance of the infants, yet if it can collect before it all the individuals who may be entitled to the fund, so as to make to each a compensation for taking from him part, it will grant an allowance for maintenance; but if the will contains successive limitations under which persons not in being may become entitled, it is not sufficient that all the parties then living, presumptively entitled, are before the Court, for none of the living may be the parties eventually entitled to the enjoyment of the property. In such a case, the order would be, in effect, to give for the maintenance of one person the property of another.(1)

May 26, 30. A question arising at the hearing, what party should [437] begin, the Lord Chancellor intimated that it was incumbent on those who claimed under the will to proceed to establish their right.

Sir *Arthur Piggot*, Mr. *Preston*, and Mr. *Maddock*, for the eldest grandson of the testator.

1. The estate of the eldest son is vested.
2. The proviso for accumulation is void.
3. The eldest grandson, as tenant of the first vested estate, is entitled to the interest and rents.

If accumulation is directed during a period tending to a perpetuity, that direction, not the gift to which it is annexed, is void. No difficulty can arise as to the realty: an estate for life is clearly vested in the grandson, subject to the clause of accumulation.

With regard to the personalty, the will contains two inconsistent clauses; one giving the property, the other directing accumulation. The Court will reject the direction as far as it is repugnant to the gift. It is not necessary, on behalf of the first taker, to argue the effect of the proviso with regard to other persons. The will contains nothing to extend the accumulation, as to him, beyond twenty-one; at that age it ceases, during the remainder of his life.

The latter clause, on which the heir and next of kin rely, does not contain words to take from the tenant for life the estate already bequeathed to him. The case of *Lord Southampton v. The Marquess of Hertford* (2 *Ves. & Bea.* 54) closely resembles the present; the direction of accumulation there being void at common law, not under the statute (39 & 40 *Geo.* 3, c. 98), [438] the Court could not divide it into portions, but held it as one entire gift, void *in toto*.

Under the statute, so far as the trust of accumulation is void, the Court will reject it, not impeaching the remainder. *Griffiths v. Vere* (9 Ves. 127), *Longton v. Simson* (12 Ves. 295). In *Tregonwell v. Sydenham* (3 Dow. 194), the accumulation was established for the benefit of the heir, as a resulting trust. In this case, if the direction of accumulation is good, it must be for the benefit of the tenant for life; but we contend that the direction is void. The gift is distinct from the proviso, which is superadded; being separate and independent, it is governed by the rule in *Mary Portington's case* (10 Co. 35), that a subsequent condition or limitation, when repugnant, is void.

At what time, according to the language of the testator, is this proviso of accumulation to cease? The persons claiming in an opposite interest must mark out clear boundaries. A decision in favour of the next of kin must define the time for which the accumulation shall continue for their benefit. In *Tregonwell v. Sydenham*, the time was defined by a limited sum of money. The distinction between that case and *Lord Southampton v. The Marquess of Hertford* is, that in the latter, no period could be assigned during which the accumulation was to continue for the benefit of the heir. According to the argument of the heir, the accumulation is good, but the trust of the accumulation is void.

The direction for accumulation does not suspend the vesting in the tenant for life. It cannot be contended that the whole gift is void; that proposition would be contrary to *Carter v. Barnardiston* (1 P. W. 505), and other cases, in which the inheritance is given after the payment of debts: such gifts are construed to be vested remainders, subject to prior chattel interests. The estate of the tenant for life is not avoided by the trust for accumulation; and that trust being void, and the gift to him good, there is nothing to deprive him of the rents and profits. We conclude that the estate of the tenant for life is not impeached by the trusts, and that he is entitled to the rents.

Mr. Trower and Mr. Wetherell, for the younger children.

Sir Samuel Romilly, Mr. Bell, Mr. Raithby, and Mr. Sugden, for Mrs. Martelli, heiress-at-law and next of kin of the testator; and Mr. Lynch, for Mrs. Holloway.

The intention of the testator is unequivocal; the question is, whether that intention is conformable to law.

On the clause of accumulation, this case cannot be distinguished from *Lord Southampton v. The Marquess of Hertford*. The period during which the accumulation may continue is indefinite. The question in these cases is, whether accumulation may not by possibility, not whether it must not necessarily, extend beyond the limit prescribed by law.

It is a general rule, that trusts for accumulation and gifts by limitation, are subject to the same principles; that a gift to a class of persons, some capable, and some, at the death of the testator, incapable, though there is only a possibility of their existence, is void in the whole, [440] the clause being entire. See *v. Audley* (1 Cox, 324), and (to omit intermediate cases) *Leake v. Robinson* (2 Mer. 363), establish this proposition. Some passages in the judgment, in the latter case, show the difficulty to be encountered in modelling this will (p. 388, 389).

Some of the provisions of the statute 39 & 40 Geo. 3, c. 98 involve great difficulty. The statute was designed merely to reduce within certain bounds the power of accumulation as it existed at the common law, and was co-extensive with the power of making gifts by limitation; but not to give validity to any provision previously void. The clauses in *Griffith v. Vere*, and *Longton v. Simson* would have been good in the whole, if that act had not passed; and the Court was of opinion, that they remained good so far as they were not impeached by it: but in cases which contravene the rule of law against perpetuities, as *Lord Southampton v. The Marquess of Hertford*, the whole is bad. In that respect there is no distinction between this case and the cases in which limitations, including persons capable and persons incapable, are void, as well with regard to the first as to the last. *Routledge v. Dorril* (2 Ves. Sen. 357), *Cambridge v. Rous* (8 Ves. 12). Of the personal estate, it is said, there is a gift subject to an illegal proviso; but, in fact, nothing is given. The persons described are not to have either the real estate, or the corpus of the personal estate, or the rents and dividends, until they attain twenty-one. By the proviso, a minor tenant in tail has no interest in either the principal or the rents and dividends of this property.

No property vests either in enjoyment or in right. [441] The Court cannot sever the intention, and, recognizing one part as valid, reject another part as void. The intention is clear, that no person shall derive any benefit from the estate before twenty-one. The proviso gives a direction and operation to every clause of the will. To omit it, and execute the rest of the will, would be to contradict the intention. The gift of £1000 to each of the grandchildren, &c., is clearly contingent, and evinces the testator's design, that no devisee or legatee should take any benefit before he attained twenty-one. The words, "subject to the trusts," mean after performance of them. The proviso is part of the gift. The leases granted by the trustees, and the after-purchased lands given by the codicils, are declared to be subject to all the trusts.

The period at which the testator's name and arms are to be assumed, one year after the devisee attains twenty-one, ascertains the period at which he meant the gift to vest. Had he intended an immediate gift he would have directed an immediate assumption of the name.

There being two distinct intentions, one that the property should accumulate during minority, the other that no minor should take an absolute interest, the latter applying to those taking by descent as well as by purchase, the limits prescribed by law are exceeded. With regard to the real estates, the manifest intent of the testator was, that no person should have any interest, either in the capital or the profits, till he attained twenty-one; the gift, therefore, contravenes the rules of law. There is not any devise till the grandson attains twenty-one; and therefore a trust results for the heir.

The Court cannot separate the gifts from the proviso. [442] All the limitations of the real estate, after the first estate for life, are void. The gifts to unborn persons were not designed to take effect till after the performance of a previous trust, which was too remote and void. All limitations, after a void limitation, are void—*Proctor v. Bishop of Bath and Wells* (2 H. Bl. 358). In *Lord Southampton v. The Marquess of Hertford*, this point was not discussed, because the Marquess of Hertford would have been entitled as heir in the alternate event; but on the subject of accumulation the late *Master of the Rolls* seems to have entertained opinions not consonant to prior authorities. *Baker v. Hall* (12 Ves. 479), is opposed to *Grosvenor v. Hallum* (Amb. 463), cited in *Tregonwell v. Sydenham*. The life estate may be good; but the direction to accumulate being void, the accumulations belong to the heir or next of kin.

The argument, that the personal estate is not vested, is enforced by the direction, that interest shall be accumulated till twenty-one. A gift of maintenance is not equivalent to a gift of interest for the purpose of vesting the fund—*Pulsford v. Hunter* (3 Bro. C. C. 416), *Hanson v. Graham* (6 Ves. 239, see p. 249), *Leake v. Robinson*. Upon all the authorities the gift is contingent—*May v. Wood* (3 Bro. C. C. 471), *Hanson v. Graham*, *Batsford v. Kebble* (3 Ves. 363), *Sansbury v. Read* (12 Ves. 76), *Booth v. Booth* (4 Ves. 399), *Mackell v. Winter* (3 Ves. 536). In no case has a gift when, or if, the donee should attain a particular age, been held to be vested, without other circumstances, as an ulterior gift if the first donee should die under twenty-one, which renders the condition subsequent instead of precedent—*Bromfield v. Crowder* (1 N. R. 313), *Boraston's case* (3 Co. 19), *Johnson and Bellamy's case* (2 Leon. 36), *Grant's case* (cit. 10 Co. 50 a; Sir Thomas Raymond, 150).

Mr. Preston in reply. The gift to the eldest son was present and immediate, and gave a vested interest, and carried with it the right to the profits not effectually given away by the clause of accumulation: the context affords that construction. In *Jee v. Audley*, and in *Leake v. Robinson*, the objection was to the validity of the gift itself. The gifts were in those cases suspended for a longer period than the law allows. In this instance the gift is good, though the accumulations aim at objects which cannot be accomplished under the provisions of the statute. A life estate may be valid, although ulterior limitations may be too remote and void; and the heir, or the next of kin, has not any interest in the accumulations, even if the trust for accumulation be valid.

In *Hopkins v. Hopkins* (1 Atk. 581; Ca. Temp. Talb. 44; 1 Ves. Sen. 268; Butler, Co. Litt. 271 b, n. 1), there was a like clause of accumulation, and it prevailed; and this case cannot be distinguished from that. In *Lord Southampton v. The*

*Marquess of Hertford*, the fund of accumulation was entire ; here it consists of successive portions ; and the direction may therefore be sustained as to the part which is good. A gift at common law from three years to three years, for ten years, is not void, but would be apportioned and sustained for nine years ; and, in this view of the case, the gift must prevail, and the trust for accumulation must fail.

[444] The trust for accumulation is a mere prior chattel interest, and does not suspend the right to a vested interest. And as the trust for accumulation is for objects which are too remote, that trust is void as contravening the enactments of the law. The consequence is, that the title of the grandson is in the same state as if there had not been any trust for accumulation, or that trust had determined.

In all cases of conditions or limitations over, which are repugnant to the estate to which the condition or collateral limitation is annexed, the gift remains in full force, although the law denies effect to the condition, or to the collateral limitation ; and the law favours the vesting of interests. Indeed, its primary object is to give the benefit of the rents to the person who, for the time being, has the first vested estate. It is not of any importance that the testator has attempted to exclude the grandson : his title is by the rules of law, not the intention of the testator. It was the object of the legislature, in passing the statute, to defeat such an intention.

The words "from and after the performance of the trusts," do not postpone the vesting ; they merely subject the life estate to the prior trusts. The language allows the estate to vest, subject to the prior interests. That point was decided in *Carter v. Barnardiston*.

Whenever a charge is too remote, or is void because given to a charity, or an object which is incapable, it fails for the benefit of the owner of the estate. So a life estate may be valid, although subsequent limitations may be too remote, and for that reason void, as in *Brudenell v. Elwes* (1 East, 442 ; 7 Ves. 382).

[445] During the argument, the *Lord Chancellor* remarked, that if the case were within the statute, the excess would be corrected ; that there was a material difference between the effect of the proviso, and the accumulation which must take place during the minority of the tenant for life, the will designing not to give an absolute, but a life, interest in the accumulation ; that the two clauses together might amount to this, that during the minority of every person entitled (whether tenant for life, or in tail), there should be accumulation ; that a tenant in tail should not acquire an absolute interest till he attained majority, but should take subject to the previous trusts—the last clause being confined to tenants in tail only, because a declaration that a tenant for life should not be absolutely entitled was unnecessary ; that the circumstance, that, in *Lord Southampton v. The Marquess of Hertford*, a term of one thousand years was created, subject to trusts of accumulation to be executed during different periods of the term, would not materially distinguish that case from the present, in which the trusts might extend beyond the period limited by law ; that, under the clause declaring that tenants in tail should not be absolutely entitled, a person might, in the intention of the testator, be tenant in tail in possession, without being entitled to take the rents.

At the close of the argument, his Lordship proceeded as follows :—

The *Lord Chancellor* [Eldon]. I shall not decide this case without referring to the authorities cited, but I have a strong inclination of opinion that it is impossible to declare that, at present, either the heir or the next of kin have any claim. The testator undoubtedly meant, not only to exclude his heir and [446] next of kin from all interest, but to render it impossible, that, during the minority of the grandchild, any part of this property should be applied even for the benefit of those for whom he eventually designed the beneficial enjoyment. Whatever may be thought of the morality of that intention, the question to be decided is, what is the law ? The scheme of the will is this ; having first given pecuniary legacies, the testator then, in one clause, devises and bequeaths all his property, of whatever nature (there can be no doubt, however, that the terms of a single clause may have very different effects, according to the nature of the property on which it operates), in trust to sell, &c., and to retain and pay the pecuniary legacies before bequeathed. He then proposes to create an accumulation fund during the minority of the persons whom he describes, expressing, in terms perfectly clear, that a person under the age of twenty-one years was beneficially interested or entitled to the estate devised and bequeathed ; and undoubtedly this is a clause of repetition which directs the accumu-



lation to take place during the minority of *all* the persons who should become entitled.

It has been argued that the legacies of £1000 are contingent ; supposing that to be so, it will not prove that there were no vested interests in the *corpus* of the estate. The trust to accumulate for this purpose will not, more than a trust for the payment of debts, prevent the vesting. This is a devise of the real and personal estate to trustees, who, subject to accumulation for a limited period, are, by the effect of this will, at the death of the testator, to stand seized and possessed for persons described. How can it be said that they are not to stand so seized and possessed, when the testator expressly says they are, and takes notice that the *cestui que trust* is only of the age of five years ?

[447] We all know that, with respect to freehold estates given to a person and the heirs of his body, he is tenant in tail ; but as personalty so given does not go to the heir, the old rule of law, possibly to serve the intention, is, that the donee, under the same limitation which gives the real estate to the heir of his body, takes it absolutely. The testator proceeds to limit to unborn grandsons, and, being aware that he could not limit estates for life, he limits to them and the heirs of their bodies, meaning that they should be all in this succession. He has then declared, that the persons named are by him considered as beneficially interested and entitled during their minority, although he has, in that very clause in which he so considered them, directed that accumulation out of those estates in which they are so interested ; and although he takes notice that the more immediate objects of the trusts are under the age of five years, and till twenty-one they could not make any alienation ; they did not, in that sense, take an absolute interest, because, at twenty-one, they would have a power of making it their own ; but the testator seems to have recollected, that the limitation of the personal estate to them and the heirs of their body made it absolutely theirs ; so much so, that if an infant was born, and died in infancy, his administrator, not the heir of his body, would be entitled.

He has not said that they shall not be beneficially interested, but shall not be absolutely entitled. Had it stopped there, I should be glad to know whether there might not be many injuries for which the minors might have demanded compensation, or acts of ownership which they might have exercised, as felling timber ; or whether timber felled by a wrong doer would not have belonged to them ? Then follows the clause relating to the remoteness of the accumulation, and it concerns not the real estate. It is possible that some of the de-[448]-visees who have not attained twenty-one might leave issue. Then the personal property would have gone over if it had stopped there : but the testator proceeds in the terms of the proviso. (2 Swans. 434.)

It seems clear, on the language of the proviso, that, although the person was under the age of twenty-one years, the testator thought him tenant in tail in possession, otherwise it is nonsense. Certainly the testator means to say, that no person, tenant in tail in possession of the real estate, however beneficially he takes, shall take an absolute, unqualified estate in the personalty during his minority. Then, considering the period which may elapse before a tenant in tail may attain twenty-one, when, by virtue of both conditions, he is to take an absolute interest in the leasehold, two questions arise, whether the antecedent limitations are good, and the subsequent bad, or whether all without exception are bad ? I have had no difficulty about the real estate. We have heard in *tithe* causes of a dancing modus : this is a clause of accumulation of the same description.

The question which I have to determine to-day is, whether, when the testator has said that the tenant in tail in possession shall not have an absolute estate in the personalty till he attains twenty-one, I am to say that the case is the same with the tenant for life, with regard to the real estate, the testator not having, as to him, said any such thing ?

A further question is, whether, because the accumulation is directed with respect to some persons to whom the limitation is too remote, it is not only void in itself, but shall defeat the effect of the other gifts ? In the cases [449] of powers, the testator has meant to give a power which could be exercised among all the objects, and did not mean to give it if it could not be so exercised ; but this testator expressly states the case to which he meant the proviso to apply ; but he has not said that he meant it to apply to the case of the tenant for life. At present, therefore, the vested interest

is in the eldest grandson : whether the heir at law or next of kin may not, at some future time, have an interest, is a question to be considered when the event occurs. The life estate being good, it would not become me now to decide the validity of the ulterior limitations. If the whole devise was void, the heir, or next of kin, would have a right to call on the Court to make that declaration ; but the whole is not void ; and the present interest does not belong to the heir. The Court is not accustomed to declare the effect of trusts until the time arrives.

July 1. In consequence of Mrs. *Martelli's* death since the hearing, application was made for judgment. The *Lord Chancellor* observed, that his opinion on the argument was, that whatever might become of the subsequent limitations, the first limitation to the testator's grandson was good, and that it would be very difficult to hold the next limitation bad.

July 3. The *Lord Chancellor* [Eldon]. There cannot be any fund for the present maintenance of the infant, unless the income is undisposed of prior to his attaining the age of twenty-one. If accumulation is well directed till he attains that age, then during the interval there is no fund undisposed of. The Court must, [450] therefore, determine whether the trust of accumulation is throughout bad, and if so, whether the accumulation between the death of the testator and the time of the grandson attaining twenty-one is undisposed of ; in which case of ineffectual gift, so much as consists of rents and profits, belongs to the heir ; and so much as arises from personal estate belongs to the next of kin. It is very difficult to distinguish this case from *Lord Southampton v. The Marquess of Hertford*. The true doctrine seems to be, that, of a trust for accumulation which, prior to Lord *Loughborough's* act, would have been good, so much as is now within the act will be good, but the excess will be bad ; but if there be a trust for accumulation, and part of it would have been bad before the act, that part remains bad notwithstanding the act. *Lord Southampton v. The Marquess of Hertford*, seems to have decided, that if property is given subject to a trust which is bad, the gift of the property takes effect exempt from the trust. The trust for accumulation in this case, I think, bad, because it may last for ages.

July 4. The *Lord Chancellor* [Eldon] stated, that he had again considered the case, and could not distinguish it from *Lord Southampton v. The Marquess of Hertford*.

April 22, 1820. "His Lordship doth declare, that the will of *Thomas Holloway*, the testator, &c., dated, &c., and the three several codicils of the testator, dated, &c., are respectively well executed and proved, and that the trusts thereof ought to be carried into execution, except in so far as the said will directs the laying out and in-[451]-vesting the dividends, interest, and annual proceeds of the stocks and securities in and by the said will directed to be purchased, with the surplus of the said testator's personal estate, after the payment of his debts, funeral, and testamentary expenses, and legacies, and the rest of his personal estate ; and also the clear yearly rents and profits of his real estates from time to time, and when, and so often, and during all such times, as any person or persons beneficially interested in or entitled to his real or personal estates, under the trusts thereafter declared thereof, should be under the age of twenty-one years, and the adding all such investments to his personal estate in order to accumulate the same : And his Lordship doth declare, that such direction to lay out and accumulate the said rents and profits, interest and dividends, is too remote and void in law : And his Lordship doth declare, that the Defendant, the infant *Horatio Francis Kingsford Martelli* is entitled in possession to the rents and profits of the said testator's freehold, and copyhold, and leasehold estates, and to the dividends, interest, and annual proceeds of his personal estate and effects, for and during the term of his natural life, with remainder to the first and other sons of his body lawfully to be begotten, successively, according to seniority of age, and the heirs of their bodies respectively with such remainders over as in the said will and codicils in that behalf respectively contained." The decree, after the usual directions for an account of the personal estate of the testator, and the rents and profits of his real estates received by the Plaintiffs, proceeded thus :—

"It appearing that the Defendants *Horatio Martelli*, the father of the said Defendants, the infants is dead, it is ordered that the said Master do inquire and state to the Court, by whom the said Defendant, the infant *Horatio Francis Kingsford Martelli*, has been maintained [452] since the decease of the said testator, and

what sums of money have been paid in respect thereof, and by whom, and what will be proper to be allowed for his maintenance and education for the time past, and to whom; and also what will be proper to be allowed for his maintenance and education, and out of what fund, for the time to come, and to whom; and in making such allowance the said Master is to have regard to the situation and circumstances of the other Defendants, the younger brothers and sisters of the said *Horatio Francis Kingsford Martelli*; and the said Master is to be at liberty to make a separate report, &c. And the Defendant *Ann Holloway*, having elected to take the provision made for her by the indenture of settlement in the pleadings in this cause mentioned to bear date the 17th day of *November* 1798, in lieu of her dower, thirds, and freebench, in and out of the said testator's freehold and copyhold estates, his Lordship doth declare, that the said Defendant *Ann Holloway*, is barred of all claim in respect of such dower or thirds and freebench; and doth order, that the said Defendant do execute a proper and sufficient release of such claims, such release to be settled by the said Master. And it is ordered, that all the costs, charges, and expenses attending the making and executing thereof be paid and discharged by the said Plaintiff out of the personal estate and effects of the said testator, &c.

"And his Lordship doth declare, that the said Defendant *Faithful Croft* is entitled to the leasehold house and premises in *Chancery Lane*, given and bequeathed to him in and by the codicil of the said testator, bearing date the 20th day of *January* 1816, for the remainder of the term of years now to come therein, from the death of the said testator, for his own use and benefit; and it being alleged by the said Plaintiffs, the trustees, that the nature and [453] circumstances of the estate of the said testator require the application of a great proportion of time, by and on the part of the said trustees, for the due execution of the trusts of his said will, in regard to his estate, and that they cannot undertake to continue the execution of the trusts without the aid and assistance of the said *Faithful Croft*, as a co-trustee, he having, during the life of the said testator, had the principal and confidential management thereof, and being better acquainted therewith than any other person, and therefore it will be for the benefit of the said testator's estate that he should continue to be a trustee thereof; and the said *Faithful Croft*, alleging, that due attention to the affairs and concerns of the said testator will require so much of his time and attention as will be greatly prejudicial to his other pursuits and concerns in business, and therefore that he would not have undertaken to act therein, but under the assurance that an application would be made to this Court to authorise the allowance and payment of a reasonable compensation out of the said testator's estate for such his labour and time, and that he cannot continue to act therein without such reasonable allowance being made to him, it is ordered, that it be referred to the said Master to settle a reasonable allowance to be made to the said *Faithful Croft* out of the said testator's estate, for his time, pains, and trouble, in the execution of the said trusts, for the time past, and, in settling such allowance, the said Master is to have regard to the legacy of two hundred pounds given and bequeathed to the said *Faithful Croft* by the said will of the said testator, on the execution of the trusts thereby reposed in him: and it is ordered, that the said Master do inquire whether it will be for the benefit of the said testator's estate that the said *Faithful Croft* should continue to be a trustee under the said will, and to receive a compensation for the future employment of his time and trouble; and in case the said Master shall [454] be of opinion that it will be for the benefit of the said testator's estate that the said *Faithful Croft* should be continued a trustee, then the said Master is to settle a reasonable allowance to be made to the said *Faithful Croft* therein (*Brock-sopp v. Barnes*, 5 *Madd.* 90); and the said Master is to be at liberty to make a separate report, &c.: and it is ordered that the said Master do tax all parties their costs, &c.; and it is ordered, that the same when taxed be paid to them by the said Plaintiffs, as executors, out of the personal estate and effects of the said testator, &c."

Reg. Lib. B. 1819, fol. 777-780.

(1) *Greenwell v. Greenwell*, 5 *Ves.* 194. *Collis v. Blackburne*, 9 *Ves.* 470. *Fairman v. Green*, 10 *Ves.* 45. *Lomax v. Lomax*, 11 *Ves.* 48. *Ex parte Kebble*, 11 *Ves.* 48, n., 604. *Errington v. Chapman*, 12 *Ves.* 20. *Aynsworth v. Pratchett*, 13 *Ves.* 321. *Errat v. Barlow*, 14 *Ves.* 202. *Haley v. Bannister*, 4 *Madd.* 275. Some early authorities (see 11 *Ves.* 606) are collected in *Mole v. Mole*, 1 *Dick.* 310.

The following authentic note of Lord Chancellor *Nottingham's* judgment on a question intimately connected with the doctrines discussed in the preceding case, is extracted from his Lordship's MSS.

Charles Howard, *Plaintiff v. Henry Duke of Norfolk, & al. Defendants.*  
Dec. 28, 33 Car. 2, 1681.

A term being limited in trust for *H.* in tail, remainder, if *I.* die without issue male in the life of *H.* to *C.*, in tail; the remainder is good.

This case had been largely argued and debated at bar last term, Serjeant *Maynard* and others, for the Plaintiff, and Mr. *Pollexfen* and others, for the Defendants, in the presence of the three Chief Justices, whom I called to my assistance; and now this term we delivered our opinions. The three Chief Justices were for the Defendants, and advised a dismissal (their arguments are reported 3 *Ca. in Cha.* 14 *et seq.*; 2 *Rep. in Cha.* 121); I was for the Plaintiff: my argument was as follows:—  
[455] This is the case. The Plaintiff, by his bill, demands the benefit of a term for 200 years in the barony of *Greystock*, upon this case.

*Henry Earl of Arundell*, father of the Plaintiff and Defendant, had issue six sons, *Thomas, Henry, Charles, Edward, Francis, Bernard*, and one daughter, the Lady *Katherine*. *Thomas* Lord *Matrevers*, the eldest son, being *non compos mentis*, care is taken to settle, by advise of counsel, the estate and family, as well as the present circumstances of it would admit.

Whereupon, two indentures are made, between the Earl of *Arundell*, of one part, and the Duke of *Richmond*, the Marquess of *Dorchester*, the Lord *Howard of Estrick*, and Sir *Thomas Hatton*, on the other part, and both these indentures bear the same date, 21st March 1647. By one of these indentures the estate in law is conveyed to them and their heirs, to these uses, *viz.* to the Earl for life, remainder for 99 years, to trustees, to raise £8000 portion for the Lady *Katherine*, remainder to the Countess for life, all which estates are spent; remainder for 200 years to the Duke, Marquess, &c., in trust, as by another indenture of the same date is declared; remainder unto *Henry*, and the heirs male of his body begotten, with like remainders to *Charles, Edward, Francis, and Bernard*, successively, with power of revocation. Then the other indenture declares the trust of the term for 200 years in this manner, *viz.* that it should attend the inheritance so long as *Thomas* Lord *Matrevers*, or any issue male of his body should be living; but if *Thomas* die without issue male in the life of *Henry*, not leaving his wife ensient with a son, or that, after the death of *Thomas*, by the failure of issue male of *Thomas*, the dignity and honour of Earl of *Arundell* do descend upon *Henry*, then *Henry* shall have no farther [456] benefit of the term of 200 years, but the benefit thereof shall redound to the other younger children, or their issues in manner following, *viz.* to *Charles*, and the heirs male of his body, with like remainders in tail to *Edward, Francis, and Bernard*, successively.

These indentures were sealed and delivered in the presence of Sir *Orl. Bridgman*, and *John Alcorn* and *Edward Alcorn*, his two clerks, who have subscribed their names as witnesses, which is to me a demonstration that the deeds were drawn by Sir *Orl. Bridgman* himself. After this the contingency happened, and the earldom of *Arundell* did descend unto *Henry* the now Duke of *Norfolk*, *Thomas* being dead without issue male.

Then the Marquess of *Dorchester*, being the surviving trustee of the term, assigns this term to *Marriot*, in 1675, upon the same trusts, and *Marriot* assigns to *Henry*, the Defendant, so the term is merged.

To excuse the Marquess of *Dorchester* for co-operating in this manner, it is said that the tenants would not renew unless the estate were transferred to a younger man, for fear of paying a new fine after the Marquess's death. But nothing can excuse *Marriot* from a palpable and wilful breach of trust, if *Charles* have any title at all to the benefit of this trust.

Therefore the labour of this case is to overthrow *Charles's* title, 1st. as void in the original limitation, 2d. as being avoided, if not by the merger, at least by the common recovery which was afterwards suffered by the Duke. If the estate be void there is no harm done; but if it be only avoided by the surrender of *Marriot* to the Defendant, perhaps all they who had notice of this trust, [457] and have wilfully procured the defeating of it, may be liable to answer for it.

These kind of defences do not seem to me to be very consistent ; for, if the Defendant's counsel had been very clear in their opinions, that the limitation to *Charles* was void, why did they advise the Duke to take so much pains to procure a surrender and extinguishment of the term, and further, to bar it by a common recovery ? For now it is come to this point in law, that unless the limitation to *Charles* be void, all other means to defeat him of it will be ineffectual. I am in a very great streight by the advice which hath been given me ; for as on one side I may safely concur with the three Chief Justices, since, if I should err in so doing, I should err very excusably, because I should *errare cum patribus*, so on the other side, where the decree must be mine, and I alone am to answer for it, I dare not (notwithstanding the reverence I have for their advice) pronounce a decree in any case where I cannot concur with it myself.

The main inquiry is, whether the limitation to *Charles* be void ? Wherein these things are plain ; 1st. The term in question, though it were attendant on the inheritance at first, yet, after the contingency happened, it is severed and become a term in gross. 2d. The trust of a term in gross can be limited no otherwise in equity than the estate may be limited in law. 3d. The legal estate of a term for years, whether it be a long or a short term, cannot be limited to any one in tail with a remainder over, for this tends directly to a perpetuity. 4th. Nay, if a term be limited to a man and his issue, and if that issue die without issue, the remainder over, though the issue of the issue take no estate, yet, because the remainder cannot commence sooner than till issue fail, which is foreign to expect, the remainder is void, [458] for this also tends obliquely to a perpetuity—13 *Car. 2*, *Perce* and *Reeves's* case (*Pollexfen*, 29). 5th. Further, yet if a term be limited to a man for life, with contingent remainders to his first, second, third, and tenth son in tail, remainder over, though the contingencies never happen, yet the remainder shall never take place, for the mere intention to create a perpetuity made all void—16 *Car. 2*, Sir *William Backhouse's* case (*Backhouse v. Bellingham*, *Pollexfen*, 33). 6th. And *Burges's* case (*Burges v. Burges*, *Pollexfen*, 40 ; *Rep. Temp. Finch*, 91 ; 1 *Ca. in Cha.* 229 ; 1 *Mod.* 114), 26 *Car. 2*, went a step further, for there the trust was to the husband for life ; remainder to the wife for life ; remainder to the first, second, third, and tenth sons in tail ; remainder to their daughters, having then a daughter, *Elizabeth*, in whom that remainder might vest ; yet adjudged, that a remainder to daughters after unbegotten sons, was void, though no sons were then born ; and the administratrix of the husband carried away the term, for still this looks like a perpetuity. 7th. Nevertheless, if a term be limited to one for life, with twenty several remainders for lives to other persons successively, who are all alive and in being, so that all the candles are lighted together, this is good enough, though it be a possibility upon a possibility, as was ruled—13 *Car. 2*, in *Alford's* case ; nay, if a remainder be limited to a person not in being ; as, to *A.* for life ; remainder to *B.* for life ; the remainder to the first issue male which *B.* shall have for life ; though this be a contingent upon a contingent, yet it being only a contingency for life, this also is good, as was ruled, 14 *Car. 1*, *Cotton v. Heath* (*Pollexfen*, 26 ; 1 *Eq. Ca. Ab.* 191) ; for to limit a possibility upon a possibility, or a contingency upon a contingency, is neither unnatural nor absurd ; but the rule which is laid down to the contrary [459] by *Popham* in the Rector of *Chedington's* case (1 *Co.* 153 ; *Moor*, 478), looks like a reason of art, but hath nothing at all of true reason in it ; and I have known that rule denied at law ; and my Lord *Coke* himself denied that rule, when he was Chief Justice, as you shall find, 13 *Jac. B. R. Blandford*, and *Blandford's* case (1 *Rolle*, 318 ; *Moor*, 846 ; 3 *Bulstr.* 98 ; *Godb.* 266 ; *Cro. Jac.* 394) ; for however that rule may hold in some cases, yet, if it should pass for a general rule, my Lord *Coke* says it would shake all common assurances ; and he cited *Paramour v. Yardly's* case (*Plowd. Comm.* 539) as a judgment in point, that the devise of a term was good, though it were with a possibility upon a possibility ; and indeed every devise of a term is so.

These conclusions thus laid down, are only preliminaries to the main debate ; and though by these conclusions we may see what the law is in all those cases which do any way border upon the present question, yet now 'tis fit to speak to the question itself, as it stands alone, and is distinguished from all these preliminaries ; and then the point is this :—

The trust of a term for 200 years, in the barony of *Greystock*, is limited to *Henry*

in tail, proviso, if *Thomas* die without issue male in the life of *Henry*, then it shall go to *Charles* in tail; remainder in tail to *Edward*, *Francis*, and *Bernard*, successively. And whether this be a good limitation to *Charles* in tail, is the question? For the last remainders to *Edward*, *Francis*, and *Bernard* are certainly void.

It hath been said at bar, that the limitation to *Charles* is void too, because it is a possibility upon a possibility; but this reason, as hath been shown already, is of no moment at all, because indeed it is impossible to limit [460] any remainder of a term after a life; but it will be in effect a possibility upon a possibility. It hath been said, too, at the bar, that the proviso by which *Charles's* interest doth rise is void, because the nature of a condition is to determine all the estates; and here the proviso determines only the estate of *Henry*; whereupon it hath been compared to *Sir Anthony Mildmay's* case, *Co. L. 6* (6 *Co.* 40; *Moor*, 632), where a proviso to make the estate tail cease, as to one brother, and go over to another, is void. Never was rule or case worse applied, for here the proviso does as it should do, viz. it doth determine all the estate to which it is annexed. Observe, there is no proviso at all annexed to the legal estate of the term; but there are two equitable estates built upon that term by way of trust; the first is a trust attendant upon the inheritance in *Henry*, and to that only is the proviso annexed, and that is entirely determined; the latter is a new trust in gross, which is to rise by the proviso, and *ergo*, could not be defeated by it. But the matter chiefly insisted on is, that the limitation to *Charles* is against the rules of law, and tends directly to a perpetuity. If this be so, there needs no other reasons or arguments to destroy it, for the law hath so long laboured to defeat perpetuities, that now it is become a sufficient reason of itself against any settlement, to say it tends to a perpetuity. Let us, *ergo*, examine what a perpetuity is, and how far that is here introduced, or any other rule of law broken. A perpetuity is a settlement of an estate, or interest in tail, with such remainders over, that no act or alienation of the present tenant in tail can never bar those remainders; but they must continue perpetually, and be as a cloud hanging over the present possession: such perpetuities fight against God, by affecting a stability which human providence can never attain to, and are utterly against the reason and policy of the common law.

[461] But yet future interests, or springing uses or trusts, or executory remainders, which are to emerge and arise upon contingencies, are quite out of the rule and reason of perpetuities, and out of the danger of them too, though they are not dockable by recovery, nor capable of being barred, especially if the contingency be not remote, nor of long expectation, but such as will wear out in a short time. Examine this a little in case of a freehold, and then see how it will hold in case of a term, or the trust of a term, which, whether it be a longer or a shorter term, I agree, makes no difference. In the first place, *ergo*, I utterly deny that rule which hath been laid down by my Lord Chief Justice *North*, viz. that where no present remainder can be limited, there can be no remainder upon any contingency; for there is no clearer rule in law than this, that there can be no remainder limited upon an estate in fee, 19 *H.* 8, *Dyer* 4; yet public reason and the convenience of common assurances have found a way to pass by this rule, as well by way of limitation of use, as by way of devise; and, *ergo*, if the father limit an use to himself and his heirs, until a marriage happen, and then to the son and his heirs, this is a good fee upon a fee, by common experience; so a devise to a man and his heirs, and if he die without issue before twenty-one, or living *B.*, to *B.* in fee, this is a good fee upon a fee,\* as hath been resolved 18 *Jac. Pells* and *Brown's* case, 22 *Jac. (Cro. Jac.* 590; *Bridgm.* 1; 2 *Rolle*, 196, 216; *Godb.* 282; *Palm.* 131), a point in the *Serjeant's* case (2 *Rolle*, 422), *Hall* and *Deering*, in 59 (*Hardr.* 148), *Hanbury* and *Cockrell* 51 (*Hardr.* 150), *Jay* and *Jay*, per *Rolle et Curiam* (*Style*, 258, 274), and this had been re-[462]-solved long before in 20 *Eliz. Hind v. Sir John Lyon* (2 *Leon.* 11; 3 *Leon.* 64, 70), and with the reason of these resolutions agree 38 *Eliz. Fulmerston* and *Steward's* case (*Cro. Jac.* 592), and 43 *Eliz. Wellock* and *Hammond's* case (*Cro. El.* 204; 2 *Leon.* 114), cited *Co. l. 3, Boraston's* case (3 *Co.* 20). For where the contingency expires in a little time, the inconvenience can neither be great nor long, nor is there any danger of a perpetuity. This is agreed by all in cases of an inheritance, but they say a lease for years, which is but a chattel, will not bear such contingent limitations, nor admit of such springing trusts, by reason of the exility and meanness of the state. Now as to this point, the difference between a

chattel and an inheritance is a difference only in words, and not in the reason or nature of the thing, for the owner hath as absolute a power over his lease as over his inheritance; and, *ergo*, where no perpetuity is introduced, nor any visible inconvenience appears, there no rule of law is broken. And the reasons to support the springing trusts of a term, as well as the springing uses of an inheritance, are these:

*First.* Because many men have no other estates but what do consist in leases for years, and, *ergo*, it were not only hard, but very absurd, to disable the owner of such an estate to provide for the contingencies of his family, especially such contingencies as are neither foreign nor remote, or of long expectation, but within view and prospect, as it were, and so will quickly be at an end. Such a contingency is that in this case, *viz.* the death of one man before another, &c.; and put the case, the lessee for years being to marry his son, assigns his term to A., in trust, for himself, his executors and administrators, until a marriage happen, during the father's life, then in trust for the married couple, is this springing trust void? How [463] many settlements will that defeat? So a springing trust good in that case, why not in this too?

*Secondly.* The limitation to *Charles* is upon this contingency:—If *Thomas* die without issue male, living *Henry*, so that the earldom of *Arundell* descend upon *Henry*, which was a common and natural possibility. Now if the limitation had stopt at these words, "If *Thomas* die without issue male," it could but have been void in that case; but if the addition of these other words, "living *Henry*, so that the earldom descend," have not mended the matter, but that the limitation be void still, then all this additional clause goes for nothing, which were very absurd.

*Thirdly.* Which I take to be unanswerable, and which I ground upon something that fell from my Lord Chief Justice *Pemberton*; suppose it had been said, if *Thomas* die without issue, living *Henry*, not only the trust to *Henry*, but the very lease itself for 200 years should cease, and, in such case, a new term should be created for other 200 years, to vest in the same trustees for the benefit of *Charles*, in tail, no man can doubt but this new lease would have been good; and my Lord Chief Justice *Pemberton* confesses, that this way the intention of the Earl of *Arundell* might have taken effect. Then I would be glad to hear a tolerable reason why may not a new springing trust be limited upon the same lease, as well as a new springing lease upon the same trust? Surely to deny this were to make a distinction without a difference; nay, I will be bold to say, that a new springing lease is the harder case of the two, for it hath a direct tendency to a perpetuity, if such a practice be allowed, and is much more inconvenient than a new springing trust upon the same lease can be.

[464] *Fourthly.* No reason at all is given why this may not be; but that the law hath so mean a consideration of a term of years, which is but a chattel interest, it will never suffer such contingent limitations to be built upon it. Now, as this is no reason in any other part of the world, so it is a reason that by this time begins to be quite exploded out of *Westminster Hall*, and most certainly can never take place in Chancery. There was a time when this reason did so far prevail, that all the judges of *England* being assembled in Chancery, for the assistance of the Lord Chancellor *Rich.* declared the law to be, that if a lease be devised to A. for life, and if A. die, living B., B. to have the residue of the term, this remainder is void; for in the consideration of the law the life of a man was a greater estate than any lease for years, though A. had the whole term, so it was ruled, 6 *Edwd.* 6, *Dyer*, 74. And the same opinion held current in other cases, until 10 *Eliz.* *Dyer*, 277. But this being a reason against sense and nature, it was impossible for the world to be long governed by it; and *ergo*, in 15 *Eliz.* *Dyer*, 328, the matter began to be a *quære*, and in 19 *Eliz.* *Dyer*, 358, it was adjudged the remainder was good, which is the same case with *Welden* and *Elkington's* case in the Commentaries, *Plowden*, 519. When the Chancery saw the judges of the common law begin to govern themselves by the true reason of the thing, and not by the vulgar reason of the books, they took a course to fix the judges in this opinion; for then it began to be a common suit in Chancery, for him who had the remainder of a term to exhibit his bill against the devisee for life, to compel him to put in security, not to bar the remainder; and it was often so decreed, 26 *Eliz.* *Price v. Jones* (*Toth.* 122); and again by my Lord *Ellesmere*, 5 *Jac.*, *Cole v. Moor*, Sir *Francis Moor*, 806, *Pl.* 1093. At last, to prevent a Chancery suit, *viz.* [465] 7 *Jac.*, *Matthew Manning's* case (8 *Co.* 94),

and 10 *Jac.*, *Lampet's* case (10 *Co.* 46), the judges came to be uniformly agreed, that the remainder was good by way of executory devise, and that the devisee for life could not bar it. So now, at last, notwithstanding the exility of a term, and the meanness of a chattel interest, there may be a devise of it for life with executory remainders; but it is true, the judges did not wisely refuse to enlarge this rule to executory devises in tail, with remainders over, for that were directly a perpetuity; yet, why they should refuse to admit of a devise without such contingent limitations or trusts, which do not lead to a perpetuity, nor are attended with any inconvenience, is hard to understand, nor is any reason given but *Child* and *Bayly's* case. (2 *Rolle*, 129; *Palm.* 48, 333; *W. Jones*, 15; *Cro. Jac.* 459.)

*Fifthly.* In the last place, *ergo*, since all that hath been, or can be, materially objected, is reduced to the single and naked authority of *Child* and *Bayly's* case, it will be fit to see, 1st. What *Child* and *Bayly's* case is; 2d, How far this authority ought to sway the present case. 1st. If that case were as it is reported by Serjeant *Rolle*, then it is nothing at all to this question, for there the case is said to be this: A term of seventy-six years was devised to the wife for life, remainder to *William Heath*, the son; proviso, if *William* die without issue during the term (not during the life of *Thomas*), *Thomas* should have it; adjudged a void remainder. Of this there can be no manner of doubt, for it is the common case of a remainder after an entail of a term, and a direct perpetuity, and the case hath often been cited to this purpose, and generally hath been taken in *Westminster Hall* to import no more, though of late it hath been more narrowly looked into.

[466] 2. If the case were as it is reported by Justice *Jones*, *viz.* if *William* die without issue, living *Thomas*, then to go to *Thomas*, and still adjudged a void remainder, then it is a direct authority in the very point. But the case is not altogether as Justice *Jones* hath reported it, for I have seen a copy of the record upon this occasion; and by the way, there is no book in the law so ill corrected, and so grossly misprinted, as Justice *Jones's* Reports. 3. The truest report of this case, and that which comes nearest to the record, is the report of Justice *Croke*, and with him agrees Serjeant *Rolle*, in his abridgment, tit. devise, 612, and there the case was; a term of 76 years was devised unto *Dorothy*, the wife, for life; remainder to *William*, and his assigns, for all the residue of the term, proviso, if *William* die without issue living at the time of his death, that *Thomas* shall have it, adjudged the remainder void.

This also is in effect the present question, but yet it must be observed, that the resolution there went upon several reasons which are not to be found in this case, as, 1. *William* having the term to him and his assigns, there could be no remainder of it to *Thomas*, of which word assigns Justice *Jones* takes no notice. 2. *Dorothy*, the devisee for life, was also executrix, and she did assent, and grant the remainder to *William*, both which reasons Serjeant *Rolle*, in his abridgment, lays hold of. 3. *William* might have assigned his interest, and then his assignee must have held it till *William* died without issue, after which there could be no remainder. 4. *William* might have had issue, and that issue might have died without issue, living *William*, and then a remainder to *Thomas*, after such a possibility, was foreign to expect. 3. The record goes a great deal farther, and says, if *Thomas* die without issue living at his death, then it shall go over to daughters; which was a plain affectation of a perpetuity, by [467] multiplying of contingencies. 6. It appears by the record, that the lease for 76 years was made 1 and 2 *Philip* and *Mary*; the father's will was made 10 *Eliz.*; the grant and assignment by the mother and executrix to her son *William* was 24 *Eliz.*; the son *William* re-assigned all to his mother in 31 *Eliz.*, and died; the mother lived till 1 *Jac.*; *Thomas*, the son, never set on foot his pretence to the remainder till 14 *Jac.*, before which time there had been six several assignments to purchasers, and the last purchaser had renewed with the Bishop of *Worcester*: no wonder then if, after so long an acquiescence by *Thomas*, and when there were but a very few years to come of that lease whereof *Thomas* claimed the remainder, the judges held hard upon him, and chose rather to declare *Thomas's* remainder void, than to disturb so many transactions amongst purchasers.

2. But now, allowing that *Child* and *Bayly's* case were as full an authority for the Defendant as he could wish, I say, then, that *Child* and *Bayly's* case stands alone, and that it was never so resolved, before nor since. Nay, the contrary hath



been resolved since ; and first, the case of *Cotton and Heath*, 14 *Car. 1, Rolle*. Devise 612 (*Pollexfen*, 26 ; 1 *Eq. Ca. Ab.* 191) seems contrary to it, for there a term was devised to A. for eighteen years, remainder to B. for life, remainder to the eldest issue male of B. for life, resolved by *Jones, Croke, and Barkly*, that this second contingent remainder was good, because this second contingency lasted no longer than during one life. But the most clear and direct resolution in the point, was the case of *Wood and Sanders*, 21 *Car. 2*, in this Court, *July* 1669. (*Pollexfen*, 35 ; 1 *Ca. in Cha.* 131.) The case was this. The trust of a long lease was limited, and declared thus ; to the father for sixty years, if he live so [468] long, then to the mother for 60 years, if he live so long, then to *John* and his executors, if he survive father and mother, and if he die in their life, having issue, to their issue, but if he die without issue, living father and mother, remainder to *Edward*, in tail, remainder to *Nicholas*, in tail ; *John* dies without issue, living father and mother, resolved the remainder to *Edward* was good, for though the whole term might have vested in *John* and his issue, if he had survived father and mother, yet, that contingency never happening, and being a contingency which would wear out in a little time, the remainder was good, by the uniform opinions of Lord *Bridgman*, *Custos*, *Twisden* and *Rainsford*, which is as contrary to *Child* and *Bayly's* case as can be ; so that though I may seem to be singular in my opinion this day, yet I take myself to be supported in the reasons I go upon by seven great men, *viz.* Lord *Coventry*, *Jones*, *Croke*, and *Barkly*, Lord *Bridgman*, *Twisden* and *Rainsford*. Thus we see the opinion of Sir *Orl. Bridgman*, when he was a practiser, and drew this deed, continued with him when he was *custos*, and to judge upon oath ; and it is due to the memory of this great man to acknowledge him a person very eminent both for learning and integrity.

It hath been urged at the bar, Where will you stop if you do not stop at *Child* and *Bayly's* case ? I answer, I will stop everywhere when any inconvenience appears, no where before. It is not yet resolved what are the utmost bounds of limiting a contingent fee upon a fee ; and it is not necessary to declare what are the utmost bounds to the springing trust of a term, for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known.

I have done with the legal reasons of this case ; the equitable reasons are much stronger. 1st. It was prudent to take care, that when the honor descended upon [469] *Henry*, a little better support should be provided for *Charles*, the next brother. 2d. This prudent care was the effect of a deliberate consultation of the whole family, after advising with learned counsel upon it. 3d. Though it were uncertain whether *Thomas* would die, living *Henry*, yet it was nearly certain, that whenever *Thomas* did die he would die without issue ; for it so much concerned the honor of the family not to have it propagated by him, that care was taken so to keep him that he might never marry till he was recovered. 4. It is a very hard thing for a son to tell his father that the provision made for his next brother is void ; and it is yet harder to tell him so in Chancery, especially where the reasons for making the conveyance void are not gross and apparent, but depend upon such a nicety and subtlety of law, as will justify different opinions.

2. The last retreat of the Defendant in this case is, to the common recovery, by which, and by the merger of the term, the legal estate for 200 years is barred and gone. This point is not worth speaking to, for whether the law be so or not, is not material, because the trust of the term, if well limited unto *Charles*, whatsoever hath been done to break in upon this trust and to defeat it, by them who had notice of the trust, and were privy to it, though it be never so good in law, yet it ought to be set aside in equity ; and in this we all agree in opinion. Now, in this case neither the Duke nor Mr. *Marriot* could be ignorant of the trust limited to *Charles* ; and if *Thomas* Duke of *Norfolk* were dead in *October* 1774, or before the Marquess *Dorchester* assigned to *Marriot*, or *Marriot* to the Defendant, and before the recovery suffered, then they must needs know that the trust was actually attached and vested in *Charles* at that very time when they went about to defeat it. And if an heir will either enter upon the trustees, or procure the trus-[470]tees to release in breach of trust, he himself is bound to make good the trust ; nay, the land stands charged with the trust in the hands of the heir, and he alone may be sued without making the trustees parties, as was twice resolved by my Lord *Bridgeman* *Custos* ; once in *M. 22, Car. 2, Anno* 1690, in the case between *Spencer* and the Earl of *Thomond* ;

and again in the same term in another case between *Jackson* and *Jackson*. But here the heir, and *Marriot* the trustee, are both Defendants. Wherefore there ought to be a decree for the Plaintiff; 1. For his quiet enjoyment during the residue of the 200 years. 2. For an account of the profits since the death of *Thomas*. 3. The Duke and *Marriot* both to be responsible to the Plaintiff. Nevertheless, I have so great a respect for the contrary opinions of the three chief justices, that I will not presently suffer this decree to pass, but will suspend my opinion for some time; and, possibly, considering how many assurances may be shaken, and how many noble families may be concerned in the consequences, if such kind of settlements be overthrown, it may be fit, at last, to adjourn this case into Parliament for difficulty. But of this I declare nothing at present. (Lord *Nottingham's* final judgment, of which his Lordship's MSS. contain no note, may be found in 3 *Ca. in Cha.* 47.)

\* "But if it had been said, and if he die without heir living *B.*, to *B.* in fee, this would not prevent the escheat, per *North*; *fortasse* case stands upon a different reason, *tamen quære, quia videtur mihi eadem ratio et eadem lex.*"

In the Matter of the MASTERS, GOVERNORS, and TRUSTEES of the BEDFORD CHARITY.  
July 31, Aug. 7, 15, 1818; May 1, 4, 8, 11, Aug. 23, 1819.

[S. C. Amb. 228; Dick. 258. See *Loscombe v. Wintringham*, 1850, 13 Beav. 89, n., and cases there collected. As to Jewish rights in Charities, see *Michel's Trust*, 1860, 28 Beav. 39. See also Religious Disabilities Relief Act, 1846 (9 & 10 Vict. c. 59).]

Jews are not entitled to the benefit of the *Bedford* charity. Whether that question could be decided on a petition presented under the statute 52 *Geo.* 3, c. 101. *Quære.*

The petition of *Joseph Lyon*, of the town of *Bedford*, in the county of *Bedford*, *Sheba Lyon* his daughter, *Michael Joseph*, of the same place, *Samuel Samuel*, *Joseph Cohen*, *Isaac Lyon Goldsmid*, *Isaac Selig* and *Alexander Levi*, of the city of *London*, Esqrs., five of the [471] elders of the congregation of the Dutch and German Jews assembling at the Great Synagogue in *Duke's Place*, and *Levi Salomons*, *Moses Levi Newton*, *Meyer Salomons*, *Raphael Raphael*, and *Michael Abraham Levy*, of the city of *London*, Esqrs., five of the elders of the congregation of the Dutch and German Jews assembling at the New Synagogue in *Leadenhall Street*, stated, That his late Majesty King *Edward the Sixth*, by his letters patent, under the Great Seal of *England*, bearing date the 15th day of *August*, in the sixth year of his reign, on the petition of the mayor, bailiffs, burgesses and commonalty of the town of *Bedford*, to him made for the erecting and establishing a free and perpetual school there, for the education and instruction of children and youth, did grant and give licence for him, his heirs and successors, to the mayor, bailiffs, burgesses, and commonalty of the town of *Bedford*, and their successors, that they or their successors, might and should make, erect, ground, and establish a free and perpetual school in the town of *Bedford*, for the education, institution, and instruction of children and youth in grammar and good manners, to endure for ever after, the school to be of one master and one usher; and the wardens and fellows of *New College* in *Oxford* were thereby constituted visitors of the grammar-school, and nominators and admitters of the masters and usher, with power to remove them for just causes, and to appoint others to act in either station; and to the end that the intent of the mayor, bailiffs, &c., should take better effect, his said majesty, by the said letters patent, did grant and give licence for him, his heirs, and successors, to the mayor, bailiffs, &c., that they or their successors might have, enjoy, and receive the lordships, manors, and tenelements, &c., and other possessions whatsoever, to the yearly value of £40 above charges and reprises, of the gift, grant, legacy, demise, or assignment of any person or persons whatsoever, though the [472] same lordships, manors, &c., were holden of the king *in capite*, or otherwise, mediately or immediately, or of any other person or persons, to have and to hold to the same mayor, bailiffs, &c., and their successors, in and to the sustentation of the master and usher, and for the continuance of the school for ever, for the marriage of poor maids of the town, and for poor children there to be nourished and informed, and also of the surplusage coming or remaining of the premises, to distribute in alms to the poor of the town for the time being. (1)

[473] The petition farther stated, that by indenture, dated the 22d of *April* in the 8th year of the reign of *Elizabeth*, [474] and made between the mayor, bailiffs, &c., of the town of *Bedford* of the one part, and Sir *William Harper*, Knt. [475] and alderman of the city of *London*, and Dame *Alice* his wife of the other part, after reciting the letters patent, it is witnessed, that the mayor, bailiffs, &c., for and towards the erection of the school, to have continuance, according to the form and effect of the letters patent, did thereby erect, make, found and establish, a free and perpetual school, within the town of *Bedford*, in a messuage there commonly called the Free School House, which Sir *William Harper* of late built; the same school to be of one master and one usher, for ever to continue; and the mayor, bailiffs, &c., then elected and admitted into the office of master of the school, *E. G.*, and into the office of usher *R. E.*; and Sir *William Harper* and Dame *Alice* for the better maintenance of the school did grant enfeoff and assure, unto the mayor, bailiffs, &c., the messuage of Sir *William Harper*, commonly called the School House, &c.; and also thirteen acres of meadow therein described; to hold the same to the mayor, bailiffs, &c., and their successors, for the sustentation of the master and usher of the school, from time to time, for the continuance of the school for ever, for the marriage of poor maids of the town, and for poor children there to be nourished and informed, according to the form of the letters patent; and the mayor, bailiffs, &c., covenanted and granted for them and their successors, to, and with Sir *William Harper* and Dame *Alice*, their heirs, executors, &c., that the mayor, &c., and their [476] successors, would employ and bestow all such rents, &c., as they should or might lawfully receive, or raise by reason of the thirteen acres of meadow, to the uses and purposes expressed in the letters patent.

The petition proceeded to state, that by an act of parliament passed in the 33d year of *George III.*, intituled, "An act for repealing an act made in the 4th year of the reign of His present Majesty, intituled, 'An act for enlarging the charitable uses, extending the objects, and regulating the application of the rents and profits of the estates given by Sir *William Harpur*, Knt., and dame *Alice*, his wife, for the benefit of the poor and other objects of charity of the town of *Bedford*,' and for the better management of the said estates, and the rents and profits thereof;" after reciting the letters patent, and the indenture and the act of the 4th of *George III.*; and further reciting, that it was found by experience that the directions given in the last-mentioned act, and the schedule thereto, for the application of the rents and profits of the trust estate and premises, were in some instances very improper, and occasioned many inconveniences to the inhabitants of the town of *Bedford*, and that the premises might be managed, and the rents and profits thereof applied in a manner much more advantageous for the objects of the charity, the recited act, and the schedule thereto annexed, and all the rules, orders, and directions therein mentioned, made or prescribed, were repealed, and declared absolutely void: And it was enacted, that the Lord-Lieutenant, and representatives in Parliament for the time being, of the county of *Bedford*, the mayor, recorder, aldermen, common council, bailiffs, chamberlains and representatives in parliament, for the time being, of the town of *Bedford*, the master and usher of the grammar school for the time being, and eighteen inhabitants of the town, who should be chosen in the [477] manner thereinafter mentioned, and their respective successors to be chosen in like manner, should be, and were thereby accordingly declared, for ever thereafter, trustees of the several estates and premises belonging to the charity; and should let, demise, and manage the same, and apply the rents, issues, and profits thereof, in such manner as by the rules, orders, and directions in the schedule thereunto annexed, was directed; and after providing for the appointment and election of new trustees from time to time, and for the regulation of their conduct, it was enacted, that the trustees of the charity for the time being should be called by the name of "The Masters, Governors, and Trustees, of the *Bedford* Charity," and should use a common seal, &c., and by such name sue and be sued, &c., and should and might purchase, take, hold, and enjoy, any lands, tenements, or hereditaments, which should be wanted, for erecting thereon any buildings proper and necessary for the use of the charity, without any license or writ of *ad quod damnum*, and the statute of mortmain, or any other statute or law to the contrary, notwithstanding; and it was further enacted, that in case any trustee or trustees should, either while continuing, or after ceasing, to be a trustee or trustees, misconduct himself or themselves in the applica-

tion of the rents and profits of the charity estates, or in the management of the same, or in not duly accounting for what should come to his or their hands, or in the execution of any of the trusts and authorities vested or to become vested in him or them, by virtue of the act, or should misdeemean himself or themselves in any manner whatsoever relating to the charity, or the estate thereof, it should be lawful for His Majesty's Attorney-General, and also any person or persons whomsoever, with the consent of His Majesty's Attorney-General, to prefer a petition or petitions from time to time, as occasion [478] might require, to the *Lord Chancellor of Great Britain*, or the Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain*, against any such trustee or trustees, either while continuing or after ceasing to be, such trustee or trustees, and with or without making all or any of the other trustees for the time being, or any other person or persons who had been a trustee or trustees, parties thereto, if the *Attorney-General*, or such person or persons should so think fit; and the *Lord Chancellor*, or Lord Keeper, or Lords Commissioners were authorised and directed, to cause the same to be heard in a summary way, and should have full power to direct such person or persons against whom such petition or petitions should be preferred, to be examined in such manner as should be thought fit; for the discovery of the truth of the matter alleged against them in such petition or petitions; and such order or orders as the Court of Chancery should think fit to make therein, or upon hearing thereof, should be observed and obeyed by such person or persons against whom such petition or petitions should be preferred, and be final and conclusive to all persons whomsoever; and the same should and might be enforced by such process as any other order or orders of the said Court; and the costs and expenses to be incurred by every such petition or application, should be paid in such manner, by such parties, and out of such fund, as the Court should direct, provided that any thing therein contained notwithstanding, the trustees appointed, or to be appointed, under that act, their heirs, executors, or administrators, should also be liable to be sued by action, bill, information, or otherwise, as any other trustee or trustees for charitable purposes were liable to be sued in law or equity.

The petition then stated, that by the schedule to which the act referred, it was provided, among [479] other things, that (the eleventh article) there should be applied and distributed yearly, out of the rents and profits of the charity estate, the sum of £800 for the marriage portions of forty poor maids of the town of *Bedford*, of good fame and reputation, in equal shares, at the times and in the manner thereafter directed; and for that purpose the trustees of the charity should, four times in every year, give three weeks' public notice in the town of *Bedford*, that they intend to meet in the town-hall, to consider of poor maidens to whom portions should be given on their respective marriages; and all poor maidens resident in the town of *Bedford*, and being of the age of sixteen years or upwards, and under the age of fifty years, and desirous of being candidates for such portions, whose fathers, not being certificated persons from parishes out of the town of *Bedford*, should either have been occupiers of one or more house or houses in the town for the space of ten years next preceding their becoming candidates, or should have been born in the town, and have been occupiers of one or more house or houses therein for the space of three years next preceding their becoming candidates, should be at liberty to send to the mayor of the town, or to the churchwardens of the parish wherein they should respectively reside, an account in writing of their Christian and surnames, their ages, the places of their births, and the names of their parents; and that all such poor maidens, not being of bad fame and reputation, who should have given in such account, one week at least before the several times after-mentioned, should be permitted, to draw lots on the *Monday* next after *Easter* day, on the second *Monday* after *Midsummer* day, on the second *Monday* after *Michaelmas* day, and on the *Monday* next after *Christmas* day, in every year, for ten sums of £20 each, [480] on every of such days, and that each of the ten poor maidens, qualified as aforesaid, who should draw the ten beneficial lots on each of the said several days, should be entitled to receive, upon the day of her marriage, £20 for her portion, provided she should marry within two calendar months from the time of drawing such beneficial lot, and provided she should not marry a vagrant or other person of bad fame or reputation: That (the fifteenth article) the house, or hospital, which had been already erected for the habitation of poor boys and girls, born and resident within the town of *Bedford*,

who were proper objects of charity, together with the offices and outbuildings should, from time to time, be upheld, maintained, and kept in good and sufficient order and repair ; and that so many of such poor boys and girls should be taken into the said house, monthly, or oftener, as the trustees for the time being, assembled at any general meeting, or the major part of them so assembled, should, from time to time, think proper ; which boys and girls should be provided with such proper and suitable nourishment, bedding, clothes, linen, and other necessities, and with proper nurses and other assistants to take care of them, until they were of a proper age to be put out to trade, agriculture, or other business, in the manner thereafter mentioned ; and in the mean time should be employed in framing, knitting, and spinning wool, or in any other branch of manufacture, in such manner as the trustees assembled, &c., should, from time to time, order and appoint ; and that the expenses of keeping the house, &c., in repair, and the wages of nurses and other persons necessary and proper to be employed for the purposes mentioned in the order ; and also the expenses of laying in provisions, furniture, clothes, linen, and [481] other necessities ; and of providing wool and other commodities for keeping the boys and girls to work, should be regulated and paid out of the rents, &c., of the charity estate, in such manner as the trustees assembled, &c., should direct, so as the same did not exceed the yearly sum of £300, exclusive of taxes and expenses of repairs, and that there should be at least twenty-six children in the hospital : That (the sixteenth article) the sum of £700, further part of the rents, &c., of the charity estate, should, yearly, by two half yearly sums of £350, be applied in placing out twenty poor children apprentices every half year, viz. fifteen boys, not being under the age of thirteen nor above the age of fifteen years, and five girls, not being under the age of twelve nor above the age of fifteen years, whose respective fathers not being certificated persons from parishes out of the town of *Bedford*, should either have actually been occupiers of one or more house or houses in that town, for the space of ten years next preceding their children being so apprenticed, or have been born in the town, and been occupiers of one or more house or houses therein for the space of three years then next preceding ; and that all such poor boys and girls respectively qualified, whose names should have been given in either to the mayor of the town, or to the churchwardens for the time being of the parish in which their fathers should respectively reside, one calendar month before the respective times of drawing lots after-mentioned, should be permitted to draw lots on the second *Tuesday* after *Michaelmas* day, and the second *Tuesday* after *Lady* day in every year ; and that the sum of £20 should be paid, as the apprentice fee, with each of the fifteen boys, and £10, as the apprentice fee, with each of the five girls, who should draw the beneficial lots, upon their being respectively placed out ap[482]-prentices, within the space of two calendar months after they should have drawn such beneficial lots, to masters and mistresses of good character and responsibility, to be approved by the trustees assembled, &c. ; and that the boys should be bound for the space of seven years, and the girls for the space of five years ; and that the girls should be apprenticed to such trades or occupations only as women usually follow (lace making only excepted) ; and if, upon any of the days appointed for drawing lots, the full number of fifteen boys, qualified as aforesaid, should not become candidates, an additional number of beneficial lots should be drawn for by the girls who should offer themselves as candidates, so that twenty beneficial lots might be drawn for every half year : That (the seventeenth article), in case any of the poor children who should draw beneficial lots, should die, or be otherwise disposed of, or not be put out apprentices within six calendar months from the time of drawing (unless the same should happen by default of the trustees, or be prevented by some inevitable accident), the money intended for such child or children should be drawn for again at some of the subsequent days appointed for drawing lots, and be applied for the benefit of such child or children as should become entitled thereto by the drawing a beneficial lot : That (the eighteenth article) such of the poor boys qualified as aforesaid who should, upon any of the days mentioned in the sixteenth order, have drawn the unsuccessful lots, should have the preference at the next succeeding day or days appointed for drawing lots for the apprenticing money, and should be entitled to the sum of £20, to be paid upon their being respectively put out apprentice, in preference to those boys who should afterwards apply : That (the nineteenth article) every boy and girl so put out apprentice, who should actually serve [483] the full term of apprenticeship, and in all respects comply with the tenor

of the indentures of apprenticeship, should, on producing to the trustees of the charity assembled, &c., within three calendar months after the expiration of their respective apprenticeships, a certificate, signed by their respective masters or mistresses, and by the minister and churchwardens of the parish where they should have respectively served their apprenticeship, testifying such actual service and compliance with the tenor of their indentures, as well as their good morals and behaviour respectively, or on producing such other proof thereof as the trustees, so assembled, should require, but not otherwise, be entitled to receive such sum of money, not exceeding £20, nor less than £10 each, as the trustees, so assembled, should judge proper and expedient; and such trustees should direct the payment thereof accordingly.

The petition proceeded to state, that the petitioner, *Joseph Lyon*, was of the Jewish persuasion, and had constantly been, for the space of twenty-one years last past, and was then, the occupier of a house in the parish of *St. Cuthbert*, in the town of *Bedford*; and that, on the second *Tuesday* after *Michaelmas* day 1816, the petitioner *Sheba Lyon*, one of his daughters, being then between twelve and fifteen years of age, viz. at the age of fourteen years and four months, and being duly qualified according to the act of Parliament, and her name having been given in in the usual form one calendar month before the time of drawing lots, as directed by the act, presented herself to the masters, governors, and trustees of the *Bedford* charity, as a candidate to draw a lot for the apprentice fee to be paid to girls; That the masters, &c., then refused to permit *Sheba Lyon* to draw a lot, alleging as a reason for such refusal that [484] the petitioner *Joseph Lyon* was of the Jewish persuasion: That since that refusal, the Masters, &c., had come to a resolution or agreement, not to permit any persons of the Jewish persuasion, whatever in other respects may be their qualifications under the terms of the act of parliament, or the children of such persons, to partake of any benefit under the *Bedford* Charity: That *Samuel Lyon*, the son of the petitioner *Joseph Lyon*, was many years since admitted into the Free School of the *Bedford* Charity, and about six years since, was permitted to draw lots for the apprentice fee to be given to boys, but did not draw a beneficial lot; in consequence whereof, at the next succeeding day appointed for drawing for the apprenticing money, being entitled under the act of parliament to a preference, he received the apprentice fee from the trustees: And that about two years since, *Elizabeth Lyon*, the eldest daughter of the petitioner *Joseph Lyon*, was permitted to draw lots for the apprentice fee to be given to girls, and drew a beneficial lot, and was bound apprentice accordingly.

The petition farther stated, that the petitioner, *Michael Joseph*, was of the Jewish persuasion, and had constantly been for thirty years past, and was then the occupier of a house in the parish of *St. Paul*, in the town of *Bedford*, and that *Joseph Joseph* and *Nathaniel Joseph*, his two sons, were admitted to the free school of the charity, from their respective ages of eight years, until they respectively drew lots for, and received, the apprentice fee to be given to boys, and were both bound apprentice to the petitioner *Michael Joseph*, in his trade of a silversmith, by the Masters, &c., of the charity, and the eldest son was bound apprentice at *Michaelmas* 1810, and having served his apprenticeship, and produced a certificate pursuant to the directions of the [485] act, received the sum of £10 from the Masters, &c., at the meeting held on the second *Tuesday* after *Michaelmas* 1817; that the three eldest daughters of the petitioner *Michael Joseph*, were respectively admitted to draw lots for the apprentice fee to be given to girls, but did not draw beneficial lots, and that at the times of their respective marriages, they received the marriage portions to be given to poor maids; and the fourth daughter of the petitioner *Michael Joseph* received both an apprentice fee and marriage portion; that the petitioners had made application to the masters, governors, and trustees of the *Bedford* charity, to admit the petitioner *Sheba Lyon* to draw lots for the apprentice fee to be given to girls, and to permit persons of the Jewish persuasion, poor inhabitants of the town of *Bedford*, duly qualified in other respects, and their children, to partake of the benefit of the *Bedford* charity, and that *John Wing*, the mayor of the town of *Bedford*, in answer to an application made to him for such purposes by the petitioner *Isaac Lyon Goldsmith*, wrote a letter to the last-named petitioner, dated the 5th of *January* 1818, informing him, that although the children of the petitioner *Michael Joseph* had been allowed the benefit of the charity without objection, yet the trustees finding the number of Jews increasing in *Bedford*, entertained considerable doubts whether such

persons were objects of the charity, and that they had been advised to refuse, and had refused, to admit Jews to participate in the benefit of the charity, leaving it to the persons so refused, if they should think proper, to bring the matter before the *Lord Chancellor*.

The petition, then stating the act of the 52d year of *George 3* (c. 101), entitled, an act to provide a sum-[486]-mary remedy in case of abuses of trusts created for charitable purposes, and that by virtue of the said acts of Parliament, or one of them, the petitioners were entitled to relief in the premises, prayed that it might be declared that the poor inhabitants of the town of *Bedford* in other respects duly qualified, are entitled to the benefit of the *Bedford* charity for themselves and their children, whether they are Jews or Christians, and that the masters, governors, and trustees of the *Bedford* charity might be ordered to permit *Sheba Lyon* to draw lots for the apprentice fee to be paid to girls, in pursuance of the act of parliament, and in case she should draw a beneficial lot, that the masters, &c., might be ordered to pay the apprentice fee to her.

*July 31.* Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Heald*, in support of the petition. This petition is presented by persons immediately interested in the charity, and by other respectable individuals, not interested, who consider it their duty to support the claims of those of their persuasion to benefits which, after having been long enjoyed, are recently denied to them. It is clear that Jews may be objects of this charity. The clause requiring attendance at some place of religious worship every *Sunday* (2 *Swans*. 501), is indeed not literally applicable to Jews, but it implies an intention not to confine the charity to persons of the established religion; the design was, to require some form of religion; and the Court will not, from that single clause, which certainly comprehends [487] Roman Catholics, infer the exclusion of Jews. The expression in the eleventh rule, "Christian name," was designed merely to secure a statement of the *prænomen*, though not imposed with the ceremony of baptism. The certificate required from apprentices concerns moral conduct only, not religious ceremonies.

The apprehensions entertained by the trustees of an undue accession to the numbers of foreign Jewish inhabitants of *Bedford*, if well founded, may be better removed by an extension of the term of ten years' residence, at present required in inhabitant householders, to qualify their children as objects of the charity, than by a regulation affecting religion. No sufficient reason is assigned to justify the trustees in establishing a distinction to the disadvantage of persons conscientiously following the faith of their ancestors. It must be argued, that, if there were no objects of the charity except Jews, the fund should be applied to other purposes, rather than for their benefit.

The particular regulations of this charity not excluding Jews, the trustees must maintain a general proposition, that Jews cannot claim a benefit under any charity. Our law recognises no such rule. The decision of Lord *Hardwicke* in *De Costa v. De Paz* (2) establishes only [488] that a bequest for the propagation of the Jewish religion is void, not that persons of that persuasion cannot be ob-[489]-jects of a charitable institution. The highest authority which we acknowledge instructs us, that difference of [490] faith should not exclude a brother in distress. Where admission to institutions requires subscription to certain [491] articles, a person declining to subscribe is disqualified, not by his principles, but by the omission of the ceremony.

The *Solicitor General* [Gifford], for the trustees, suggested a doubt whether the warden and fellows of new college, expressly appointed visitors of the grammar school, were not also visitors of other parts of the charity; and insisted that the question depended on the intention of the founder, the act of parliament not extending to any class of persons not originally comprehended within the letters patent.

The *Lord Chancellor* [Eldon]. It is indispensable to see the letters patent, from which alone can be collected the objects of the charity, [492] referred to by the recital in the act. The Court must also be informed whether it does or not appear on the records of the charity, that a Jew has ever voted in the choice of trustees, or been elected trustee, or educated in the grammar school, or apprenticed, or admitted into the alms-houses; and whether any of the poor maidens who have received marriage portions have been Jewesses. In deciding whether Jewesses can be entitled to the benefit of those portions, the Court must recollect what will be the effect of that

decision on all the other provisions. My present opinion is, that the warden and fellows of new college, are visitors of the grammar school only.

Affidavits were afterwards filed in support of the petition, and in opposition to it.

The affidavits of *Michael Joseph*, *Joseph Levi*, and *Godfrey Levi*, in support of the petition, stated, that since the petitioner *Michael Joseph* became a resident householder at *Bedford*, he had twice voted in the annual election of trustees of the charity, once when such elections used to take place at the old town-hall, which had been pulled down upwards of twelve years, and once at the sessions house, where the elections had been since held; that on occasion of his last voting, he was solicited so to do by Mr. J. C., one of the present trustees, and an alderman of the town of *Bedford*; and that he had been at several other times solicited to vote in the election of trustees, but had declined so doing in consequence of its being inconvenient to him to be at *Bedford* at the time of the elections; that he settled at that town and became a housekeeper there, about thirty-one years ago, and at that time there was no other person professing the Jewish religion there, nor had been, in the memory of man; that he had had two sons [493] and seven daughters, all of whom were born in *Bedford*, and then living, and that both his sons were admitted into the free school of the charity, and were educated there in the usual manner, his eldest son being in the lower or writing school, and his youngest son both in the grammar and writing school, and both of them drew for and received apprentice fees from the charity, and the eldest, on being out of his apprenticeship, and on production of the certificate required by the act, received the benefaction of £10; that his four eldest daughters drew for apprentice fees given to girls, the three eldest of them did not draw beneficial lots, but the youngest having drawn a beneficial lot, the apprentice fee was paid with her: that all his daughters had since claimed and received the marriage portions given to poor maidens; that the eldest of his three youngest daughters had twice drawn for the apprentice fee, namely at *Michaelmas* 1814, and *Lady Day* 1815, but drew unsuccessful lots on both occasions; that no Jew had ever been proposed or elected a trustee of the charity; but that such trustees had always been elected from among the most opulent and considerable inhabitants of the town; and no Jew, during the time of *Michael Joseph's* first residence there, had been, by his circumstances and mode of living, entitled to the distinction of being elected a trustee: that no Jew boy or girl had ever been admitted into the hospital, nor any Jew into the alms-houses belonging to the charity, and that no Jew girl ever received the donation given to maid-servants, and no Jew ever received any part of the monies distributed annually under the provisions of the act, among the poor inhabitants of *Bedford*; but that no one professing the Jewish religion since *Michael Joseph's* residence in the town, or at any time preceding, as he believed, had ever applied for, or been a fit object to [494] partake any of those benefactions (in as much as no Jew had been incapacitated by age or infirmity, so as to fall within the description of persons for whose benefit the alms-houses were erected), or to receive the surplus of the charity funds annually distributed; and no Jew girl, the daughter of an inhabitant of *Bedford*, had ever gone out to service; that there were then three Jew housekeepers in the town, and no more, and that since *Michael Joseph* first came to reside in the town, there had been four other Jew families resident as housekeepers there, all of whom had either left the town, or ceased to be housekeepers therein.

The affidavits farther stated, that *Godfrey Levi*, resident at *Bedford*, had four daughters and a son, of whom the two eldest daughters were received at the preparatory free school belonging to the charity, at its first erection in 1816, and continued there for a considerable time, until he thought proper to remove them, and place them in another school; and that the youngest daughters of *Michael Joseph* and *Joseph Lyon* were admitted into the preparatory school, but had since been removed by them.

The affidavits of *John Brereton*, clerk, doctor of civil law, master of the free grammar school, *William Massey*, master of the writing school, and *John Furze*, master of the hospital for the nourishment of poor children, and of the *Harpur* preparatory school, filed in opposition to the petition, stated, that in *January* 1811, *Dr. Brereton* was appointed, by the warden and fellows of *New College, Oxford*, master of the free grammar school, upon the death of the late master; that soon after his appointment, certain regulations for the management of the school were made and approved by the warden and fel-[495]-lows, and also by the masters, governors,



and trustees, and by Dr. *Brereton*, which were printed and distributed in the town of *Bedford*, and a copy, painted on boards, placed in the school, and the school had ever since been, and still was, conducted agreeably thereto ; that each boy attending the grammar school was required to learn, and was instructed in, the Latin language, and so soon as he had made sufficient progress therein, he was required to learn, and was instructed in, the Greek language, and in reading the Greek Testament, and the works of such Latin and Greek authors as were usual in public schools, and the boys were divided into classes as usual in such schools ; that every boy was also instructed in the principles of the Christian religion, and required to read the Bible and New Testament ; that on Dr. *Brereton's* entrance on the duty of master of the grammar school, in 1811, he found *Nathan Joseph*, the son of *Michael Joseph*, one of the scholars in that school ; that *Nathan Joseph* (who also attended the writing school) never made further progress than learning the Latin grammar, and remained altogether not more than twelve months in the school, when his father took him away ; that *Michael Joseph* requested Dr. *Brereton* to dispense with *Nathan Joseph's* attendance in school at the time of morning and evening prayer, on account of its being inconsistent with his faith as a Jew, and for the same reason to dispense with his attendance on the *Saturday*, being the Jewish *Sabbath*, and also on the Jewish holidays ; that *Nathan Joseph* never attended the grammar school on a *Saturday*, nor on certain other days which were Jewish holydays ; that he was very irregular in his attendance in school, of which Dr. *Brereton* frequently complained to *Michael Joseph*, who uniformly described his absence to be of necessity, on account of his being of the Jewish persuasion ; that no boy of the Jewish persuasion, except *Nathan Joseph*, [496] had at any time applied for admission, or been admitted, into the grammar school, during the time Dr. *Brereton* had been the master thereof : that all the boys in the writing school, without exception, were educated in the principles of Christianity, and taught to read, and actually read, the Bible and New Testament, and learn and repeat the Church Catechism ; that no boy of the Jewish persuasion had applied for admission, or been admitted, into that school, during the time W. *Massey*, who was appointed in *December* 1814, had been the master ; that, in *June* 1815, the masters, &c., founded a school for instructing the poor boys of the town upon Dr. *Bell's* system of education, by the name of a preparatory school, and *John Furze*, master of the hospital for poor children, was appointed master ; that no Jew boy had ever been educated in the preparatory school ; that on the afternoons of *Tuesday* and *Thursday*, in each week, being the half holydays of the boys, the school was opened for the education of girls residing in the town, in reading, writing, and arithmetic, from two till four ; that two daughters of *Michael Joseph*, three daughters of *Joseph Lyon*, and two daughters of *Godfrey Levi*, came to the preparatory school, for education, on the *Tuesday* and *Thursday* afternoons, for about six months ; that the two daughters of *Michael Joseph* informed *Furze*, that, being Jewesses, they were not allowed to read the New Testament, and he permitted them to read the commandments and the Bible only ; that the children of *Joseph Lyon* and *Godfrey Levi*, being little children, were, on the above afternoons, put, with children of the same class, to read the parables and miracles of the New Testament ; that all the Jew children staid away from the school on certain days, which were Jewish holidays, and neither of the Jew children remained in the school more than six months, when they entirely ceased to attend, except *Sheba Joseph*, who remained upwards of twelve months.

[497] The affidavit of *John Whitehouse*, clerk to the masters, &c., of the charity, stated that he was of the age of forty-eight years, and a native of *Bedford*, out of which he had never resided for six months together ; that he never knew or heard of any Jew residing in the town before *Michael Joseph* came to reside therein, about thirty years ago, since which time other Jews had come to reside there ; and that in *November* 1799 he was appointed by the masters, &c., to take the management of the *English* or writing school of the charity, the then master being incapacitated by age, and upon his decease in 1803, the deponent was appointed master ; that during the time he officiated, the boys in the school were severally instructed in the principles of the Christian religion, and read the Bible and New Testament, and learned and repeated the Church Catechism ; that no boy of the Jewish persuasion was ever admitted into the school for education before the deponent officiated as master, and the only boys of the Jewish persuasion who were admitted whilst he

was master, were *Joseph Joseph*, eldest son of *Michael Joseph*, and *Lemuel Lyon*, son of *Joseph Lyon*; that *Michael Joseph*, on occasion of his son's admission, requested that *Joseph Joseph* might not be desired to attend the morning and evening prayers on account of his religion; that the deponent did not dispense with *Joseph Joseph's* attendance, but permitted him to sit instead of kneel during such prayers; that at the request of *Michael Joseph*, the deponent permitted *Joseph Joseph* to be absent from school every *Saturday*, being the Jewish *Sabbath*, and also on such days as were Jewish holydays; that *Lemuel Lyon* was also absent every *Saturday*, and on the Jewish holydays: that neither *Joseph Joseph* or *Lemuel Lyon*, on account of their religion, ever read the New Testament, or learned the Church Catechism, as all the other boys did; that in *July 1809* the deponent was appointed by the masters, [498] &c., to be their clerk, and thereupon vacated the mastership of the *English writing school*; that *Rosma Joseph*, a daughter of *Michael Joseph*, drew for and received the marriage portion on the 6th of *January 1808*, and that *Elizabeth Joseph*, *Mary Joseph*, and *Hannah Joseph*, three other daughters of *Michael Joseph*, had also since drawn for and received the marriage portions; that *Hannah Joseph* and *Joseph Joseph* drew for and obtained the beneficial lot to be bound apprentice, and were severally with the consent of the masters, &c., bound apprentice to their father, *Michael Joseph*; that *Nathan Joseph*, the other son of *Michael Joseph*, also drew for and obtained the beneficial lot, and was with the like consent bound apprentice; and *Joseph Joseph*, on a certificate of faithful service, received the usual benefaction of £10; that *Lemuel Lyon* and *Elizabeth Lyon*, children of *Joseph Lyon*, had also respectively drawn for and obtained the beneficial lot, and had been bound apprentice; that no Jew had ever been proposed or elected a trustee of the charity, and that no Jew, except *Michael Joseph*, had ever ballotted on the election of any trustee; that no Jew girl had ever received any portion, or donation, as a maid-servant, or on going to service; that no Jew boy or girl had ever been admitted into the hospital; that no Jew had ever received any part of the monies distributed annually for the relief of poor decayed housekeepers, and other proper objects, or been admitted in any alms-house of the charity, or otherwise partaken of the charity, except as before set forth.

The regulations for the management of the school annexed to Dr. *Brereton's* affidavit, contained, among others, the following articles:—"4. Prayers will be read every morning before breakfast, at the commencement of the school-time, and at the end of it every even-[499]-ing. 5. Every boy will be expected to attend most punctually at the above stated hours (specified in the third article) with his lesson and exercises prepared. Names will be called over at the commencement, and the close of every school-time, and boys absenting themselves from morning prayers, without a sufficient reason sent to the master in writing by their parents or guardians, will, after due admonition and correction, be liable to be expelled by the master. 6. Saints' days, and every *Saturday* afternoon, will be fixed holydays."

The following clauses of the act of 33 *Geo. 3*, were, in addition to those stated by the petition, the subject of observation in the argument and judgment. The clause regulating the election of trustees directed, that they should be inhabitants of the town of *Bedford*, who had resided there for three years, and be seised of, or entitled to, a freehold of the yearly value of £10, or occupy a house in the town of the yearly value of £15, chosen annually by inhabitants paying scot and lot.

The trustees were required, before they acted, to take and subscribe an oath, or, being one of the people called Quakers, a solemn affirmation, of their qualification, and faithful performance of the duties of the office; and a subsequent clause directed, that the monument and statue of the founder should be supported and kept in repair from the rents of the charity. It was also enacted, that if any of the provisions or regulations of the act should at any time prove inconvenient or impracticable, or if any doubts, disputes, or difficulties, should arise, touching the application of the rents and profits of the charity estates, or the construction of any of the rules, orders, and directions, contained in the schedule, or afterwards made by the trustees, it should be lawful for the trustees, or any eight or more of them, to prefer a petition to the Lord Chancellor, or the Lord Keeper, or the Lords Commissioners of the Great Seal, who were thereby authorised and directed to cause the same to be heard in a summary way, and such order as the Court of Chancery should think fit to make therein, or upon the hearing thereof, should be final and conclusive;

and the costs and expenses to be incurred by every such petition should be paid out of the rents and profits of the charity estate.

The third article of the schedule directed, that, at the school, all the children who should resort thereto for education should be instructed in grammar, reading, writing, and other useful learning, and good manners, in such manner as the warden and fellows of *New College, Oxford*, the visitors of the grammar school, and the trustees for the time being of the charity, assembled at a general meeting, or the major part of them, should direct. The fifth article required the master and usher to be fellows of *New College*, or clergymen of the Church of *England*, appointed by the warden and fellows of *New College*. The ninth article directed the warden and fellows of *New College*, on the first *Thursday* in every *May*, to send two sufficient visitors to the grammar school, who should publicly examine the boys in their learning, and, as visitors, examine into the conduct of the master and usher, and also into all faults and neglects respecting the school, and make a report thereof to the warden and fellows. The fourteenth article directed the residue, if any, of the annual sum of £800, applicable under the eleventh article (2 *Swans*. 479), to be distributed amongst such poor maid-servants, not being of bad reputation, then resident in *Bedford*, as should have been in service there five years, and should have been married [501] within one year before such distribution. The thirty-first article, directing the erection of alms-houses, for the reception of ten poor old men and ten poor old women, housekeepers of *Bedford*, with certain allowances, required the persons inhabiting the alms-houses, if able, to go every *Sunday* to some place of public worship, in *Bedford*, on pain of liability of removal, for neglect of attendance, or other misbehaviour.

Aug. 7. The *Solicitor-General* [Gifford], Mr. *Phillimore*, and Mr. *Shadwell*, against the petition. To entitle themselves to the relief sought, the petitioners must show, that, at the date of the foundation of this charity, *Jews* might have claimed the benefit of it. That proposition is confronted by the most decisive authorities. In the reign of *Edward the Sixth*, for many centuries preceding, and for more than a century following, *Jews* were aliens in the strictest sense of the term; though born in this country, yet professing *Judaism*, the law distinguished them as alien enemies. Such is the doctrine of *Calvin's case*; and though the terms in which it is expressed may not sound decorous to modern ears, the Court will recollect that that case was argued before the twelve judges, assisted by the *Lord Chancellor*; and Sir *Edward Coke* remarks the singular unanimity of the decision (7 *Co.* 28, but the passage cited is merely a *dictum* of *Coke*.) The principle thus established by the highest legal authority is this: "All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *potentia remota*, a remote possibility), for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace—2 *Cor.* vi. 15. [502] *Quæ autem conventio Christi ad Belial, aut quæ pars fidei cum infideli*: and the law saith,—*Judæo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere*—Register, 282.(3) *Infideles sunt Christi et Christianorum inimici*. And herewith agreeth the book in 12 *Hen.* 8, fol. 4 (a *dictum* of *Brook, Justice*), where it is holden that a pagan cannot have or maintain any action at all."(4) [503] In his Commentary on *Littleton*, Lord *Coke* states this case: "A Jew born in *England*, taketh to wife a Jewess [504] born also in *England*; the husband is converted to the Christian faith, purchaseth lands, and enfeoffeth another, and dieth; the wife brought a writ of dower, and was barred of her dower; and the reason yielded in the record is this: *Quia vero contra justitiam est quod ipsa dotem petat vel habeat de tenemento quod fuit viri sui, ex quo in conversione sua nolit cum eo adhærere, et cum eo converti*."(5)

In the earlier periods of *English* history the kings of *England* exercised a peculiar jurisdiction over the *Jews*: [505] they were in the absolute disposition of the crown; (6) and whatever sums the necessities of the monarch required were raised by seizing their lands, though the lands of [506] aliens could not be seized without inquest of office found—*Molloy de Jure Maritimo*, l. viii. c. 6. In the reign of *Edward the First*, they quitted this country whether in consequence of the Statute *de Judaismo* is uncertain,(7) and returned not till the Com-[507]-monwealth.(8) Throughout that long interval no Jew could be an object of this charity; nor can

it be supposed that *Edward the Sixth*, a most religious monarch, designed to found an establishment for the support of infidels, by letters patent, in which he describes himself as *Ecclesiæ Anglicanæ supremum caput*. Christianity is a part of the law of *England*; (2) to permit Jews to enjoy the benefit of the charity, would be indirectly to encourage a mode of faith, in support of which, according to the express decision of Lord *Hardwicke*, this Court will not interfere.(2) The letters patent specify as objects of the endowment, the instruction of youth in *grammatica literatura et bonis moribus*; and though in a knowledge of the learned languages Jews and Christians may agree, they differ widely in their interpretation of *boni* [508] *mores*: the good morals contemplated by the founder were such as conform to Christian rules, and originate in Christian faith. There is no law tolerating an infidel religion, nor has any statute passed since the return of the Jews, and now in force,(9) exempted them from the disabilities to which at the common law they are subject. In the debate on the bill introduced in a late reign, for the naturalization of the Jews,(10) a question arose whether Jews born in *England* can hold real property as natural-born subjects? Mr. *Fazakerly* strongly maintained the negative (*New Parliamentary History*, xiv. 1406); the opposite opinions of *Pigot* and others proceed on reasoning obviously inconclusive, that they know no statute depriving Jews of a right to hold; it was sufficient to know that there is no statute repealing the disqualifications of the common law.(11) So wide is [509] the distinction between Jews and other natives of *England*, that, on the trial of a Jew, the jury is chosen *de medietate*, half Christians and half Jews.(12)

It is in evidence that no Jew has ever been a *trustee* of this charity; the first statute, 4 *George 3*, required as a qualification in the trustees, that those who were not members of the corporation should be church wardens; a provision which necessarily excluded Jews, whose exclusion from corporations was, as appears in [510] *Blackstone* (4 *Bl. Comm.* 58), one of the objects of the corporation act, 13 *Car. 2*, st. 2, c. 1. The requisites of seisin of a freehold estate, and notice in the parish church, obviously refer to *Christians*. In the objects of the charity the requisition of the Christian and surname of the candidates; of attendance at public worship on *Sunday*; of certificates of good conduct by the minister of the parish; and the provision for an exhibition to scholars going to the university, are all inapplicable to Jews. A Jew could not perform the duties of an apprentice to a Christian, the days appointed for work and rest being different in the two religions. The care of the monument and statute of Sir *W. Harper*, is inconsistent with the Jewish faith. The schoolmaster must be in orders: would it be reasonable to require a clergyman to superintend the education of persons in a faith opposite to Christianity? The general expressions, good morals, is defined by the subsequent regulation, directing removal for non-attendance at church, as a species of misbehaviour. Could the master honestly release from the obligation of morning and evening prayers, a large proportion of the scholars; and if Jews are admissible, a majority might be Jews.

Sir *Samuel Romilly* in reply. The result of the inquiries suggested by the Court is, that persons professing the Jewish religion have, in almost every mode, enjoyed the benefit of this institution; have been educated there, placed apprentices, and received the reward of good conduct; and that which the counsel on the other side suppose impossible has happened; a clergyman of the church of *England* has certified the moral merit of a Jew, thinking it practicable [511] for a man to be good without being a Christian. No Jew has held the office of trustee, because no Jew has resided in the town, who was not an object of the charity.

The manner in which this case has been argued, renders it of extreme importance; and if the doctrines advanced at the bar receive the sanction of the Court, this will be a new epoch in the jurisprudence of the country, so far as concerns religious opinions. The Solicitor-General supposes, that this Court will not give effect to a charity for the benefit of Jews. The decision of Lord *Hardwicke* in *De Costa v. De Paz*,(2) proceeds expressly on the design of the institution in that case for the propagation of the Jewish religion. What would be the condition of Jews, if neither Jew nor Christian could establish a charity for their relief? It is sufficient that there is not even a *dictum* in support of that doctrine.

It has been said, that by the law of this country Jews are aliens, and disqualified to hold real property. Whatever might have been the opinion of Mr. *Fazakerly*, who was alone in it, on that point, the universal opinion at present is, that Jews

born in this country are as much entitled to hold and enjoy lands, as other natives. (11) No one ever objected to a title because the estate had belonged to a Jew. It is matter of fact that no such notion is entertained by the present Chief Justice of the King's Bench, who purchased from a Jew the house in which he now resides. On any other supposition, the statute 13 Geo. 2, c. 7, which expressly enacts that Jews residing seven years in a *British* colony, and [512] taking the oaths prescribed, shall be deemed natural-born subjects, would be nugatory.

It is painful to comment on the doctrine cited from Lord Coke's report of *Calvin's* case; a doctrine disgraceful to the memory of a great man, whose latter years redeemed in some measure his failings as an officer of the crown. That passage has never been cited without reprobation. In *The East India Company v. Sandys*, Sir George Treby condemned it in the strongest terms. "I must take leave to say that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical, and fanatical. It is akin to *dominium fundatur in gratia*." (10 *Howell's* State Trials, 392. *Vide* 2 *Swans*. 502, n.)

It is corrected by Sir Edward Littleton as a known error; and in *Omichund v. Barker*, (13) Chief Justice Willes rejected it with indignation. "This notion, though advanced by so great a man, is, I think, contrary not only to the Scripture, but to common sense and common humanity; and I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce from which this nation [513] reaps such great benefits. We ought to be thankful to Providence for giving us the light of Christianity, which he has denied to such great numbers of his creatures of the same species as ourselves. We are commanded by our Saviour to do good unto all men, and not only unto those who are of the household of faith. And St. Peter saith, Acts x. 34, 35, that 'God is no respecter of persons, but in every nation he that feareth him and worketh righteousness, is accepted with him.' It is a little, mean, narrow notion to suppose that no one but a Christian can be an honest man. God has implanted by nature, on the minds of all men, true notions of virtue and vice, of justice and injustice, though heathens perhaps more frequently act contrary to those notions than Christians, because they have not such strong motives to enforce them. But (as St. Peter says) there are, in every nation, men that fear God and work righteousness; such men are certainly *fide digni*, and very proper to be admitted as witnesses. I will not repeat what was said by Sir George Treby in the case of monopolies in the State Trials, vol. vii. p. 502, of this notion of Lord Coke's, and which was cited by one of the counsel, but I think that it very well deserves every epithet that he has bestowed on it. I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion, that an infidel cannot be a witness. For though it may be founded upon some general sayings in *Bracton*, *Fleta*, and *Britton*, and other old books, those I think of very little weight, and therefore shall not repeat them. First, because they are only general *dicta*; and in the next place, because these great authors lived in the very bigoted popish times, when we carried on very little trade except the trade of religion, and consequently our [514] notions were very narrow, and such as I hope will never prevail again in this country." (14)

It is said that this institution was founded by Edward the Sixth; and that establishing a charity for relief of the calamities incident to human nature, he, as a religious man, intended to confine it to persons of his particular persuasion. Edward the Sixth was the founder also of *St. Thomas's Hospital*: is it contended that a sick or wounded Jew is not admissible into that establishment? The argument that no person can be an object of the charity, who was not, or might not have been, in the contemplation of Edward the Sixth, would exclude the members of all subsequent sects. If no Jews are eligible because no Jews were resident in *England* during his reign, on what principle can Quakers be received? The statutes of *Elizabeth* were passed during the exile of the Jews, and if this argument is valid, no Jew can have the benefit of the poor laws. Jews, however, though, to their credit, they commonly maintain their own poor, [515] are compelled to contribute to the poor's rate, and must either serve the offices of churchwarden and overseer, or fine for not serving.

If Lord Coke's doctrine is pursued, we must proceed to some of our early writers,

who declare that the marriage of a Christian with a Jewess, is a capital offence punishable by a cruel death. 15. On the same authority, no Jew can have the benefit of clergy. "It hath been said, that Jews and other infidels, and heretics, were not capable of the benefit of clergy, till after the statute 5 Anne, c. 6. as being under a legal incapacity for orders. 12 *Hal. P. C.* 373; 2 *Hawk. P. C.* 338; *Fost.* 306.) But I much question whether this was ever ruled for law, since the introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect, it only dispensing with the necessity of reading in those persons, who, in case they could read, were, before the act, entitled to the benefit of clergy." (4 *Bl. Comm.* 371, 372.) Such is the doctrine of *Blackstone*. On their re-admission to this country, after the virtual repeal of the flagrant act of injustice which had banished them, the Jews were restored to the privileges of other subjects, and became entitled to the benefit of all institutions not confined to members of the established church.

The duty of repairing a monument, is not inconsistent with the Jewish religion, which permits statues for [516] temporal purposes; the second commandment is as much adopted by Christians as by Jews. The argument that Jews cannot be trustees, because they cannot be members of a corporation, proves too much, and would require the exclusion of all dissenters.

The Lord Chancellor [Eldon]. The prescribed form of oath supposes that a quaker may be a trustee.

Argument in reply resumed.

The framers of the Articles could scarcely have taken so much pains to omit the use of the term Church, in requiring attendance on public worship, except with the purpose of not excluding sectaries. The synagogue is open every day, and a Jew might attend worship there on Sunday. The phrase "Christian name," has been relied on. If Christian name means baptismal name, Anabaptists are excluded. No one who reads the regulation can fail to understand that the design was merely to designate the person with certainty, and that the Christian name is used only as a familiar description of the name which distinguishes the individual from all other members of his family. The comprehensive words "all children of inhabitants, and children of all persons," &c., afford a much stronger inference of the intention of the founder, that there should be no exclusion. The only description relative to admission into the alms-houses, is of persons advanced in life, and wanting aid.

The doctrine of the other side amounts to this, that Jews reside here only by sufferance, with all their landed property at the pleasure of the crown, excluded from [517] the benefit of every charity, in the condition of persecuted aliens.

The Lord Chancellor. What interest in the question have the gentlemen of the synagogue, who join in the petition? Every person possessing the character of an inhabitant of Bedford, and describing himself as an object of the charity, is entitled to apply to the Court; but how can I hear persons representing the synagogue? How can I notice the body called the Jews' synagogue?

Argument in reply resumed.

That objection, at the utmost, renders those persons superfluous, and the petition must be considered as that of the other petitioners; but as any one may be a relator in an information, so any one may be a petitioner under the new act (52 *Geo.* 3, c. 101). The members of the synagogue appear in their individual character, and the words "elders of the synagogue," are merely descriptive.

The Lord Chancellor. Under which act is the petition presented?

Sir Samuel Romilly. Under both acts.

The Lord Chancellor [Eldon]. I doubt whether the petition can be received, either under the particular act, or under the general act.

[518] Aug. 15. The Lord Chancellor. I am perfectly satisfied that Jew boys cannot be admitted into the school; whether the other provisions of the charity are applicable to Jews, is a question on which I have not quite formed an opinion.

May 1, 1819. The Lord Chancellor [Eldon]. There is a question in this case to which I must desire an answer, why the gentlemen of the synagogue are petitioners? Under Sir Samuel Romilly's act (52 *Geo.* 3, c. 101), supposing this a petition which

could be authorised by that act (a point on which I shall hereafter remark), no person can petition who has not a direct interest in the charity. The act, indeed, authorises "any two, or more persons," to present a petition; but I conceive, that those words must be understood to mean persons having an interest.

May 4. The *Lord Chancellor* [Eldon]. The petition proceeds on an allegation, that the petitioners are entitled to relief, either under the act relative to this particular charity, or under the general act, or under both those acts. The petitioners must elect on which act they will proceed; and for this reason: under the particular act the judgment of the *Lord Chancellor* is final; under Sir *Samuel Romilly's* act it is subject to appeal; the Court, therefore, cannot proceed on both [519] acts; the judgment cannot be both final and not final. I cannot give judgment in two jurisdictions.

If the petitioners proceed under the *Bedford* charity act, their affidavits, which are unstamped, cannot be read; it is only under Sir *Samuel Romilly's* act that they are authorised to read affidavits without a stamp. (52 *Geo.* 3, c. 101, s. 3.)

A third point is, what reason is there for permitting the elders of the Jewish synagogue in *London* to become petitioners?

Another question also requires consideration, whether, regard being had to the nature of this case, which arises, not on misconduct, but on doubt of the construction of the articles, the Court possesses jurisdiction under the particular act, except on the petition of the trustees?

Mr. *Heald* in support of the petition. Under the *Bedford* charity act, any person whatever, with the consent of his Majesty's Attorney General, may apply by petition. (See the clause, 2 *Swans.* 477.) Sir *Samuel Romilly's* act is susceptible of a like construction. The words, "any persons," comprehend persons who may not have an interest. In the instance of charities for relief of the blind or the poor, it has been the practice to receive the petition of the minister of the parish; and on behalf of orphans seeking the benefit of a charity for fatherless children, the Attorney General may proceed without a relator.

The *Lord Chancellor* [Eldon]. The petition of the minister of the parish is received, [520] because the poor may be burdensome to him; and there is no doubt that, though a relator is commonly required for the purpose of securing costs (some cases concerning relators are collected, 1 *Swans.* 305 n.), the Attorney General may, if he pleases, proceed without a relator. The petitioners must make their choice between the acts; and if they proceed on the *Bedford* charity act, the office-copy of the affidavits must be stamped. When they have declared their election, I will decide the question as if the other act had not been mentioned.

Another matter may deserve consideration. I have not found any actual refusal to give the benefit of this charity to any individual except *Sheba Lyon*. I wish to know whether, supposing that any thing can be done on the petition of persons not trustees, I can give to the petitioners all that their petition seeks? It was argued, that persons of the Jewish persuasion are entitled to the benefit of all the distributions to be made of this charitable fund, or if not to all, at least to a part; and the petition prays that they may be declared entitled to all.

A doubt has also occurred to me, whether admissibility into the school is within my exclusive jurisdiction; whether it does not belong to the visitors, the warden, and fellows of *New College*? They have introduced a variety of regulations for the conduct of the boys' school, with which no Jew boy could comply. Without now giving final judgment, I have no doubt that a Jew boy cannot have the benefit of that school because he cannot comply with those regulations.

May 8. Mr. *Bell*, for the petitioners, declared their election to [521] proceed under the *Bedford* charity act, and suggested, that the petition should stand over, in order that the affidavits might be stamped.

Mr. *Shadwell* against the petition, proposed that the statement of the affidavits should be taken as true.

The *Lord Chancellor*. That cannot be done.

The question was argued on comprehensive principles, but is, in fact, no more than this, What is the meaning of these instruments? And I think that I need not much concern myself with general doctrines.

The affidavits on both sides were afterwards stamped.

May 11. The *Lord Chancellor* [Eldon]. I have before me the petition of some

residents of the town of *Bedford*, and also of persons not resident there ; and without inquiring whether the last ought to have been joined, I will consider it only as the petition of the former. The petition claims relief under one or other of the acts of Parliament ; but I now understand, that the petitioners rely on the *Bedford* charity act ; not insisting on the other ; and I am quite content to take it in that way, without giving them the trouble of amending the petition ; it can easily be recorded, that the judgment of the Court proceeded on the *Bedford* act : but then arises a question, whether, on that act, the application is right in form ? whether the best course of [522] proceeding will not be, that a short petition should be presented by the trustees, stating, that doubts had arisen on the construction of the act in regard to Jews, and submitting to the Court what they take to be the true exposition, as far as those persons are concerned ? On the letter stated in the petition, as on a great deal urged to me in argument, those liberal ideas about worshipping God in church, chapel, or synagogue, I purpose to make no observations ; it is not necessary. The decision in *De Costa v. De Paz*, has established, that no one can found, by charitable donation, an institution for the purpose of teaching the Jewish religion ; but it is quite a different question, whether property can be given to perform charitable acts to persons who happen to be Jews ; and it appears to me, that the present is a mere question, whether these individuals are or not, within the four corners of this act of Parliament, objects of the charity thereby given ? I have no concern with general principles ; I am only to construe the act.

On behalf of any persons, objects of this charitable institution, the mode of proceeding, independent of the course provided by the act of Parliament, would be by information ; if this is a case within the intent of the act of 52 *Geo. 3*, c. 101, the Court might proceed on a petition presented in the mode prescribed ; if the present proceeding is to be considered as depending for validity on the jurisdiction given to the Court under the *Bedford* charity act, it then becomes necessary to inquire, in what cases, and by what form, this Court is to be applied to, recollecting the weight and effect of the proceeding, if correct ? Whether the trustees were right or wrong in so doing, I mean to intimate no opinion ; but for some years they admitted Jews and Jewesses to the benefit of the charity ; they state, that they have since [523] been advised, that they ought not to continue that practice ; and a question which I should wish to suggest for their consideration is, whether they would proceed under a clause in the act, which authorises them to present a petition to the *Chancellor* ; a proceeding which would render the order of the Court unquestionably valid. (See the clause, 2 *Swans.* 499, 500.) Under that clause, when these doubts and difficulties arose, the trustees had it in their power to ask from the Court an exposition of the rules and orders, and the different passages in the schedule to the act, which would have served to them as a guide, with respect to those doubts. The letter written from the trustees to one of the elders of the synagogue, refers it to those who claim the benefit of the charity, to take such steps as they think proper, for asserting their rights. The question then arises, laying out of the case the 52 *Geo. 3*, c. 101, within which it would be extremely difficult for the petitioners to bring themselves, and if the application is not under the clause which I have just stated, whether the petitioners have any effectual mode of proceeding, except by information ? The question would be, whether the next clause (2 *Swans.* 477) was meant to apply to a case where there had not been misconduct or misdemeanour in the trustees, but where they acted erroneously, if you please, on doubts and difficulties which they felt with regard to the construction of the act of Parliament ? The terms of that clause contemplate acts, not of the body of trustees, but of individuals being trustees ; the language applies not to corporate bodies at all ; I cannot examine them, and the usual process is not applicable.

The difficulty which I have on this is, whether, in an application of this sort, this clause authorises a proceeding of this summary nature against a corporate body, [524] with respect to a matter which consists not in misconduct, or misdemeanour, or wilful misapplication ; not in a case in which the Court can examine individual trustees, but in doubts and difficulties, with respect to which there is a provision in the former clause ? I submit it, therefore, to the trustees, whether, in order to have this point settled, they would not better present a petition under that clause ? The strong inclination of my opinion, on looking into the act of Parliament, is, that I have not jurisdiction in this case under the other clause.



Mr. Bell. Even on an information, the question might arise, whether your Lordship would not quit the judicial character of *Lord Chancellor*, and pronounce an opinion in your visitatorial character of *Lord Chancellor*?

The *Lord Chancellor*. Then the preliminary question would arise, whether I have a visitatorial character?

A petition was afterwards presented by the masters, governors, and trustees of the *Bedford* charity, praying a declaration whether the poor inhabitants of the town of *Bedford*, who were of the Jewish persuasion, were entitled, with Christians, to the benefit of the *Bedford* charity, for themselves or their children; or to what extent, and in what respects, if any, they or their children were entitled to the benefit of such charity.

Aug. 23. The *Lord Chancellor* [Eldon]. This case came originally before the Court, on a petition presented by certain persons resident in the town of *Bedford* and by certain other persons describing themselves as elders of synagogues in *London*; and it was insisted, that the petition might be sustained, either on the act called *Sir Samuel Romilly's act*, or on the act regulating the *Bedford* charity. There were difficulties in that way of considering the case. If the matter was contested, whether the corporation were trustees for Jews as well as Christians, great doubt arises whether the petition could be sustained under the first act; and, under the second, it was extremely doubtful whether the *Chancellor* had authority to proceed in this summary way by petition, in a case where the trustees were not accused of misconduct. It would be difficult to represent this as a case of misconduct, within that clause. Another difficulty, which I continue to think very considerable, is this: if Jews, inhabitants of *Bedford*, claiming to be objects of the charity, could, as inhabitants of *Bedford*, establish in themselves the character of *cestuis que trust* of this charitable fund, yet I cannot comprehend on what principle the petitioners, describing themselves as elders of the congregation of Dutch and German Jews, assembling at certain synagogues in *London*, have a right to present a petition. Those who are interested in the fund, provided *Sir Samuel Romilly's act*, or the *Bedford* charity act, apply to this case, namely, persons residing at *Bedford*, are entitled to the summary interference of the Court, but I know not on what ground these gentlemen residing in *London* can appear as petitioners. To receive their petition would be to give a sort of corporate character to individual petitioners, which this court would not allow to be sustained. The *Bedford* charity act authorizes the Court, in the instance of misconduct of the trustees, to interfere on the petition of any person or persons; but I apprehend, that, in judicial construction, these expressions must be understood to mean, not persons having no interest, but persons who have an interest in the fund. If the petitioners resident in *Bedford* could have established their title as objects of the charity, still, as to the other petitioners, it would have been the duty of the Court to dismiss the petition as a matter of course. These difficulties, however, are removed by the petition which the trustees have preferred.

This charity had its foundation in letters patent of *Edward the Sixth*, who founded a grammar school at *Bedford* as in many other parts of the kingdom, and this is the foundation of a school, pro institutione et instructione puerorum et juvenum in grammatica literatura et bonis moribus. (*Vide* the Letters patent, 2 *Swans*. 472 *et seq.*)

The *Lord Chancellor* having remarked that the phrase "boni mores" admitted various constructions in classical writers, and referred to the acts of 1764 and 1793, observed on the clauses authorising applications to the Court. Attending to the language of the enactments with respect to cases in which all the trustees ought to apply in a summary way, and of these enactments, on the authority of which the former petition was presented, it appears to me that the letter was not designed to authorize a petition for the construction of provisions on which doubts arose. The former enactment being appropriated to that purpose, this clause authorizes the *Attorney-General* to interpose if a trustee misconducts himself, which he could hardly be said to do when he was *bona fide* construing the act. I also think that the words "any persons" must mean persons interested, and therefore that the elders of the *London* synagogues had no authority to petition.

[527] His Lordship having stated the provisions of the acts of parliament, and of the schedule, proceeded thus:

I have detailed both the acts and the provisions contained in the schedule, for

the purpose of presenting to my own attention, at least, the clauses on which observation was made in the course of the argument. It appears that until about thirty years ago, for reasons stated in that affidavit, there never was any distribution of these funds to the children of Jews, nor any application by Jews on behalf of their children; that within the last thirty years, some parts of the profits of these estates have been applied in favour of some children of the few Jews residing in the town; but, that on the application of the petitioner, *Isaac Lyon Goldsmith*, the trustees declared that they did not think themselves authorized to make application of the funds among the children of Jews.

Many arguments were addressed from the bar on the practice and principle of toleration. I apprehend that the present question is perfectly simple in its nature, and neither more nor less than this, whether the letters patent of *Edward* the 6th, and these acts of parliament, have or not comprehended within the true construction of their provisions persons of the Jewish persuasion? Whatever my sentiments may be of the opinions expressed in some clauses of the letter written on that occasion, I apprehend that it is the duty of every judge presiding in an *English* Court of Justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church, or synagogue, to recollect that Christianity is part of the law of *England* (*vide* 2 *Swans*. 487, n.); that in giving construction to the charter and [528] the acts of parliament, he is not to proceed on that principle farther than just construction requires; but to the extent of just construction of that charter and those acts, he is not at liberty to forget that Christianity is the law of the land.

With respect to usage, as far as usage is to be looked to for an exposition of the charter, it may be convenient first to consider it with reference to the question whether Jew boys can be admitted to the school, and next to the admission of Jewish maidens. I am not sure that the first question does not belong to the visitors; (16) but I have no difficulty in giving my opinion on it.

An observation not without weight is, that this school was founded as a grammar school, by *Edward* the 6th, who founded many throughout the kingdom, and the words grammar school have generally been construed to mean a school for instruction in the learned languages; (17) but I believe that it has been the practice from the beginning, and I hope that it still continues, and will long continue, that in these schools great care is taken to educate youth in the doctrines of Christianity; to teach them their duty to God and their neighbour, in the terms in which those duties are taught in the Catechism; and I remember the time when boys so educated were attended to church every *Sunday* by their master; thereby giving to them the opportunity of [529] learning the principles of that establishment which the law certainly favors.

The result of the affidavits is, that it does not appear that any Jew ever partook the benefits of the charity, till within the last thirty years; that a Jew has voted in the choice of trustees, being canvassed for his vote by one of the aldermen of *Bedford*, and that two or three Jewish children have been admitted into this school (in what manner conducted will be seen presently), that they have not received the benefit of other parts of the charity, the affidavits accounting for that, because from their circumstances of age or otherwise, they were not in a situation to solicit charitable assistance, or to be appointed trustees. Here are the regulations of the school approved by the warden and fellows of New College; and I can find nothing to raise an argument, that would authorize me to say, that they have not authority to make regulations for the conduct of the school. Even though the charter and the acts had not excluded Jews, the charter and the acts giving to the warden and fellows the power of making regulations, if these regulations, in a Christian country, operate to exclude Jew boys, it will remain to be considered, whether that is not a due exercise of visitatorial authority, and such as must be submitted to?

There is another way of considering it; Whether the visitors have not, in excluding Jews, rightly construed the charter and the acts? I have no doubt that *Edward* the 6th had not any intention for the education of Jews. Whatever may be our sentiments, it does not appear to me that they were within the scope of the charter, nor do I think that they are within the scope of the acts; the acts could not mean to comprehend persons who were not comprehended by the charter. How is [530] it possible that the education of boys professing Christianity, and of boys professing Judaism, can proceed together? It is in evidence, that Jew boys were absent

on Jewish holidays, and while the New Testament was read. They cannot comply with the regulations for education at this school, in what must, according to the construction of the charter, be held to be *boni mores*; the master always chooses the Latin and Greek books, and I know none of the grammar schools in which the New Testament is not taught, either in Latin or in Greek. In prescribing the school hours, directions are given for the attendance of the boys, on every day in the week, except *Sunday*; it is impossible that Jew boys can give that attendance consistently with the observance of Jewish holydays. Prayers are to be read every morning. What kind of prayers? They are prayers in a grammar school, where the master is a clergyman, and where the scholars are to have exhibitions to the universities, to which it is impossible that any Jew boy can be sent. It is not necessary to go through all these particulars, because it seems to me that Jews resident at *Bedford*, acting conscientiously, could not permit their sons to attend this school. I am therefore clearly of opinion, that there is no pretence to say that they are entitled to attend.

With respect to the other objects of the charity, the only question before me relates to Jewish maidens. First, can it be that at the time of the letters patent, Jew girls were within their scope and meaning? Next, if it is clear that boys must be educated in the principles of Christianity, is there any thing in the Charter to authorize me to say, that it being the intention to found an institution, a great object of which was, education of boys in the Christian religion, other objects of the charity were to be persons not professing Christianity? [531] Various articles interspersed, all tend to shew that the design of the charity was to benefit persons professing the Christian religion. I shall mention only one; that girls are required to send in their Christian names. It is said that Christian name means only first name, and that, on the other construction, an Anabaptist could not be admitted. Be it so, but I apprehend that Christian name means something which a Jew would say does not belong to him. I apprehend that Christian name does not necessarily mean baptismal name. Though Anabaptists do not baptize until later in life than other Christians, I think that the name which they give to their children is, in a sense, a Christian name. Another circumstance is, that the children are to attend public worship every *Sunday*. It is stated, and I doubt not truly, that Jewish children do attend worship every *Sunday*; but can any one contend that the words of the letters patent, attending worship every *Sunday*, mean more than attending on a day on which, under the Christian religion, attendance at worship is more imperative than on any other day?

Mr. *Heald*. Another question relates to apprentice fees.

The Lord Chancellor [Eldon]. I think that the same thing. The petition of the trustees having been presented to me since the argument, I mean to declare my opinion that Jews are not objects of the charity, but having heard no argument on this petition, I intend not to direct the order to be drawn up, without giving an opportunity of re-arguing the case, if the parties desire it.

[532] Mr. *Heald* applied for the costs of the proceeding, as settling an important question.

The Lord Chancellor [Eldon]. I doubt whether I have power to give costs. The trustees will take their costs under the act, without my order. On the first petition I could have made no order. I do not apprehend that in this summary jurisdiction I can give costs, unless the act of parliament authorizes me; in a cause I have power to give them, but not on proceedings in this summary jurisdiction. (18)

"His Lordship doth declare that the poor inhabitants of the town of *Bedford* who are of the Jewish persuasion are not entitled to any benefit of the *Bedford* charity in the said petition mentioned, for themselves or their children." *Reg. Lib.* A. 1808, *fol.* 2081-2083.

(1) The following is a copy of the letters patent:—

Vivat Rex

Edwardus sextus Dei gratia Angliæ Franciæ et Hiberniæ Rex, fidei Defensor, et in terra Ecclesiæ Anglicanæ et Hiberniæ supremum caput, omnibus ad quos presentes litteræ pervenerint salutem. Sciatis quod uos ad humilem petitionem maioris, ballivorum, burgensium, et communitatis, villæ nostræ *Bedford*, nobis pro libera et perpetua scola ibidem erigend, et stabiliend, exhibit. pro institutione

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et instructione puerorum et juvenum, de gratia nostra speciali, ac ex certa scientia et mero motu nostris, Nec non de advisamento concilii nostri, concessimus et licenciam dedimus, ac per presentes concedimus et licenciam damus, pro nobis et heredibus et successoribus nostris, quantum in nobis est, dictis maiori ballivis burgensibus et communitati dictæ villæ nostræ Bedford, et successoribus suis, quod ipsi aut successores sui quandum liberam et perpetuam scolam grammaticalem, in villa nostra predicta, erigere, facere, fundare, et stabilire, possint et valeant, pro educatione institutione, et instructione puerorum et juvenum, in grammatica litteratura et bonis moribus, perpetuis temporibus futuris duratur, ac Scolam illam fore de uno magistro sive pedagogo, et uno subpedagogo sive Hypodidasculo, pro perpetuo continuatur, et ut dicta intentio predictorum maioris ballivorum burgensium et communitatis villæ predictæ, meliorem capiat effectum, de uberiori gratia nostra concessimus et licenciam dedimus, ac per presentes concedimus et licenciam damus, pro nobis heredibus et successoribus nostris predictis, quantum in nobis est, predictis maiori ballivis burgensibus et communitati villæ nostræ predictæ, quod ipsi aut successores sui, dominia, maneria, terras, tenementa, redditus, reversiones, revencoes, servitia, et hereditamenta quæcunque, et alias possessiones quascunque, ad annum valorem quadraginta librarum, ultra omnia onera et reprisas, ex dono concessione legacione, dimissione vel assignatione, cujuscunque personæ sive personarum quarumcunque ea eis dare concedere legare vel assignare volentis vel volentium, licet dominia maneria terras et tenementa illa, de nobis in capite vel aliter mediate vel immediate teneant. aut de aliis personis sive alia persona teneant. habere gaudere percipere acquirere perquirere et recipere possint et valeant, Habendum et tenendum eisdem maiori ballivis burgensibus et communitati villæ predictæ et successoribus suis, in et ad sustentationem predicti magistri sive pedagogi et subpedagogi sive hypodidasculi, et pro continuatione scolæ predictæ imperpetuum, pro pauperibus virginibus villæ predictæ maritand. ac pro pauperibus pueris ibidem nutriend. et informand. ac etiam ad elemosynam de residuo sive superfluitate premissorum proveniend. remanen. pauperibus villæ predictæ pro tempore existentibus distribuend. Ac etiam concessimus et licenciam dedimus, ac per presentes concedimus et licenciam damus, pro nobis heredibus et successoribus nostris, de advisamento et assensu predicto, quod guardianus sive custos collegii Beatæ Mariæ Winton in Oxon. vulgariter nuncupat. novi collegii Oxon, et socii ejusdem pro tempore existentes, vel eorum major pars pro tempore existentium, de tempore in tempus cum necesse fuerit vel justa occasio postulabit, per eorum discretiones, dictum magistrum sive pedagogum aut dictum subpedagogum sive hypodidasculum scolæ predictæ in villa predicta, nominare eligere et admittere possit vel possint, et pro bonis justis et rationalibus causis et occasionibus, illos de tempore in tempus mutare et remove, aliosq. habiles et idoneos homines in dicto loco sive officio, magistri sive pedagogi ac subpedagogi sive hypodidasculi scolæ predictæ, nominare eligere et admittere possint et valeant, possitque et valeat, Et eisdem personæ sive eisdem personis quod ipsa vel ipsa dominia maneria terras tenementa redditus revencoes reversiones servitia et hereditamenta predicta, ad annum valorem predictum, prefatis maiori ballivis burgensibus et communitati villæ predictæ pro tempore existen., dare concedere legare vel assignare possit aut possint, habendum sibi et successoribus suis sicut predictum est tenore presentium, similiter licenciam dedimus ac damus, specialem absque impedimento impetitione seu gravamine nostri vel heredum aut successorum nostrorum, justiciariorum escaetorum vicecomitum coronatorum ballivorum seu aliorum ministrorum nostrorum, vel heredum nostrorum aut aliorum quorumcunque, et absque aliquibus aliis literis regis patentibus. aut aliquibus inquisitionibus super aliquo brevi de ad quod damnum vel aliquo alio mandato regio in hac parte quovismodo habend. prosequend. seu capiend. statuto de terris et tenementis ad manum mortuam non ponend. vel extendend. aut portand. aut aliquo alio statuto actu sive ordinatione inde in contrarium fact. edit. sive ordinat., aut aliqua concessione vel aliquibus concessionibus prefatis maiori ballivis burgensibus et communitati villæ predictæ per nos vel per aliquem progenitorum nostrorum ante hæc tempora fact., in presentibus minime fact. exist. aut aliqua alia re causa vel materia quacunque in aliquo non obstant. Et hoc absque aliquo fine seu feodo nobis pro premissis seu aliquo premissorum in hampshire nostro seu alibi reddend. solvend. vel faciend. eo quod expressa mentio de vera valore annuo aut de aliquo alio valore vel certitudine premissorum sive eorum

alicujus, aut de aliis donis sive concessionibus per nos seu per aliquem progenitorum nostrorum prefatis maiori ballivis burgensibus et communitati villæ predictæ ante hæc tempora fact. in presentibus minime fact. exist. aliquo statuto actu ordinatione provisione sive restrictione inde in contrarium fact. edit. ordinat. sive provis. aut aliqua alia re causa vel materia quacunque in aliquo non obstante. In cujus rei testimonium has literas nostras fieri fecimus patentes. Teste me ipso apud Ely quinto decimo dei Augusti anno regni nostri sexto.

Per Bre. de privato sigillo et de data predictæ auctoritate parlia. COTTON.

(2) *Amb.* 228 ; 1 *Dick.* 258 ; 2 *Ves. Sen.* 274, 276 ; 7 *Ves.* 76 ; 2 *Jac. & Walk.* 308. The following note of that case, which supplies many deficiencies in the printed reports, is extracted from Mr. *Coze's* MSS.

"De Costa v. De Paz. *Michs.* 17 *Geo.* 2.

"The questions in this case arose upon the will of one *Elias de Paz*, who thereby directed his executors to invest a sum of £1200 in some government or other security ; and directed that the revenue arising therefrom should be applied for ever in the maintenance of a *Jesiba*, or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion ; and directed that his executors, during their respective lives, should have the management of the assembly, and appointed A. B. and C. his residuary legatees ; and the bill was to have this £1200 laid out according to the will.

"The Lord Chancellor upon the opening asked, if there had ever been a case where such a charity as this had been established, for it being against the Christian religion, which is part of the law of the land, he thought he could not decree it.

"Mr. *Clark* said, that no cases could be found antecedent to the act of toleration (1 *W. & M. c.* 18), where a bequest of this kind had been established ; yet since that act, by which sects differing from the established religion are by law tolerated, there may be some instances ; but the present case is of a sect that can only be said to be connived at ; that it may therefore become material to consider whether this bequest will not come within the statute of *Edward* the 6th, of superstitious uses (1 *Ed.* 6, c. 14), and whether there are not some vesting clauses in the statutes concerning superstitious uses, that may give this legacy to the crown.

"*Ryder*, Attorney General. The Act of Toleration gave no new right to sectaries, but only took away the effect of the penal laws, and gave people liberty of worshipping God their own way. Before the Revolution there were cases that have not been received since, particularly *Baxter's* case. (1 *Vern.* 248, revised after the Revolution, 2 *Vern.* 105.) (See 7 *Ves.* 76.) How is the present case ? It is only for propagating and reading that law which is allowed in our church, and which is the foundation of the Christian religion. By the toleration a liberty was at last given to these people. By the statute of *Edward* the 6th, superstitious devises of lands and personal estate are not made void, but come to the crown, and this court has considered the statute as making a gift to the crown ; and therefore that might be the foundation of the first determination in *Baxter's* case : there could be no other ground for it.

Mr. *Noel*, for the residuary devisees, insists that this bequest is absolutely void ; as being in opposition to the Christian religion, and for establishing the Jewish ; and that it cannot take effect to vest in the crown as a devise to a superstitious use, because it is not so ; and therefore as it is part of the will that cannot be performed, it falls into the residuum, and must go to the devisees of that.

The cases before the revolution where the crown interposed, were a great strain on the power of the crown, and not approved by the court, and could be on no other foundation than as vested in the crown as a bequest to a superstitious use.

Ld. *Hardwicke*, Chancellor. This case requires two considerations ; 1st. Whether the legacy in question is good, and such as this Court can or ought to establish ? and, 2dly, If not, whether it is void absolutely, or only to the particular intent, so as to leave it a general legacy, and such as the crown may dispose of ? As to the first, I am of opinion that it is not a good legacy, and ought not to be established, no such instance being found. Nobody more against laying penalties or hardships upon persons for the exercise of their particular religion than I am ; but there is a great difference between doing this and establishing them by acts of the Court. The cases of dissenting ministers before the Toleration were different ; particularly

*Baxter's* case, was not of an illegal bequest, but was a bequest for poor ejected ministers : and even as to this case of the Jewish religion, it would be for a different consideration, were it for the support of poor persons of that religion. Orders are made by me and the *Master of the Rolls*, every year, upon petitions for their support, as poor people. But this is a bequest for the propagation of the Jewish religion ; and though it is said, that this is a part of our religion, yet the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord *Hale* and Lord *Raymond* ;\* and it undoubtedly is so ; for the constitution and policy of this nation is founded thereon. As to the Act of Toleration no new right is given by that, but only an exemption from the penal laws. The Toleration act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the dissenters under certain regulations and tests. This renders those religions legal,† which is not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the legislature.

" But the second question is more doubtful, as to what will be the consequence of my opinion upon the first ? The objection is, that this is a superstitious use, and so that the bequest must go to the crown ; but in answer to this it is said, that that can only be in cases that are within the statute of Edward 6. But the cases have gone further ; and in *Baxter's* case it is said, that the Court hath taken in charities *in eodem genere*, and though this decree was reversed, yet it was on the general point that the bequest was not illegal. (7 *Ves.* 76.) And there is another case to this purpose, which is, the *Attorney General* and *Guise* (2 *Vern.* 266), where the case of one *Combes* is mentioned, which was before the Toleration Act ; and there such bequest was held not void. But if this is to be considered as a superstitious use, it would be a proper consideration for a court of revenue ; for I do not think the crown is obliged to apply a bequest to a superstitious use to a charity. If it be an illegal bequest, then it is another consideration, and the Court may direct the application. Therefore, upon this part of the case I have great doubt, and all I shall do at present is, to direct the money to be paid into the bank, and shall reserve the determination as to the disposition of it for further consideration."—Mr. *Coxe's* MSS. " As to the said legacy of £1200 given by the said will towards the establishing a *Jesiba*, or assembly for reading and improving the Jewish law, his Lordship declared that he was of opinion, that the same was not good in law, and ought not to be decreed or established by this Court ; but doth reserve the consideration, whether the said sum of £1200 ought to fall and accrue to the residue of the said testator's personal estate, or be applied to any other, and what use, &c." 6th December 1743. *Reg. Lib. A.* 1743, fol. 94.

\* *Taylor's case*, 1 *Vent.* 293 ; 3 *Keb.* 607, 621. *Woolston's case*, *Fitzg.* 64 ; 2 *Str.* 834. *Vide post*, p. 527.

† See *Harrison v. Evans*, 2 *Burns. E. L.* 207, 220. *Furneaux* Letters to *Blackstone*. App. *Rex v. Barker*, 3 *Burr.* 1265 ; 1 *Bl.* 300, 352. *Attorney-General v. Pearson*. 3 *Mer.* 353.

(3) A writ of protection granted to the prior and brethren of the hospital of St. John at Jerusalem, in which the hospital is described as founded for the defence of the church against the enemies of Christ and of Christians.

(4) 7 *Co.* 17. See 4 *Inst.* 155, *Michelborne v. Michelborne*. " Upon a motion made for consultation upon prohibition awarded : It was said by the Lord Coke, that no subject of the king may trade with any realm of Infidels, without licence of the king, and the reason of that is, that he may relinquish the Catholic faith and adhere to infidelity ; and he said that he hath seen a licence made in the time of *Ed.* 3, where the king recited that he, having special trust and confidence that his subject will not decline from his faith and religion, licensed him (*ut supra*) ; and this did rise upon the recital of a licence made to a merchant to trade into the *East Indies*." 2 *Brownlow and Goldesb.* 296. Some important remarks on the authority of these *dicta* may be found in *Pollexfen's* arguments in *The case of Monopolies. East India Company v. Sandys*. 10 *Howell's State Trials*, 440, 441. For farther comments *vide post*, p. 512, *et seq.* In *Ramkissenseat v. Barker*, " The exception of the plaintiff being a Pagan was taken, but on argument, over-ruled." 1 *Atk.* 19,

and see a pamphlet, imputed to *P. Carteret Webbe, Esq.*, entitled, "The question, whether a Jew, born within the *British* dominions, was, before the making the late act of parliament, a person capable by law, to purchase and hold lands to him and his heirs, fairly stated and considered," *London*, 1753, p. 35. "A Jew brought an action, and the defendant pleaded that the plaintiff is a Jew, and that all Jews are perpetual enemies *regis* and *religionis*. Judgment *si actio. Curia*, a Jew may recover as well as a villein, and the plea is but in disability so long as the king shall prohibit them to trade; and judgment was given for the Plaintiff." *Mich. 36 Car. 2*, in *B. Regis. 1 Lilly Pract. Register 3*. The question, &c., p. 41. So *Wells v. Williams*, 1 *Lord Raym.* 282. *De Costa v. De Pax*, 2 *Swans.* 487, n. *Villareal v. Mellish*, 2 *Swans.* 533, and many other cases, particularly *Lindo v. Belisario*, 1 *Haggard's Reports*, 216, and Appendix, *D'Aguilar v. D'Aguilar*, *Id.* 134, n. *Goldsmid v. Bromer*, *Id.* 324. In *The Nabob of Arcot v. the East India Company*, 3 *Bro. C. C.* 292; 1 *Ves. Jun.* 371; 12 *Ves. Jun.* 56, the suit was sustained by an alien infidel.

In *Osborne's case*, *Pasch. 51 Geo. 2*, "Information was prayed for publishing an account of a murder, committed by several Jews, lately arrived from *Portugal*. Chief Justice objected that the generality of the reflection made it difficult to say who are the persons meant by the paper; *Fazakerly* answered, that by proper averments in the information the persons reflected on might be easily discovered, as in *Franklin's case*, though the word ministers only was used in the libel, yet by suitable averments in the information, and proof made of them to the jury, they found those ministers of state to his present Majesty, and the Defendant guilty.

*Trin. 6 Geo. 2*. The paper on which the information was prayed, contained an account of a murder committed on a Jewish woman and her child, by certain Jews, lately arrived from *Portugal*, and living near *Broad Street*, because the child was begotten by a Christian, and the affidavits set forth that several persons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broad Street*, were attacked by multitudes in several parts of the city, barbarously treated and threatened with death, in case they were found abroad any more.

*Strange* showed cause against the information, and that it could not be granted as for a libel, because it not appearing who the persons reflected upon are, no judgment can be given for the king; as in *King v. Orme*, *Trin. 11 W. 3* (1 *Lord Raym.* 486), where an indictment was exhibited for a libel, called *The Ladies' Invention*, and alleged to be to the scandal of several ladies unknown; and after verdict *pro Rege*, judgment was arrested, because it did not appear who the persons reflected on were.

*Sed per Cur.* Admitting an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable, and totally incredible." *MSS.* and see *Anon. 2 Barn.* 138. *The King v. Osborne*, 2 *Barn.* 166.

(5) *Co. Litt.* 31 b. See *Jenk. 3 marg. Tovey, Anglia Judaica*, p. 230. *Molloy de Jure Maritimo*, lib. 3, c. 6, s. 11; but "a Jew's wife might have dower or thirds out of her husband's credits and chattels."—*Madox, Exchequer*, c. 7, p. 168.

(6) *Sciendum quod omnes Judæi ubicunque in regno sunt, sub tutela et defensione Regis ligee debent esse, nec quilibet eorum alicui diviti se potest subdere sine Regis licentia. Judæi enim et omnia sua Regis sunt. Quod si quispiam detinuerit eos, vel pecuniam eorum, perquirat Rex si vult tanquam suum proprium.*—*Leges Eduardi*, c. 29. *Wilkins' Leges A. S. Selden Op.* v. ii. p. 1582. The authenticity of this law has been questioned by *Prynne*, *Demurrer*; and his doubts are supported by the author of the able and learned tract already cited, *The question, &c.*

In *Madox's* account of the "Exchequer of the Jews" (*History of the Exchequer*, c. 7) may be found some curious particulars of the Judaical revenue of the Norman kings, and the exactions practised on the Jews, for the benefit of the royal treasury. So entirely were the Jews the property of the monarch, that *Henry the Third* actually assigned and delivered to his brother, *Richard Earl of Cornwall*, all the Jews of *England*, as a security for the repayment of a debt—39 *Hen. 3*. *Rex omnibus, &c. Noveritis nos mutuo accipisse a dilecto fratre et fideli nostro R. comiti Cornubiæ.*

quinque millia marcarum sterlingorum novorum et integrorum, ad quorum solutionem assignavimus et tradidimus ei omnes Judæos nostros *Angliæ, &c.* *Madox, Exchequer*, c. vii. p. 156 ; 1 *Rymer, Fædera*, 315.

The parliamentary edition of *Rymer* contains a writ issued in the ensuing year. De scrutando arcas Judæorum pro *Ricardo comite Cornubiæ*, 1 *Rym.* 337. A writ of the 46th of *Henry the Third* bears the following title, De scrutando omnes arcas Judæorum, ac de capiendis omnia sua bona in manus regis per totum regnum. 1 *Rym.* 407.

The nature of the toleration extended to the Jewish worship appears in the following record of the 37th year of *Henry the Third*,—"Rex providit, quod universi Judæi in sinagogis suis celebrent submissa voce, secundum ritum eorum, ita quod Christiani hoc non audiant." *Madox, Exchequer*, 169 ; 1 *Rym.* 293. But one of the most curious facts concerning their religious privileges, is the existence of a bishop or presbyter of the Jews who appears to have been, at some times, appointed by the crown, at others, elected by the Jews, subject to the royal approbation. The principal records on this matter may be found in 1 *Rym.* 95, 362, 591. *Madox, Exchequer*, c. 7, p. 177. *Tovey, Anglia Judaica*, 53, et seq. *Selden, Op.* iii. p. 1583, 1584.

(7) The statute *de Judaismo*, or, according to its original title, *de la Jeverie*, Statutes of the Realm, i. 221, passed in the third year of *Edward the First*, *Prynne, Demurrer*, 204, 232, concludes with a declaration, that the permission to the Jews, to take lands on lease, should not continue more than fifteen years from that time ; and at the expiration of that period in the eighteenth year of *Edward the First*, the Jews of *England* were banished. The principal records connected with that event seem to have perished ; but writs of safe conduct remain, issued in that year, entitled, *Salvus conductus pro omnibus Judæis regnum exeuntibus Rege jubente* ; and reciting, cum certum terminum omnibus et singulis Judæis regni nostri præfixerimus idem regnum exeundi, &c. 1 *Rym.* 736 ; *Tovey*, 240, et seq. In page 244, of a copy of *Tovey's Anglia Judaica*, in the possession of the editor, is the following manuscript note :—"Anno 1306, 3 Ed. Secundi" (the date must be incorrect, *Edward the Second* having ascended the throne in 1307), "circiter festum Sancti *Johannis Baptisti*, sex Judæi venerunt *Londoniæ*, eo quod voluerunt impetrari licentiam a Rege in *Anglia* commorandi ; unus eorum fuit *Physicus*. *Annales Civit. London. Bib. Cotton.* Otho. B. iii. The statute, 1 Ed. 3, st. 2, c. 3, *Le roi veut, que les dettes des Jues soient perdonnez*, Stat. of the Realm, i. 255, may probably be understood of the debts subsisting at the period of the banishment of the Jews, and which, on that event, became payable to the crown, *Ryley, Plac. Parl.* 129, 173, and seems not to authorise an inference of the residence of Jews in *England* when the statute was passed.

(8) During the protectorate, an address was presented on behalf of the Jews, soliciting the free exercise of their religion ; a measure which *Prynne* opposed in his laborious tract : "A short Demurrer to the Jews' long discontinued barred Remitter into *England*." Of the proceedings on this application, an amusing account is collected by Dr. *Tovey*, who concludes that the Jews failed to obtain a legal establishment under *Cromwell*, and that their return occurred in the reign of *Charles 2.* *Anglia Judaica*, 259, et seq., an opinion supported by the author of *The Question, &c.*, p. 36, 37. See also 1 *Haggard's Reports*, App. nos. 1, 2.

(9) 1 *Ann. st.* 1, c. 30 ; 1 *Bl. Comm.* 449 ; 13 *Geo.* 2, c. 7, s. 3, and see 6 & 7 *W.* 3, c. 6, ap. ; *Gibson Cod.* 433 ; 10 *Geo.* 1, c. 4 ; 26 *Geo.* 2, c. 33, s. 18. "The Plaintiff had leave given by the Court to alter the venue from *London* to *Middlesex*, because all the sittings in *London* were on a *Saturday*, and his witness was a Jew, and would not appear that day." *Barker v. Warren*, 2 *Mod.* 270.

(10) 26 *Geo.* 2, c. 26, repealed by 27 *Geo.* 2, c. 1. An account of the debates on the latter bill may be found in Lord *Orford's Memoires*, i. 310, et seq.

(11) Mr. *Webbe's* tract contains the concurrent opinions of Sir *Robt. Raymond*, Serjeant *Cheshyre*, Mr. *Pigot*, Serjeant *Whitaker*, Mr. *Kettleby*, Mr. *Lutwich*, Mr. *Reeve*, Mr. *Talbot*, and Sir *Clement Wearg*, that Jews, natives of *England*, have the same capacity of purchasing and holding lands as other subjects ; a conclusion supported by *Webbe*, with much learning and ingenuity.

*Mich.* 27 *Geo.* 2. "A question having been started, on occasion of the late act of parliament concerning the naturalization of the Jews, which act was repealed this session, whether Jews are entitled to purchase and hold lands in *England*."



Lord Temple, after the repeal of the act, moved in the House of Lords, that some method might be taken to ascertain this question; and that for this purpose the judges might be desired to attend and give their opinions upon it; which was opposed, and the motion rejected, for many reasons, but particularly because the judges are not obliged to give their opinions to the house upon such extra-judicial questions, where no bill is depending; and the Duke of Argyle mentioned a case in Queen Anne's time, where such a question being put to the judges, Lord Chief Justice Holt, in the name of himself and the rest, insisted that they were not obliged to give their opinions on any such questions, and his objections were allowed by the house." Mr. Coxe's MSS. E. E.

(12) The authorities for this practice refer to times before the banishment of the Jews. 1 Rym. 151; Dyer, 144, a. n; Madox, *Exchequer*, c. 7, p. 166, *et seq.* Selden de Synedriis Vet. Hebr., *Op.* v. i. p. 1469. *Id.* "Of the Jews sometime living in England." *Op.* v. iii. p. 1460; Barrington on the Statutes, 225. Concerning the judges appointed to "exercise jurisdiction in the affairs of the Judaism," see Madox, *Exchequer*, c. 7, p. 159, *et seq.*; 4 Inst. 254. Tovey, *Anglia Judaica*, p. 43, *et seq.* Selden, *Op.* v. iii. p. 1459-1462; and for the assembly called the Jewish parliament, Prynn, *Demurrer*, part 2, p. 28, *et seq.* Tovey, *Anglia Judaica*, p. 110, *et seq.*

(13) "Turks and Infidels are not *perpetui inimici*, nor is there a particular enmity between them and us; but this is a common error founded on a groundless opinion of Justice Brooke; for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons. Per Littleton (afterwards Lord Keeper to King Charles I.) in his reading on the 27 E. 3, 17, MS." 1 Salk. 46; 1 Atk. 21; Willes, 538.

(14) Willes, 542. In *Campbell v. Hall*, Mr. Hargrave having cited the distinction mentioned by Lord Coke in *Calvin's* case, between "countries vested in the king by conquest, and countries coming to him by descent," added, "in reporting this doctrine, Lord Coke mixes with it another distinction between infidel and Christian countries, which is now justly exploded." Upon which Lord Mansfield interposed, "do not quote the distinction for the honour of Lord Coke." 20 Howell State Trials, 294. His Lordship's judgment in that case, contains the following passage: "Laws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim are incontrovertible; and the absurd exception as to pagans, in *Calvin's* case, shows the universality of the maxim. The exception could not exist before the Christian æra, and in all probability rose from the mad enthusiasm of the crusades." *Id.* 323.

(15) 3 Inst. 89. *Contrahentes cum Judæis vel Judæabus, in terra vivi confodiantur.* Fleta, lib. i. c. 37. See Barrington on the Statutes, 222.

(16) Lord Hardwicke declined to interfere in regulating the school of this charity, but controverted the application of the revenue. *Attorney-General v. Corporation of Bedford*, 2 Ves. Sen. 505. See the cases collected in *The Attorney-General v. Dixie*, 13 Ves. 519. *Ex parte Berkhamstead Free School*, 2 Ves. & Bea. 134.

(17) *The Attorney-General v. Whitely*, 11 Ves. 241. *The Attorney-General v. Hartley*, 2 Jac. & Walk. 353.

(18) The following account of a decision connected with the doctrine discussed in the preceding case, is extracted from a MS. in the possession of the Editor, and agrees nearly *verbatim* with a note among Lord Colchester's MSS. A very imperfect report of the proceedings occurs in 2 Atk. 14, under the title of *Mellish v. Da Costa*.

[533] Villareal v. Mellish. In Chancery. 17th March 1737.

V., the daughter and widow of a Jew, having agreed with her father, that he should have the care of the persons and estates of her two infant children, and in the event of their death during minority, should receive a moiety of their property, and having abjured Judaism and married a Christian, on the petition of the children the Court ordered that they should be delivered to their mother, guardianship not being assignable, and the agreement not purporting to be an assignment, and the right of the mother to be guardian continuing notwithstanding her second marriage.

The Defendant, Mrs. Mellish, was the daughter of Mr. Da Costa a Jew, and having married Mr. Villareal a Jew, had by him two children, one of whom is near

nine years old, and the other about eight, and *Villareal* dying, a bill was brought in this Court touching the children's estate, &c., a decree thereon, and the fortune of the two children appeared to be £27,000 each. Afterwards a treaty of marriage was had between the mother and one Mr. *Mendez*, and thereupon *Da Costa* her father prevailed on his daughter to assign over the guardianship of the two children to him, and to agree that if the two children died during their minority, he should have a moiety of their fortunes. The treaty of marriage afterwards breaking off, she married Mr. *Mellish* without her father's consent, and became a Christian, and Mr. *Da Costa* having possession of the two children, refused the mother to visit them, without a French woman being with them, &c. Thereupon Mr. *Mellish* and wife preferred this petition to be restored to the guardianship, or that she might have liberty to see the children without interruption alone, and the children liberty to visit her. Another petition was presented on behalf of the two children, praying that the Court would give proper directions for their education, &c.

Mr. *Browne* for Mr. *Mellish et ux.* This assigning the guardianship, is void by the mother, it being a personal right without any interest, but for the good and benefit of the infants, &c., and as it cannot be transferred, so neither can it be renounced. *Vaugh.* 177, *Bedell v. Constable.*

Mr. *Thomas Clarke* for the two children. They have a right to the mother's care, unless she be disabled or disqualified, which is not in this case, unless by the deed, by which it is pretended the mother has assigned her right of guardianship; and as to the deed itself, as it is of such a nature as the Court [534] would not carry into execution, so by the same reason the Court will not suffer it to be made use of in bar. *Plowd.* 294, *Osborn v. Carden.* *Barret v. Lady Penham*, guardianship not assignable, *v. Ca. in Dom. Proc.* 1724. (*Reynolds v. Lady Teynham*, 9 *Mod.* 40. *Lady Teynham v. Dacre Barret Lennard*, 4 *Bro. P. C.* 302.) As to what may concern the religion of the infants, though that should be the choice of every person, yet as here they cannot choose, and as the method of education will naturally affect religious principles, therefore care should be taken of such education; but considering the temporal advantages only of the children, the education in Judaism will affect their fortunes, and the consequence of the children continuing with the grandfather, being educating them in a different religion from the parent, so that will lay a foundation for that difference in a family, which is too common upon account of their difference in religious principles, and especially in Jewish families; as appears by the provision made by the legislature for allowance by Jewish parents to convert *Christian* children; *Stat.* 1 *Ann. c.* 30.

Mrs. *Mellish* by affidavit, said she was baptized 28th of *March* 1735, and that her father Mr. *Da Costa* was a Jew.

Mr. *Talbot* for the children. *Vaughan*, 181. The one child here is a daughter, and the other a son. The daughter, as a Jewess, may be married improvidently, the son will be under incapacities, by our law as a Jew, can enjoy no offices, &c.

Mr. *Attorney General*, for Mr. *Da Costa.* Mr. *Villareal*, the former husband, died in 1730. Mr. *Da Costa* has had the care of the children under the Deed of Agreement in 1734, without any complaint by the children or the mother, till this petition. Agrees a guardianship cannot be assigned in law; but it does not follow but that the plaintiff, having such right, may agree that another proper person should exercise that authority. Debts are not assignable at law otherwise in this Court, and this petition is to set aside her own agreement. This Court is not bound to interpose in such cases. Case of Mr. *Hopkins* (*Ex parte Hopkins*, 3 *P. W.* 151), having given to two of the daughters of Mr. *Jepp* about £10,000 [535] a piece, and the executor having the custody of the two children; the father petitioned to have the children educated, &c., but the Lord Chancellor *King* dismissed the petition, and said if the father could recover the possession of the children at law he might. The objection to the father was his being a farmer in the country, improper, &c. As to the children's petition, it is said they are not bound by the mother's agreement: and that no objection lies against her; but here by her second marriage she is not *sui juris*, and the children will come under the power of the father in law. The next objection is that the mother is now a Christian; this is a popular argument, but we are not to be wiser than the law; and it was thought one of the hardest parts of the persecuting of Protestants abroad, the taking away the children, and putting them under a different education; and if the Court should interpose in such cases,

is afraid no children would be suffered to be educated otherwise than according to the legal establishment. The foundation of the statute 1 Ann. was, that children should be left free without force in their choice of religion. The Statute 12 Car. 2, c. 24, s. 8, 9, which gives power to the father to devise the guardianship of a child, takes no notice of the mother.

The deed and agreement between Mr. *Da Costa* and his daughter Mrs. *Mellish* read, dated 3d of May 1734. She agreed that if her two infant children should die infants intestate, he should be entitled to an equal moiety with her, and that she and all persons who should be entitled to the guardianship of the two children, should permit *Da Costa* to have the care of their persons and estates. On the back of the deed is an indorsement, dated March 1735, by Mr. *Mellish* and Mrs. *Villareal* (then his wife), whereby they confirmed and ratified the deed. A deed-poll signed by Mr. *Da Costa* whereby he agrees to permit Mrs. *Mellish* to visit the children at his house. Affidavit of Mr. *Da Costa* of the occasion of making the deed, on treaty of the daughter's marriage with Mr. *Mendez*, and her free act, and never refused her to visit the children; also affidavit of Mr. *Da Costa's* care of the children.

Mr. *Fazakerly* and Mr. *Murray* on the same side. The guardianship of the mother is little regarded by the common or statute law of [536] this kingdom; and wisely so; because the mother by second marriage puts herself under the power of another; and her affection often alienated from the children of the first husband, to those of the second. Instances in the guardianship in socage, customs of London, &c. Case of Lord *Mansell*, who being about 14, would have chosen his mother (who was then married to a second husband) to be his guardian; but Lord *Talbot* refused it, but upon other persons of honour being joined with the mother's husband. Though a guardianship cannot be assigned, yet it may be renounced; and in case of an action at law by the mother here, the deed would bar. This is not such a case as the court should interpose any extraordinary power; and the giving the guardianship here to the mother, would in truth be giving it to the father-in-law; because she is in *potestate viri*. This is a general question, whether this Court will interpose to give a guardian to children upon account of religion? The children here as much (Note: A blank occurs here in the original MS.) as they

can be, considering their tender years. The father here might have devised the guardianship, upon the statute 12 Car. 2, though Roman Catholics are excepted, for political reasons. The true point is, whether this Court will change the education of the children, on this case, so as to change their religion?

The Lord Chancellor. It is with reluctance he is obliged to determine questions of this sort, in family disputes, and more disagreeable where they relate to religious matters; but when it becomes necessary he must do it. Here are two petitions, first by the mother, second by the children. As to the mother's, her claim must be considered first. Her claim, as before the deed of 1734, is clear, and a right in her. It has been truly said that the right of guardianship of the mother differs from that of the father; she cannot devise, as the father may by the statute of Car. 2 (*Bedell v. Constable*, Vaugh. 177. *Ex parte Edwards*, 3 Atk. 519). The mother's right abstracted from socage (which is not here the case, there being no lands) arises from nature. She has a right to the custody of the persons, and care of the education; and this in all countries [537] where the laws do not break in. The grandfather has no right to interpose, otherwise than as the mother being his daughter, owed a duty to him. It must be admitted likewise, that the mother had no right to assign the guardianship; no guardianship assignable except in chivalry. Lord *Vaughan* in *Bedell v. Constable*, calls it a private office of personal trust.\*

Next, how it stands under the deed of May 1734. It must be agreed that that does not transfer the guardianship. As to the difference that though things may not be assignable at law, yet they may in equity, that is, where they consist in interest; and therefore guardianship is no more assignable in equity than at law; and the deed here does not use words of assigning, but is an agreement that the grandfather should have the actual care and education, and that she would not interpose. It is therefore clear that Mr. *Da Costa* has gained no right to the guardianship under this deed, but to clear the mother, &c. It seems a little strange to come into a court of equity to pray contrary to the agreements of the party; and much less can the court set aside the agreement in this summary way. No imputation on the behaviour

of Mr. *Da Costa*, and therefore no ground to relieve Mrs. *Mellish* on her petition, and her petition therefore dismissed; but as to the petition of the infants another consideration. Objection to this that it comes from the mother; but though it may be so, yet as this comes before the court in a case where the court has given directions touching the estate of the infants, the court ought to interpose, from whatever hands it comes, though from a mere stranger; and so it was done in the case of Lord *Dudley* to controvert the accounts of the receiver.

Here are two questions; first, whether in the power of the court to give any directions to deliver them to the mother? Whether proper? As to the first, the power, has no doubt of it, though no cause depending, as was Mr. *Barrett* and Lady *Teynham's* case.† As to [538] the interposition of courts of law on *Habeas Corpus*, the courts of law have nothing to do about the right of guardianship, but as to the liberty of the party only;‡ and there are proper writs, as ravishment of ward, &c., and *Habeas Corpus* is only for the court to take care that the party be not confined contrary to law.

Secondly, as to the discretion of the Court; and holds that he is bound to interpose. Has declared that the deed passes no right, but that it still remained in the mother; and whatever the mother has done, if she neglects, the children may complain, or any one for them. Much has been said on the point of religion; holds the true state of the question to be, whether this court shall not take the infants out of the hands of a person who has no right of guardianship, and put them into the hands of the person who has the right, and is of the religion of this country? Do not by any means intend, but declare the contrary, to take the children of Jews from their parents, any farther than as required by the act of parliament.§

It has been said, that the father of the children was a Jew. I see nothing to prevent the father from devising; but the father being dead, and not having disposed of the guardianship, the father's right devolves to the mother, and she is here of the religion of the country, and there-[539]-fore no reason to take the right from her.

As to the statute 1 *Anne*, though the present case is not within the provisions of it, yet the reason weighs; for, if a Jew child become Christian, the act of parliament takes away the father's power, and as the children here are of such tender years that they cannot choose for themselves, should not the Court interpose to assist in restoring them to their rightful guardian?

No person has greater regard to conscience, but holds likewise that the Christian religion is part of the law of the land, and so held and declared by Lord Chief Justice *Hale*, in the case of the *King v. Taylor*, 1 *Vent.* 193; 3 *Keb.* 107.

Order the children to be delivered forthwith to the mother. (On the power of the mother as guardian of her infant children, notwithstanding a second marriage, see *Pottinger v. Wightman*, 3 *Mer.* 67.)

\* *Vaugh.* 177. *Eyre v. Countess of Shaftesbury*, 2 *P. W.* 121. *Earl of Shaftesbury v. Shaftesbury*, *Gilb. Rep. in Eq.* 172.

† *Reynolds v. Lady Teynham*, 9 *Mod.* 40. *Lady Teynham v. Dacre Barrett Lennard*, 4 *Bro. P. C.* 302. See *ex parte Salter*, 2 *Dick.* 769; 3 *Bro. C. C.* 500, where some earlier authorities are collected. *Spencer v. Earl of Chesterfield*, *Amb.* 146. *Ex parte The Earl of Ilchester*, 7 *Ves.* 348. *Eyre v. The Countess of Shaftesbury*, 2 *P. W.* 102. *O'Keefe v. Casey*, 1 *Schoales & Lefr.* 106. *Ex parte Woolscombe*, 1 *Mad.* 213. *Ex parte Mayerscough*, 1 *Jac. & Walk.* 151. In *ex parte Hopkins*, 3 *P. W.* 151, Lord Chancellor *King* declined to order, on petition, the delivery of infants to their father.

‡ The decisions on this point seem not perfectly consistent. *Rex v. Johnson*. *Lord Raym.* 1334; 8 *Mod.* 214; 1 *Str.* 579. *Rex v. Smith*, *Ridgeway Rep. Temp. Hardwicke*, 149; 2 *Str.* 982; 3 *P. W.* 155, n. *Rex v. Delaval*, 3 *Burr.* 1435; 1 *Bl.* 410. *Rex v. Hopkins*, 7 *East*, 579.

§ On a bill by a testamentary guardian against a trustee, the answer of the Defendant, representing the Plaintiff as an unfit person to have the management of the minors, "being a man of small fortune and increasing family, and also a sectary," was declared scandalous and impertinent. *Corbet v. Tottenham*, 1 *Ball & Beatt.* 59.

THOMAS HAWKSHAW, *Plaintiff*; WILLIAM PARKINS and JOHN THOMPSON, *Defendants*.  
*July 21, 23, Nov. 12, 1818; Feb. 27, 1819.*

Demurrer to a bill by a surety, stating, that two partners having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, overruled. Whether a release so executed binds all the partners, *quære*. A writ of injunction issued after execution is in the same form with the common writ before execution. The Plaintiff, in equity, having been taken in execution, and discharged by a judge of the court of law, on payment into the hands of the Master of that Court, of the amount of the sum indorsed on the writ, with sheriff's poundage; and the common injunction having afterwards been issued; on motion to dissolve the injunction, it was ordered, that the Plaintiff might apply to the court of law for payment to him and to the Defendants, of the sum paid into the hands of the Master, that sum, when received, to be paid into the bank to abide the event of the cause.

The bill filed on the 10th of *June* 1818 stated, That one *Daniel Rencher*, late of *Bedford Street*, in the county of *Middlesex*, coal merchant, but now [540] abroad, and out of the jurisdiction of the court, sometime in the year 1810 represented to the Plaintiff that he had considerable dealings with the Defendants, who carried on trade as coal merchants at the *Adelphi*; and that he could obtain a considerable enlargement of his credit with the Defendants, if he could procure some respectable person to join him in a security to them by way of bond, and he requested Plaintiff, to join him, upon an assurance that no risk was likely to be incurred in so doing as the credit allowed by the Defendants to *Rencher* was small, and the settlements frequent; that the Plaintiff, influenced by such representations and assurance, and being willing to accommodate *Rencher*, consented to join in such security, and for that purpose executed with *Rencher* a joint and several bond to the Defendants, dated the 1st of *May* 1810, in the sum of £500 conditioned to be void on payment by the Plaintiff and *Rencher* or either of them of the sum of £250, or any less sum that should or might thereafter become due from time to time for coal delivered to *Rencher* by the Defendants; that some time in 1816 *Rencher* having become embarrassed in his circumstances, entered into a composition with the Defendants and his other creditors, whereby they agreed to accept an assignment of his property, and in consideration thereof to execute a release of their several demands; that on the 27th of *August* 1816 an indenture of that date was executed by *Rencher* of the first part, *C. G.* a creditor of *Rencher* of the second part, and the Defendants, and *W. M.*, and *M.* his son and copartner, being *bona fide* creditors of *Rencher*, of the third part, whereby after reciting that *Rencher* stood indebted to the parties of the second and third part in the several sums of money set opposite to their respective names, and was unable, by reason of certain losses, to pay the whole of their respective demands, but in order to render to them the [541] utmost satisfaction in his power, had proposed to convey all his estate and effects to *C. G.* in trust for himself and the rest of the creditors of *Rencher*, rateably and in proportion to the amount of their several debts, to which the parties of the third part had consented and agreed, and had chosen and appointed *C. G.* to be a trustee accordingly, it was among other things witnessed, that the creditors, parties of the second and third parts, severally and respectively, and for their several and respective executors, &c., accepted the said assigned premises, estate, and effects in full payment and satisfaction of their respective debts, and released *Rencher* from the said several debts, and from all actions, suits, &c., for or by reason of the debts so due to them, or of any other matter whatever, antecedent to the day of the date of the indenture.

The bill further stated, that the indenture was executed by the Defendant *Thompson* on behalf of himself and his copartner *Parkins*, but *Parkins* did not, save as aforesaid, execute the same, and the deed was not therefore binding upon him or the firm as a release at common law; but submitted that it was a sufficient discharge in equity of any claim or demand which the Defendant might have had by reason of the bond against the Plaintiff as surety, and that the bond ought to be delivered up to the Plaintiff to be cancelled. It was also stated that the Defendant had commenced proceedings at law against the Plaintiff on the bond, and had caused him to be arrested and held to special bail for the sum of £250. The bill, charging that

the indenture was executed by *Thompson* on behalf of himself and his copartner, and that though the Plaintiff could not take advantage of the indenture by way of plea in bar to the action at law, yet that the same ought to be considered in equity as a good discharge of Plaintiff's liability on the [542] bond, inasmuch as the principal was thereby released, and the Plaintiff only a surety therein, prayed that the Defendants might be restrained by injunction from proceeding at law against the Plaintiff in respect of the matters aforesaid, or upon the bond, and that the bond might be delivered up to the plaintiff to be cancelled.

■ The Defendants filed a general demurrer.

■ Mr. *Wetherel* for the bill. The release being executed by *Thompson* only, is not at law binding on *Parkins*. A partner cannot bind his copartner by deed, unless expressly authorised by the articles of partnership. (*Harrison v. Jackson*, 7 T. R. 207. See *Ball v. Dunsterville*, 4 T. R. 313.) In proceedings under the bankrupt laws indeed, one partner is permitted to act for all (*Ex parte Hall*, 1 Rose, 2. *Ex parte Hodgkinson*, 19 Ves. 291); but those exceptions have never been considered as impeaching the general rule. At law, therefore, the Plaintiff has no defence; but in equity a partner having accepted a composition from the principal, has discharged the surety; and the release, though it cannot be pleaded at law, is an effectual discharge of the surety in equity. (Note: The cases on the discharge of the surety by transactions with the principal, are collected in *Mayhew v. Crickett*, 2 Swans. 185.) It is clear that a release to one co-obligor, is, in equity, a release to both. *Bower v. Swadlin* (1 Atk. 294). At least one part of the relief prayed by the bill is equitable, namely, that the bond may be delivered up to be cancelled.

Mr. *Seton* in support of the demurrer.

A release to one of several co-obligors discharges the [543] rest. *Com. Dig. Pleader*, 2 W. 30, on the authority of a passage in 2 *Rolle*, 410, l. 47.(1) A release of partnership debts executed by one partner, concludes the firm. *Montague on Partnership*.(2) And a deed of composition of debts is an exception to the general rule that one partner cannot bind the rest by deed. "When a trader is unable to satisfy the demands of his creditors, to save the trouble and expense of a commission of bankruptcy, upon his giving up all his effects, they may agree to accept a certain proportion of the debts due to them, in satisfaction of the whole. This can only be done by deed, and there is generally introduced into it a clause of release. If copartners are creditors, and come in under the composition deed, it binds all if executed by one, and may be pleaded in bar of an action brought for the previous debt, either in conjunction with him who executed it, or by the others as surviving partners after his death." *Watson on Partnership* (p. 225). The plaintiff, therefore, on his own statement has a defence at law.

The *Lord Chancellor* [Eldon]. When a bond is prepared as the joint bond of two persons, though formerly if executed by one only, being intended to be executed by both, it was considered as the bond of neither, it has been lately and repeatedly held to be the bond of him who executed it. (*Elliot v. Davis*, 2 Bos. & Pull. 338.) The question then here would be, whether this release, if not [544] valid against both the partners, is valid against one? If so, the parties are right in coming into equity, because the release, though not good against both, changes the nature of the property.

In reply to a question by the *Lord Chancellor*, whether, if two partners have a demand against a principal and a surety by bond, and one, professing to act for the other as well as himself, signs, seals, and delivers a release, that release is at law valid against himself, if void against his partner? The *Solicitor General*, *amicus curiæ*, stated that he had never known the point occur in practice, but thought that the release might be pleaded; that a deed amounting to a mere acceptance of terms of composition, executed by one partner, is not binding on the rest, but that a release so executed binds all, the release of a joint-obligation by one, being at law an extinguishment of the debt.

The *Lord Chancellor* [Eldon]. When Courts of Law have held that a bond which was intended to be executed by two as a joint bond, being executed by one is valid as his bond, why is this release not valid? The bill prays an injunction against actions on the surety bond. In *Harrison v. Jackson*, the question depended in great measure on the nature of the deed. I take it that that was a deed by which one partner, signing, sealing, and delivering for himself and his partners, undertook

to make a grant ; the effect of such a deed is very different from the effect of a release.

It is common for suitors to apply here to be discharged from bills of exchange, from which they might be discharged at law, the original jurisdiction being here. [545] Very many injunctions have been granted to restrain proceedings on bills of exchange, where time given would have afforded a good defence at law on the rule that sureties are discharged by time given to the principal. We had bills in this Court before that doctrine prevailed at law. The fact that that doctrine now constitutes a legal defence is no reason why the equitable jurisdiction of this Court should not be maintained.

July 23. The Lord Chancellor [Eldon]. The case is no more than this. The Plaintiff's bill states, that he executed a bond in the penalty of £500, as surety for the payment of £250, the obligees being partners ; that all the creditors of the principal, including the obligees in the bond, agreed to accept an assignment of his effects, and to give a release : that is the substantive charge in the bill. It then states, that the release was executed by the creditors, but that the mode of release by these two creditors, the obligees, was, that one only released, signing and sealing the deed for himself and his partner ; it proceeds to allege, that the deed being executed by only one partner, the Plaintiff cannot defend himself at law, and prays that it may be declared a good discharge in equity against the surety.

The case was argued before me on the question, whether this was a valid legal release ; but without adverting to that question, and supposing that it would not be valid at law, still the bill has charged, that the Defendants agreed to execute a release, and that an assignment was made in performance of that agreement ; that will sustain the agreement in equity if not in a court of law. It was contended, that the Plaintiff could not support [546] this bill if he had a legal defence. I cannot accede to that argument. It has always been held here, that time given to the principal releases the surety ; the recent adoption of that doctrine, by courts of law, will not exclude the concurrent jurisdiction of this Court. Another circumstance is, that the bill prays relief which cannot be obtained at law, the delivery of the bond to be cancelled. I am therefore of opinion, that the demurrer must be overruled.

Demurrer overruled. Reg. Lib. A. 1817, fol. 1883.

On the 23d of July, the day on which the demurrer was overruled, the Plaintiff obtained from the Vice Chancellor an order for the common injunction till answer and further order, allowing the Defendants to call for a plea and proceed to trial thereon, and for want of a plea to enter up judgment, but staying execution ; and an injunction was issued accordingly.

Nov. 12. On this day the Defendants moved, that the order of the Vice Chancellor might be discharged, and the injunction dissolved ; or that, notwithstanding such order and injunction, the Defendants might be at liberty to make an application to the Court of King's Bench for payment to them of the money paid by the Plaintiff into the hands of the Master of that Court.

The affidavit of the Defendant's solicitor, in support of the motion, stated, that in the action commenced by the Defendants on the bond, a verdict for £250 was found for them ; and on the 20th of June 1818, the Plaintiff was taken in execution by the Sheriff of Middlesex, under a writ of *capias ad satisfaciendum*, for the sum of £325, 10s., being the amount of damages and [547] costs in the action ; that on the 23d of June, on an application by the Plaintiff, Mr. Justice Bailely ordered the Plaintiff to be discharged out of the custody of the Sheriff, upon payment into the hands of the Master, of the amount of the sum indorsed on the writ, with the Sheriff's poundage, to remain in the hands of the Master until farther order ; and that the Defendants have put in an answer, denying the whole equity of the Plaintiff's bill.

Mr. Agar for the motion. The merits have been decided at law ; if the release could have been pleaded in the action, this Court, which never relieves misleading, will not restrain proceedings under the execution. The release, if void at law, cannot be good in equity. A common injunction, issued after execution executed against the person, is irregular.

Mr. Blake against the motion. On the demurrer, the Court decided, that the Plaintiff might be entitled to equitable relief. The Court will not permit the Defendants to obtain the money, till the question of equity is determined. *Aze v. Clarke* (2 Dick. 549), *Franklin v. Thomas* (3 Mer. 225). A motion to dissolve the common injunction *per saltum*, without the usual order *nisi*, is contrary to practice.

*The Lord Chancellor (Eldon).* In what instances has the common injunction been granted since the 18th and been taken in execution? Where the money has been paid, the writ is then issued, because the execution is not complete till the money is paid, and there may be some between the law and the equity; but where the body has been taken, the execution is executed. Mr. Justice Bailey would not have discharged the Plaintiff out of custody, without payment of the money to the Defendant, unless he had observed some irregularity in the proceedings.

*Feb. 27. 1818. The Lord Chancellor (Eldon).* There is no doubt that if the execution had been executed before an injunction can be obtained in a case in which the Court will interfere after execution executed, the Court must set the matter right in such cases in which it will so interfere, are special.

The old writ of *habeas corpus* was by supplemental bill to make the sheriff a party, and order him to pay over the money. Lord Thurlow thought that if goods were in the hands of the sheriff, the order would authorize the sheriff to stay proceedings, but if he chose to pay over, he might. *Arm v. Martin*, 2 Dick. 549; 3 Mer. 234. The Court afterwards resolved, that if the money was paid over, it would compel a return. If the law is so with regard to goods, it is impossible to maintain that the party shall not have relief where the execution is against the body, because the sheriff cannot do what that as with goods.

In *Francis v. Thomas*, 3 Mer. 225, on the day on which the Plaintiff would have been entitled to an injunction, the Defendant demurred, and by that means prevented the issuing the writ. One of the great difficulties was on the form of the injunction; the common form allowing the [549] party to call for a plea, and proceed to trial, &c.; and I think that on inquiry we satisfied ourselves, that even in those special cases the common form is employed. The practice of applying that form itself, established that there must be some principle for the application. It would be an intolerable hardship, that when the body is taken, the party could not be discharged from execution; but if the Court delivers him, care must be taken to place him in such a situation that he shall not be at liberty to say, that he has satisfied the execution.

I agree with Lord Thurlow, that, after the injunction, the sheriff might proceed to sell; but not if he meant to say that the Court would not stay the money in the hands of the sheriff: always considering these as special cases, and admitting that, in ordinary cases, the Court will not interfere.

Mr. Agar mentioned, that this subject had recently undergone discussion before the Court of Exchequer; and Mr. Blake added, that, in that instance, the bill was filed after execution against the person.

*The Lord Chancellor [Eldon].* There is an important difference between a bill filed after execution, and a bill filed for the the purpose of preventing execution.

The present is a very special case. Unless I misrecollect what passed on the former occasion, although the party is already in execution, yet, if the case is such that the Court would grant an injunction after execution, the form of the writ is the same in as the ordinary cases. (This position was confirmed on reference, by the registrar, Mr. Croft.) [550] In many cases the injunction is granted after execution executed, as on warrants of attorney. If the court of law has acted on what I may call its equity, that affords no reason why this Court should not entertain jurisdiction on a bill filed. It is quite a different question where judgment has been obtained after proceedings at law.

I apprehend that I shall feel no difficulty on the doctrine as between principal and surety. If I mistake not, there is, in the *Term Reports*, a decision, that a covenant not to sue one of several co-obligors is not, at law, a release of the co-obligors. (*Dean v. Newhall*, 8 T. R. 168. *Hutton v. Eyre*, 6 Taunt. 289.) That may introduce a question whether such a covenant is not a release in equity.

" His Lordship doth order, that the Plaintiff be at liberty to make an application to the Court of King's Bench for payment to him and to the Defendants, of the money paid by the Plaintiff into the hands of the Master of the said Court of King's Bench, pursuant to the order of Mr. Justice Bailey, on the 23d day of June 1818; and it is ordered that they do pay the same when so received, to be verified by affidavit, into the bank, with the privity of the Accountant-General of this Court, on the credit of this cause, to abide the event of this cause; but this order is to be without



prejudice to the right of any of the parties to such money, or any of the questions in this cause."

Reg. Lib. A. 1818, fol. 1281.

(1) Probably 2 *Ro. Abr.* 412, G. 4, 5, see *Co. Litt. Ed. Hargr.* 232 a, n. 1. *Dorchester v. Webb*, *W. Jones*, 345. *Cheetham v. Ward*, 1 *Bos. & Pull.* 630, and the authorities cited in *Dean v. Newhall*, 8 *T. R.* 168.

(2) P. 21, citing the *dictum* in *Tooker's case*, 2 *Co.* 68, that in personal actions one joint-tenant may release all, and the argument of *Wood*, in *Swan v. Steele*, 7 *East*, 211.

[551] CAMPBELL v. MULLETT. WILLIAMSON v. LONGMEAD. *Rolls.* June 2, July 23, 24, 1818; March 18, 19, 24, 1819.

Two American citizens residing at *Baltimore*, and a French subject residing at *St. Domingo* being in partnership, and owners of certain ships captured by British cruisers, and the commissioners appointed under the 7th article of the Treaty of Commerce concluded in 1794, between this country and *America*, for awarding compensations to American subjects who had suffered losses by capture for which they could obtain no redress in the ordinary tribunals, having awarded in compensation of the ships of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen, as an alien enemy; the sums so awarded are not partnership property, and the creditors of the partnership have no claim on them, as against the separate creditors of the Americans.

The original bill filed on the 14th of *July* 1804, by *Archibald Campbell*, *David Williamson*, *James Dall*, *John Munnickhuysen*, and *Joseph Sterrett*, of *Baltimore*, in *North America*, and *John Heathcote* of *London*, Merchants (the first five Plaintiffs being trustees of the estate and effects of *Stephen Zacharie*, of *Baltimore*, Merchant on his separate account, and as a partner of Messrs. *Coopman* and *Vochez*, lately trading in *Baltimore*, under the firm of *Zacharie, Coopman*, and *Co.*), stated that in *November* 1794, a treaty of amity, commerce, and navigation, between his Majesty King *George* [552] the Third, and the United States of *America*, was signed by certain Ministers Plenipotentiary, and in the course of the following year duly ratified by his Majesty and the then President of the United States; that by the 7th article of the treaty, after reciting that complaints having been made by divers merchants, and other citizens of the United States, that, during the course of the war, in which His Majesty was then engaged, they had sustained considerable losses and damages, by reason of irregular or illegal captures or condemnations of their vessels and other property, under colour of authority or commissions from His Majesty, and that from various circumstances adequate compensation for the losses and damages so sustained, could not then be obtained by the ordinary course of judicial proceedings, it was agreed, that in all such cases where adequate compensation could not, for whatever reason, be then actually obtained in the ordinary course of justice, full and complete compensation should be made by the *British* government to the claimants, and that for the purpose of ascertaining the amount of any such losses and damages, five commissioners should be appointed and authorized to meet and act, and that the award of the commissioners or any three of them should in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the claimants, and His Majesty undertook to cause the same to be paid to such claimants *in specie*, without any deduction, in such place, and at such time, as should be awarded by the commissioners; and that five persons were duly appointed and constituted to carry into effect the provisions of that article.

The bill proceeded to state, that *Stephen Zacharie*, *Francis Coopman*, and *John Vochez* (deceased) were, in the year 1793, and had been for some time previously [553] merchants and co-partners at *Baltimore*, under the firm of *Zacharie, Coopman*, and *Co.* and traded to the *West Indies* and *Europe*, *Zacharie* and *Vochez* residing at *Baltimore*, and *Coopman* residing at the island of *St. Domingo* in the *West Indies*; that some time in the year 1793, in consequence of the capture of many of their ships by *British* cruisers, and large debts due to them from the *French* government, *Zacharie*, *Coopman*, and *Vochez* became embarrassed, and at length stopped payment

of their debts ; that in *November 1794*, *Vochez* intending shortly afterwards to proceed on a voyage to *Europe*, it was agreed between him and his co-partners, that he should collect for his and their use, all the monies due or to become due to him and them as co-partners in *Europe*, and in pursuance of such agreement, *Zacharie Coopman*, and *Vochez*, on the 24th day of *November 1794* executed a power of attorney to *Vochez*, to recover and receive all sums of money, debts, &c., and demands whatsoever, due, payable and belonging to them or detained from them by any means, and perform all things for them as co-partners, as he should from time to time find necessary and convenient ; that in 1795 *Vochez* arrived in *England*, and commenced business on his own account in *London*, as agent for the *French* prisoners in this country, and continued to reside here until his death ; that *Vochez*, on the 24th of *March 1798*, executed a power of attorney to *Thomas Mullett* and *Joseph Jeffries Evans*, whereby, on behalf of himself and his co-partners, and under and by virtue of the former power of attorney, he substituted in his place *Mullett* and *Evans*, for him and his co-partners ; that *Mullett* and *Evans* in *April 1798*, on behalf of *Zacharie*, *Coopman*, and *Vochez*, as co-partners, and as their agents [554] or attorneys, and also on behalf of *Zacharie* on his own private account, and as his agent or attorney, presented several memorials to the commissioners appointed to carry into effect the provisions of the 7th article of the treaty, praying compensation and relief for the loss sustained by *Zacharie*, *Coopman*, and *Vochez*, as co-partners, and also by *Zacharie* on his own private account, by reason of the capture and condemnation of their ships and the cargoes thereof, by the *British* ; and on the 8th of *July 1803*, the commissioners by seven awards, adjudged and awarded that seven sums of money should be paid to *Mullett* and *Evans*, on behalf and for the sole use of *Zacharie* and *Vochez*, their executors, administrators, and assigns, for the losses, and expenses sustained by them, in consequence of the capture of seven ships named ; and the commissioners also, by another award of the same date, adjudged and awarded, that the sum of £1496, 12s. 4d. should be paid to *Mullett* and *Evans*, on the behalf and for the sole use of *Zacharie* alone, his executors, &c., for the loss sustained by him, in consequence of the capture of the ship *Hope* ; all the sums of money so awarded being made payable by three equal yearly instalments, on the 15th of *July* in each year, the first instalment to be paid on the 15th of *July 1803* ; that the *British* Parliament granted to his late Majesty a sum sufficient for the payment of the awards, and the money to be paid under such awards, was impressed by warrant under the sign manual to *Joseph Alcock*, principal clerk of the revenue department ; that the awards were delivered to *Mullett* and *Evans*, and they received from *Alcock* on the 15th of *July 1803*, £1979, 14s. 7d., being the whole money awarded in respect of the ship *Liberty*, and they also received from *Alcock* the first instalment of the several other sums of money, by [555] the other awards made payable, and the residue of such several other sums, to the amount of £10,257, 8s. 4d., still remained in the hands of *Alcock* ; that at the respective times of the captures of the several ships mentioned in the awards, *Coopman* resided at *St. Domingo* as a *French* citizen, and the commissioners considering him as an alien enemy, did not therefore conceive him to be entitled to any relief or compensation, in respect of such ships as joint property.

The bill also stated that *Zacharie* at a Session of the General Assembly of *Maryland*, held at the city of *Annapolis*, from the 6th of *November 1797*, to the 21st of *January 1798*, obtained an act exempting his person from imprisonment, on account of debts due from him as a partner with *Coopman* and *Vochez*, and also in his private capacity for the time, and upon the terms therein mentioned, and by that act *Campbell*, *Williamson*, *Dall*, *Munnickhuysen*, and *Sterrett*, were duly appointed trustees of, and became entitled to his real and personal estates, for the benefit of or in trust for all his creditors, not only in his private individual capacity, but also as a partner with *Coopman* and *Vochez* ; that by a letter of attorney under their hands and seals, dated the 3d of *December 1803*, the trustees appointed *John Heathcote* their attorney, for them and for the use of the creditors of *Zacharie*, as a partner with *Coopman* and *Vochez*, and in his individual capacity, to demand from *Mullett* and *Evans*, and from any other person liable, all sums received on account of the first instalment of the several awards which became due on the said 15th of *July 1803*, and an assignment of the several awards to *Heathcote*, for the benefit of the trustees, and also all future instalments of the monies payable by

the awards ; that at the time the memorials were presented, *Vochez*, with respect to his transactions in this country, was in insolvent circumstances, and had ceased to carry on [556] business here, and he continued in such circumstances until the time of his death, and by some deed bearing date on or about the 19th of August 1803, he assigned all his estate and effects, and particularly his right and interest in the awards, and the monies thereby made payable to *Philip Langmead*, *Thomas Mein* (residing out of the jurisdiction), and *John Compton*, three of his principal creditors, in trust for the benefit of themselves and all others his separate creditors, and for the purpose of making some provision for his maintenance during his life ; that *Vochez* died in or about May 1804 insolvent, and that no person had taken administration to his estate in case he died intestate, or if he made a will, the same had not been proved, and there was not any legal personal representative of him.

The bill in answer to a pretence by *Mullett* and *Evans*, that they had retained £1629, 2s. 9d. of the sums received by them, in discharge of some debts due from *Vochez* alone, and paid the remainder, and by the deed of the 19th of August 1803, assigned the awards and the monies payable thereby, to *Langmead*, *Mein*, and *Compton*, upon certain trusts for the benefit of themselves, and all other the separate creditors of *Vochez*, after payment of some maintenance to him for his life, and were therefore not then answerable for the money received by them, charged, that such payment and retaining, and assignment, were a breach of trust and a fraud in *Mullett* and *Evans* ; that *Zacharie* never signed the deed of the 19th of August 1803, and that if the same bears his signature, it was added thereto by *Vochez*, who had no lawful authority so to do, and that *Mullett* and *Evans*, before they received the money, knew that the house of *Zacharie*, *Coopman*, and Co. was insolvent, or had stopped payment ; that *Langmead*, *Mein*, and *Compton*, when they received the sum paid by *Mullett* and *Evans*, knew that it was not the [557] sole property of *Vochez*, but of him and *Zacharie*, or *Zacharie's* trustees, and ought not to have distributed more than *Vochez's* share among his creditors, and that on the 19th of August 1803, *Langmead*, *Mein*, and *Compton*, and *Vochez* executed a deed of indemnity to *Mullett* and *Evans*, against the consequences of the assignment of the awards, and payment of the money, *Vochez*, without any lawful authority, affixing the signature of *Zacharie*, the power of attorney of the 4th of November 1794, not authorising him to execute that deed, or the deed of assignment in the name of *Zacharie* ; and on the payment by *Langmead*, *Mein*, and *Compton*, they received an indemnity from the other creditors of *Vochez*.

The bill prayed that *Mullett* and *Evans*, and also *Langmead*, *Mein*, and *Compton*, might be decreed to pay to the Plaintiff *Heathcote*, on behalf of the other Plaintiffs as trustees, the sum received by *Mullett* and *Evans* for the first instalment of the money made payable by the award which relates to the ship *Hope*, and also the share which belonged to, and formed part of the estate and effects of *Zacharie* of the several other sums of money received by *Mullett* and *Evans*, in respect of the award made in favor of the ship *Liberty*, and for the first instalment of the several sums of money made payable respectively by the several other awards, with interest ; and that the award which relates to the *Hope* might be assigned to *Heathcote* on behalf of the other Plaintiffs, as trustees, and that the several other awards might be deposited and lodged with one of the masters for safe custody, and for the benefit of all parties interested therein ; and an injunction to restrain *Mullett* and *Evans*, and also *Langmead*, *Mein*, and *Compton* from receiving, and *Alcock* from paying, the sum of £10,257, 8s. 4d., in his hands.

[558] By their answer *Mullett* and *Evans*, admitting that *Zacharie*, *Coopman*, and *Vochez* had in 1793 stopped payment of their debts, stated, that they had not been informed of that event, when the power of attorney was executed to them by *Vochez*, nor till some time in the year 1803 ; that when they presented the memorials to the commissioners they believed, and still believed, that *Vochez* was in affluent circumstances : that they knew not whether he was insolvent at the time of his death, but that a very large sum then remained due to him on account of his contract with the French government ; more than sufficient to pay his debts.

*Langmead* and *Compton*, by their answer denied knowledge or belief, that when the memorials were presented by *Mullett* and *Evans*, *Vochez* was in insolvent circumstances, but stated reasons for believing that he had acquired a large fortune by his contract, and that at his death he was not insolvent, the French govern-

ment being indebted to him £180,000, and his debts not exceeding £43,000 ; that in consequence of the omission of the *French* government to remit to him the sums stipulated by his contract, *Vochez* became unable to pay his debts, and proposed to assign to *Langmead*, *Mein*, and *Compton*, as his principal creditors, the awards of the commissioners, and (by a deed in the custody of *Mein*) executed an assignment to them on trust (subject to certain debts specified, and a sum for his maintenance), for the benefit of his creditors, affixing thereto the signature of *Zacharie* or *Coopman*, or both of them ; denied that they had distributed any sums among themselves, or the separate creditors of *Vochez*, all the funds received by them having been applied by the order and to the use of *Vochez*, according to the agreement ; and denied liability to the Plaintiffs.

[559] The answer of *Alcock* stated that he had paid to *Mullett* and *Evans*, or their assigns, by virtue of the warrants, ten sums, amounting in the whole to £7108, 8s. 8d., and that there was remaining in his hands for the persons entitled thereto under the awards, the sum of £10,257, 8s. 4d. ; which was afterwards paid into court.

The bill having been amended, by their several answers, *Langmead* and *Compton* stated their belief that *Vochez* had advanced to the account of *Zacharie*, *Coopman* and Co., from his private property, £10,787, 6s. 2d., and that *Coopman* was also indebted to *Vochez* on account of his contract, and that *Vochez* had a lien on the awards for those sums, and *Langmead*, *Mein* and *Compton*, were entitled to deduct those sums from the money accruing due on the awards ; and insisted that the money was payable to the sole use of *Zacharie* and *Vochez*.

By the decree, dated the 15th of *March* 1809, the bill was dismissed as against *Alcock*, and it was ordered that the master should take an account of all sums of money received by *Mullett* and *Evans*, or either of them, or by any other person, &c., as and for the first instalment of the money made payable by the award, relating to the ship *Hope* ; and an account of the several other sums of money received by *Mullett* and *Evans*, or either of them, &c., in respect of the award made in favour of the ship *Liberty* ; and as and for the instalments of the several sums of money made payable by the several other awards ; and ascertain how much of what he should find due from them upon taking the last-mentioned account, was the proportion or share which belonged to and formed part of the personal estate and effects of *Zacharie* ; and the master was likewise to take [560] an account of all payments made by *Mullett* and *Evans*, to *Vochez* on account of the partnership of *Zacharie*, *Coopman*, and *Vochez*, and on the separate account of *Zacharie*, in respect of the said instalments, and of the award made in favour of the ship *Liberty* ; and in case the master should find any accounts settled between *Mullett* and *Evans*. and the said partnership, he was not to disturb the same ; and it was ordered that the master should take an account of all sums of money received by *Langmead* and *Compton*, by virtue of the assignment to them of the awards, and also an account of all payments made by them on account of the partnership of *Zacharie*, *Coopman*. and *Vochez* : and the master was also to take an account of all the payments made by *Vochez*, on account of his said partnership. and for the separate use of *Zacharie*.

By his report dated the 8th of *February* 1813, the master certified that a state of facts had been laid before him, verified by the examination of *Mullett* and *Evans*, whereby they stated, that they had not received any sums of money as the first instalment of the money made payable by the award respecting the ship *Hope* ; nor in respect of the award made in favour of the ship *Liberty* ; nor as the instalments of the several sums of money made payable by the several other awards, except the first instalments of the money made payable by the awards in favour of two ships named, for which they admitted to have received £578, 19s. 5d., and £1050, 3s. 4d. ; that the commissioners appointed under the treaty of amity, commerce and navigation, between his *Britannic* Majesty and the United States of *America*, by two several awards, adjudged that the said two sums should be paid to *Mullett* and *Evans*, for the sole use of *Zacharie* and *Vochez* ; and the master found that the sum of £1814, [561] 11s. 4½d., being one moiety of the total of those two sums, was the proportion or share which belonged to and formed part of the personal estate of *Zacharie* ; and he found that *Mullett* and *Evans* had paid on account of the partnership of *Zacharie*, *Coopman* and *Vochez*, for charges and commission in respect of the awards, and for a gratuity to the American consul,

£1027, 4s. 3d. ; and that they paid to *Vochez*, on account of the partnership of *Zacharie*, *Coopman*, and *Vochez*, sundry sums, amounting to £880, and to the separate use of *Zacharie*, for the charges and commission on the ship *Hope*, and for his portion of the gratuity to the *American* consul, the sum of £111, 15s. 1d. ; that *Langmead* and *Compton* had received on account of the first instalment of the several awards, certain sums, amounting to the sum of £5278, 0s. 7d. ; and the master did not find that *Langmead* and *Compton* had made any payments on account of the partnership of *Zacharie*, *Coopman* and *Vochez*, except the sum of £282, 0s. 8d., paid to *Mullett* and *Evans*, on account of the balance due to them, in respect of payments made by them on account of the partnership, and therein-before mentioned ; and he found that *Vochez* had paid on account of the partnership, of *Zacharie*, *Coopman* and *Vochez*, several sums, amounting to the sum of £8363, 13s. 8d. ; and he did not find that *Vochez* had paid any sum for the separate use of *Zacharie*.

June 2. On this day the cause came on for further directions.

Sir Samuel Romilly and Mr. Wear, for the Plaintiffs.

Mr. Hart and Mr. Raithby, for the Defendants.

[562] July 23. The Master of the Rolls [Sir Thomas Plumer]. I have read the pleadings in this cause, and I think that the important questions which it involves must be more fully argued. The bill calls on the court to distribute a sum of £24,000 stock ; and it must be admitted, that if this fund is clearly shown to be the property of the partnership, belonging at once to the three partners, and liable to their joint debts, and if the suit is properly constituted to agitate that question, then no difficulty would occur in the distribution ; neither partner could claim it till two sets of accounts had been taken, the accounts of outstanding debts, and the accounts *inter se* : but the questions in this cause are, first, whether this fund is partnership property ; secondly, whether the suit is properly constituted to enable the court to decide that point ? The former, a difficult question, has not yet been spoken to. The three partners, two residing at *Baltimore*, and the third at *St. Domingo*, were owners of several ships captured ; by an article of the treaty of 1794, a mode having been provided for making compensation to *American* citizens, who had sustained losses by capture, for which redress could not otherwise be obtained, memorials were presented on behalf of the three partners to the commissioners appointed by the treaty, specifying several ships. *Zacharie* was sole proprietor of one ship, which was never partnership property, and the Plaintiffs, therefore, who were appointed by an act of assembly to represent *Zacharie*, would be entitled to so much of the fund in question as was the produce of that ship. The commissioners made a distinct award for each ship ; all the awards but one relating to ships that had originally belonged to the three partners ; but *Zacharie* and *Vochez* being *American* subjects, resident in *Baltimore*, *Coopman* was a French citizen, at *St. Domingo*, at [563] the time of the capture and of the memorials ; on that ground the commissioners were of opinion that he was entitled to no compensation. That opinion might be founded on the principle either, that as to so much of the ships as was *French* property, they were rightly captured, or that if they were then *American* property, yet compensation ought not to be now given to an alien enemy. Whatever was the reason, the commissioners refused compensation.

The question which I consider, as requiring, to be argued is, whether the sums thus awarded are the property of the three partners, being the produce of captured ships, which were their property, and two of the partners being *Americans*, and the third a *French* citizen, whom the commissioners intended to exclude ; the creditors of the three having an undoubted right against the ships : or are they a new acquisition belonging to the two partners ? Supposing that the court would decree the fund between *Zacharie* and *Vochez*, to the exclusion of *Coopman*, it must be observed that, though the assignees of *Vochez* are parties, it appears that he is dead, and no personal representative, who would be entitled to any surplus remaining after payment of debts, is before the court ; and it may be doubted whether in his absence the court can dispose of this property. But another point must be considered ; is the suit fitly framed for the discussion of the question, whether this fund is partnership property ? The bill is filed by persons claiming under *Zacharie* against the assignees of *Vochez*, but I do not find that that preliminary question

is raised. It seems taken for granted ; and it may be doubted whether there are parties before the court to agitate it.

Another difficulty is created by the decree, respecting [564] which I speak with great deference. It merely directs accounts, and those accounts do not reach the question which I have stated except indirectly ; for the accounts directed are against *Mullet* and *Evans*, who insisted that the whole interest of *Vochez* was transferred to them, and that having made large payments on account of this fund, they were entitled to retain the whole. The decree appears to proceed on a different principle, requiring them to account, and directing inquiries what payments they had made on account of the partnership of *Zacharie*, *Vochez*, and *Coopman*—a direction which seems to imply that those payments were properly made. Without determining the question, there being nothing in the pleadings to raise it, how the decree could sanction payments of that description, is a point which I wish considered.

Again, no account was directed between *Vochez* and *Zacharie*. It will, I presume, be insisted, that if, as it appears to be assumed, this was partnership property, an account must be taken how much belongs to each of the partners. The only question made on the hearing before me was, whether the Court should direct payment and division among those claiming under the two, or call in the creditors of the three ? On reading the pleadings, I am of opinion, that it is impossible to dispose of the case without further inquiry, to whom the fund belongs, and whether the suit is properly constituted for the decision of that question.

March 18, 19, 1819. Mr. *Bell* and Mr. *Spranger*, for the Plaintiffs. The only authority applicable to this case is *Thomp[565]-son v. Ryan*, in which no judgment has been given by the Lord Chancellor, but the injunction remains undissolved. (1) In the absence of direct authorities, the [566] question must be argued on principle. It is settled, that the separate creditors of a partner have no right against [569] the partnership property beyond the separate interest of that partner, his share upon a division of the surplus [570] after payment of the partnership debts—*Taylor v. Fields* (4 Ves. 396). In order to determine whether that rule is applicable to the present case, it becomes necessary to consider the principles on which it rests. One principle is, that, by the nature of the contract between the partners, partnership property must be first applied to partnership purposes, and, among other purposes, to the payment of partnership debts ; and it would be a breach of contract to apply it otherwise without the consent of all the partners—*Shirreff v. Wilks* (1 East, 48). The equity of the creditors is founded, as Lord *Eldon* has repeatedly stated, on the equity of the partners. Another principle is *qui sentit commodum, sentire debet et onus* ; as the partnership property has been acquired by means of partnership debts, it ought first to be applied in discharge of them. A third principle may be, that, if one partner has paid more than his proportion, the first object, after payment of the partnership debts is, to place the partners on an equality, by reimbursing the advance ; a principle constantly adopted in courts of equity : and the right is the same, whether the division is prior or subsequent to the payment of the debts. These principles apply when the property of three partners becomes, by death or assignment, the property of two ; it is still subject to partnership claims, and can never be divisible till they are satisfied ; nor can it be exempted from those claims except with the concurrence of all the partners—*Ex parte Ruffin* (6 Ves. 119).

[571] The question here is, whether the present case shall form an exception to these rules ? The circumstance that the share of one partner, as an alien enemy, is annihilated, cannot affect the equity of the remaining partners, or of the partnership creditors through them. In the case of forfeiture for treason, the Crown would take the interest of the criminal partner, still subject to the claims of the joint creditors. The accident, or the crime, of becoming an alien enemy, cannot deprive the other partners of their previous rights. *Zacharie* is entitled to insist, that before the assignees of *Vochez* receive any part of this sum, the partnership debts, to which *Zacharie* is liable, shall be discharged. For many purposes a partnership continues after dissolution, as in *Tarleton v. Backhouse* (Note : Probably connected with *Ex parte Tarleton*, 19 Ves. 464), before Lord *Ellenborough*, and on a motion for a new trial, before Lord *Eldon*, where a commission of bankrupt was

sustained against a partnership on a debt contracted many years after dissolution, the sale of partnership goods having been continued.

The sums awarded are partnership property ; they are given under the treaty as an indemnity to the partnership ; but the share of one partner happens to be intercepted. The treaty designed not a bounty, but an act of moral justice, to place the partners *in statu quo*. The intention of the commissioners was to reserve the share which they conceived to have devolved to the Crown, but not that the remainder should be distributable otherwise than if the whole had been paid.

The *Master of the Rolls* [Sir Thomas Plumer]. If a partnership sustained an accidental loss, as by fire, and an individual were to make a donation to two [572] of the partners, in compensation of their loss, would that be partnership property ?

Argument for the Plaintiff resumed.

On that point *Larazzabel v. Gorbea*, recently decided in this Court, is applicable; but it may be admitted, that such a donation to the two partners would not be partnership property ; here the sum awarded is purchased by the loss of partnership property ; the treaty expressly acknowledges in the partners a right, for which they could not obtain satisfaction in the ordinary course. This is not a gratuitous gift, but a satisfaction in consideration of a loss for which the parties were, under the treaty, entitled to compensation, analogous to damages recovered from the hundred by a partnership which has been robbed. In what proportion would this sum be divisible between the two ? Not equally, but in the ratio of their respective interest in the partnership.

Assuming that the fund is subject to the partnership debts, the absence of one of the partners out of the jurisdiction, will not prevent taking the partnership accounts, and the suit is properly framed for that purpose. The Plaintiffs suing as assignees of one of the partners, the Court must first ascertain that the partnership debts are paid, as in an ordinary bill for an account and division of partnership property.

Mr. Hart, Mr. Martin, and Mr. Raithby, for the Defendants, the assignees of *Vochez*. It is admitted that the partnership creditors have no lien on this fund, and that their equity can be made effectual only through the equity of the partners ; yet it is insisted that the existence of creditors creates an equity [573] in the partners. If what was partnership property has become the separate property of a partner, as by *bona fide* investment in land for his benefit, the joint creditors have no claim against it, in preference to the separate creditors.

In this case the interest of the partnership in the ships was determined by the capture ; the distinction is familiar between what are called treaty cases, in which the claimants have no legal right, and cases of contested capture, where the validity of the detention is in dispute. Before the award of the commissioners none of the parties had any transmissible or assignable right in the ships, or the sum to be awarded in respect of them. *Coopman*, an alien enemy, could have maintained no suit. A contract, express or implied, by *Zacharie* and *Vochez*, to hold in trust for *Coopman*, would be a fraud on the commissioners, judges without appeal of the facts and justice of the case.

Here is neither restitution which supposes the identity of the subject matter ; nor compensation, which supposes obligation. (Note: the substance of the argument for the Defendants is stated in the judgment.)

Mr. Duckworth, for Mullet and Evans, represented that they had rendered an account with which all parties were satisfied.

March 19. The *Master of the Rolls* [Sir Thomas Plumer]. The claim, as I understand it, now advanced by the Plaintiffs, is to have an account taken of the joint debts [574] of the three partners, before any division is made of this fund, insisting that it is liable to the ordinary equity attaching on partnership property, not to be divided among the partners till the partnership debts have been satisfied. In the argument it seems to have been admitted that *Coopman* himself has no interest in this property ; that if he were an individual claimant, there being no joint creditors, he would be concluded by the nature of the grant ; but it is contended, that still the joint creditors ought to be called in for the sake of the other two partners, and that in taking the account between them, there is that equity affecting each of the three, that every partner shall be discharged from his liability in respect of partnership debts, before any division of the funds liable to those debts between the partners. The first question is, whether the bill is properly framed ? the second, whether on the merits the Plaintiffs are entitled to the relief claimed ?

It seems that this point of great novelty had not offered itself in the prior stages of the cause. The bill contains not the least hint of the question, which is now the subject of this elaborate argument. The general nature of the bill is, that the assignees of *Zacharie* call for an account against two descriptions of persons ; those who represent *Vochez*, the other neutral partner, and *Mullett* and *Evans* (who were possessed of part of the fund, and had endeavoured to protect themselves from accounting, by insisting that they had made payments to the separate creditors of *Vochez*, and to himself after he had traded in this country, and were entitled to retain the residue) ; and seek to bring the fund into court from the hands of the Defendant *Alcock*, to give to *Zacharie's* representatives that proportion which appears to be due to him, as sole owner of one of the ships, and as a co-partner in the others. From the beginning to the [575] end, there is no hint that *Coopman*, or any one claiming under him, has an interest ; on the contrary, the bill seems to allege, as a reason for excluding him, that at the time of the capture, he resided at *St. Domingo*, and was therefore excluded by the terms of the award. The relief sought by the Plaintiffs therefore is an account and division, not suggesting that any one has a right to a share but *Zacharie* and *Vochez* : the Defendants meeting this claim, insist also that the parties entitled to divide, are *Zacharie* and *Vochez*, but object to go into the accounts.

In considering the case, it must be remembered, that the ships were, during the co-partnership in 1793, and at the time of the capture, the property of the three, not merely as part owners, but as partners in trade ; a portion of the joint stock of the three ; and for this purpose it is immaterial to what country they belonged : in that state, all the principles so ably urged on the part of the Plaintiffs undoubtedly attach on the ships. The rights of creditors in such a case are indisputable ; a long series of authorities has established the equities of creditors, to be worked out through the medium of the partners. They have no lien, but something approaching to lien ; that is, a right to sue, and by judgment and execution to obtain possession of the property ; but till then, they cannot prevent the partners from effectually transferring it by *bona fide* alienation. Is it clear from *Ex parte Ruffin* (2), and other cases, that where a partner conveys joint property, the circumstance of its having been joint property, does not render it such for ever, or prevent its being effectually aliened to two, or one of the partners. If, by *bona fide* con-[576]-veyance, a new purchaser is put into possession, he is to all intents and purposes the owner, and joint creditors cannot follow the property into his hands.

Such being the general rule, in 1793 the captures take place. It is immaterial for the present, whether the captures were legal or illegal ; on that subject we are precluded from inquiry, and know not on what ground and in what circumstances the capture was made, under what flag the ships sailed, in what commerce they were engaged, on what principal taken, or where condemned. The Court knows only the capture and condemnation, and the fact, that two shares in the ships belonged to *Americans*, and the third to a *French* subject resident at *St. Domingo*. Capture and condemnation having taken place, though I agree with the argument, that we must refer to the treaty to determine, whether the case is within its provisions, which it would not be unless the capture was illegal, or in circumstances within the operation of the seventh article, still it must be assumed, that it was a case in which the parties were not entitled to any remedy in any municipal court. The property, therefore, was lost and gone by the adjudication of a competent tribunal ; and it was not in the power of the individuals to recover it, and reverse the sentence of condemnation. The ships had irrevocably passed into the hands of the captors, and become their absolute property.

Stopping here, whatever antecedent rights the joint creditors had in the property, whatever right of suing for it, while it remained the property of the partners, here every right was gone ; the maritime tribunal, by sentence *in rem*, had determined the ships to be no longer their property, but that of another : the appli-[577]-cation for relief under the treaty assumes, that the parties were without remedy in any municipal court. Thus far, therefore, this case differs from *Thompson v. Ryan*. (1) in these circumstances ; there was restitution to the partner residing in *Copenhagen*, of the goods that had been seized there as the property of a *British* subject ; they were restored to *Ryan* : that is restitution of the thing itself ; that which once belonged to the co-partners was in part restored ; the right of the captor, or his officer, is taken from him ; the property was never suffered to pass into his hands, but saved from



confiscation by the circumstance of *Ryan* being interested in it. *Pro tanto*, no confiscation took place. It may be a very important question, whether, in such a case, the property has been changed between the partners ; the *res ipsa* being restored, and in the hands of one of the partners, whether the other partner may not claim his share ? The very thing which once had impressed on it the character of partnership property, remains *in solido* in the possession of one partner untouched by the sentence of condemnation. Here the thing is irrevocably gone ; the sentence not being subject to reversal by any suit that could be instituted in any municipal court. (*Vide* 2 *Swans*. 586.)

In that state the parties remained for ten years, from 1793–1803, when the awards were made. In the *interim* the ships had passed into other hands, and there has never been any restitution of them. By the treaty, not of peace, but of amity and commerce, concluded in 1794 between *America* and this country, complaint having been made by *Americans* of illegal captures during the war, one of the contracting powers engages that com-[578]-missioners shall be appointed to inquire into those cases, and make compensation to the parties.

It is said, that the sums awarded by the commissioners are not matter of bounty or donation ; can they be matter of right ? What is right ? That which may be enforced in a court of justice. Had the parties whose property was condemned by irrevocable sentence, any right ? What they obtain after that condemnation is not founded in right, but in policy between the nations, providing compensation to individuals who have lost property by sentences which are thought unjust : the ground of relief before the commissioners is the want of redress in any municipal court. Whatever the individual obtains is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without any thing in the nature of consideration, yet, for the purpose of being contrasted with property or right, it is donation, not restoration of a former right, but from a new fund, belonging to an independent authority, a grant to the sufferer for what he lost. The inducements for one nation to give to the citizens of another this bounty, are matter of liberality and conciliation, but not of strict legal right. It may be said, that there is a moral obligation to rescind an unjust sentence ; if so, it is one of those imperfect obligations which cannot be judicially enforced.

This, therefore, is not a case in which property is recovered in a court of law, by the medium of a sentence, and as matter of right. The parties claim, not the thing itself, but compensation : making application to indulgence for an equivalent, cannot be assimilated to recovery by right in adverse litigation. All persons receiving benefit under this commission succeed not in virtue of any con-[579]-sideration moving from them ; but by an article of a treaty, which gives as bounty from this nation to *American* citizens, a compensation for losses. It is extremely material to consider in what character this grant was made, for on that depend the consequential rights. A power is given to the commissioners, final and absolute, to grant or to refuse relief to any individual, and in any circumstances, as they may think fit ; and whatever they adjudicate cannot be questioned.

*Vochez* arrived here in 1795, engaging in a distinct trade, and the trade of the three was never afterwards revived. They were insolvent, and stopped payment in 1794. By an act of assembly in 1798, the property of *Zacharie* was conveyed for the benefit of his creditors. All these transactions were prior even to the application for relief under the treaty ; at length, in 1798, four years after the treaty, *Mullet* and *Evans* preferred memorials to the commissioners, not omitting the claim of *Coopman*. The memorial is presented in his behalf, stating incorrectly, that all the partners were *American* subjects ; the fact, that *Coopman* was a *French* citizen, being discovered, the commissioners adjudicated a sum to the two only, for their sole use, expressly negating the claim of *Coopman*, and bestowing on the two a pecuniary compensation. On what ground they proceeded we know not ; it is difficult to conceive how, in a case of restitution, *Coopman*, an alien enemy at the time of the capture, could have had a share ; but it is enough to say, that the award, which is conclusive on all parties, gave to the two and not to the third. The question is, what is the effect of this grant ?

First, I ask, who are entitled to the money ? It is impossible to contend that this grant made *Coopman* a participator. It is admitted that it must be taken as an

[580] exclusive grant to the two *American* subjects, with a negative against participation by *Coopman*. His share, if he ever had one, was gone; and the other two are to receive their proportions exactly as if *Coopman's* share were satisfied. When once it is admitted that the right of property under this grant was, at law and in equity, with the two, and not with the three, I think it will be exceedingly difficult to prevent the obvious consequences. It would be a perfect anomaly, and contrary to every principle, to hold, that the creditors of the three have any right on the property of the two. The joint property of the three is subject to the joint debts of the three, and the property of the two, by the known law, is subject to their respective classes of creditors. If *Zacharie* and *Vochez* had been engaged in a distinct partnership of two, and also in a partnership of three, when this property was first created and given to the two, and admitted to be their absolute property, in law and equity, on what grounds could the creditors of the two be postponed to the creditors of the three? The right of the creditors of the three can attach only on the co-extensive property of the three; they have no more right to charge the property of the two than the property of one. It was acknowledged, and could not be denied, that the equity of creditors, in any case, must be worked out through the medium of each partner; the difficulty then is, it being admitted that *Coopman*, one of the partners, has no right in this property, that it neither is nor ever was his, to know on what principle he can give to his creditors what he has not himself? His creditors claim through his medium only, as a partner, and admitting that he has no right, can they be in a better state? It is conceded, that, if this were surplus, *Coopman* could not claim in competition with the two: then it is not joint property. It wants the essential character of joint property unless it belongs to the three. Belonging to [581] the two only, if *Coopman's* creditors are admitted, the consequence is, that he will be exonerated by this fund from the weight of debt which he must otherwise bear; that a sum given to two shall operate in favour of the third, in contradiction to the terms of the grant, which are to the sole use of *Zacharie* and *Vochez*, nothing being stated that denotes an intention at variance with those terms: it being clear, on the contrary, that the commissioners intended that *Coopman*, by reason of his personal disability, should not be benefited; having occasioned the loss by his character of alien enemy, and his proportion having been rightly condemned, they meant to except him, and to give to the two exclusively. Why then are we to construe the two to be trustees for that very third, who, by the terms of the grant, is excluded? If they are declared trustees, must it not be on the ground that they were intended to be trustees? How can a trust be raised, not only not in conformity, but in contradiction, to the terms and the design of the grant?

It was then insisted that an account must be taken of the debts of the three for the purpose of dividing the property between the two, and also the accounts of the three partners *inter se*. Supposing that, in the result, it appeared that *Coopman* alone was a creditor of the partnership, the other partners being debtors, could the Court, he being subject to pay the debts, give to him the surplus for that purpose? Was an account ever taken between three, each of whom was not equally interested in the result? an account of a partnership of three, including two, and excluding the third? Yet it is contended that it ought to be taken for the benefit of the two, while it is admitted, that, as to the third, it cannot be pursued, because he is, by the grant, excluded from participation.

[582] In order to raise this point, *Coopman* should have been a party. How can an account be taken of a partnership in the absence of one of the partners, the pleadings not stating that he is out of the jurisdiction, but that, as an alien enemy, he was excluded from the grant of the fund to be distributed? The claim of *Coopman*, now introduced, creates these difficulties and this anomaly.

The case of *Thompson v. Ryan* is distinguishable in the circumstance that I have stated. The principle on which this case depends is, that the fund in question is for the first time created by the award, and though, in some respects, arising out of the antecedent capture of joint property, yet not connected with it, as a continued claim of property, pursued in the usual course in which right is ascertained. It is more analogous to gifts by individuals to one of several partners, in case of casual loss to the partnership; a grant to one and not to the rest. It seems admitted, that, in such a case, it would be impossible to attach to the gift the incidents of partnership property, more than to a legacy to one or two of these partners in compensation of losses by war. The distinction is, that this is no part of the partnership property, but for the first

time brought into *esse* by a parliamentary grant ; as much the separate property of those to whom it is awarded, as if they had acquired it by any other means. To say, that, in equity, the partnership creditors could follow it, would be to carry that doctrine beyond any authority. When the property is changed, the equity is gone. The creditors, not pursuing it while joint property, have lost their right when it passes into other hands. The principle on which joint property is liable, namely, credit given, is not applicable to this fund, which came into unexpected existence by the effect of the treaty ; bestowed on the two, not on the three, it was [583] not commensurate with partnership property, nor succeeded to the place of it, but quite distinct and independent, belonging to different individuals.

These are the difficulties at present occurring to me against considering this as property of the partnership, or over which the partnership creditors have any equity. Whatever else is to be done with it, what division is to be made between *Zacharie* and *Vochez*, or what farther consequences, remains to be considered. I cannot declare that the creditors of *Coopman* have any interest in a fund which I think does not belong to him.

March 24. The *Master of the Rolls* [Sir Thomas Plumer]. I retain the opinion which I expressed on the hearing. I think that the joint creditors of *Zacharie*, *Coopman*, and *Vochez*, have no equity against the fund. It must be considered as the property of *Zacharie* and *Vochez* only ; by the terms of the award it is given to them, and *Coopman* is expressly excluded. The argument, that the ships, being originally joint property, the sum awarded in compensation of their capture must be, like that out of which it grows, joint property, goes too far. On that principle the property must be joint for all purposes, and between the partners as well as for the creditors. Clearly and confessedly, however, this fund is not joint property between the partners. But it is a fallacy in reasoning to suppose it a substitute for joint property ; it is a substitute for separate property. A division into parts was necessary before the commissioners could award any compensation. The ships had been condemned, and could never be restored. Considering that the share of the French partner was included in the condemnation, the only way of awarding a compensation [584]—tion to the others was, first to make a division to ascertain the interest of the alien enemy, and, placing that out of the question, to bestow a gift on the two *Americans*. The compensation is therefore given, not for joint, but for separate property ; commensurate with, and adequate to, the interest of the two, in the event of a division. Supposing that they had sold their shares, and invested the amount in stock, could it have been said that that stock was joint property, because produced by it ? Where there is a conversion of joint property by a valid act, it is a fallacy to consider it still joint. The question will always be, whether, with regard to creditors, the act is valid ? If a bale of goods, belonging to three partners, is sold, the price is not necessarily the property of the three, because the bale was their property. The question is, was the transaction a fair conversion ?

This case proceeds a step farther ; there neither was nor could be resitution of the ships ; it could not be intended that the French partner should have a portion ; by the terms of the treaty the commissioners were bound to exclude him : not being at liberty to bestow any share on the alien enemy, they were under the necessity of negating the joint claim, and of giving to the two partners only as individuals. By every mode of analysis and construction therefore, the examination, of the award operates to prove what the terms shew, that the fund awarded is separate, not joint property. When that is established the consequences are obvious. I think that this fund is, what, by the reference, it was intended to be, what, by the terms of the award, it is declared to be, what alone it legally could be, separate property. By the award the joint creditors are not placed in a worse situation ; the joint property was already lost. If the very joint stock, or a part of it, as in *Thompson v. Ryan*, [585] had been restored, there would have been nothing to alter the property ; the goods are returned, *in statu quo*, the property of the partners ; but here the ships are gone, and never restored, and the question concerns a new property come to the two in the way of compensation. That is far removed from a case of restitution. Restitution might have made it still joint property ; compensation considers only the individual shares, and gives in the proportion of their interests individually to the two. There is no more ground for admitting the joint creditors than *Coopman*.

The argument that the two partners may have unequal interests in the joint property, and that the commissioners may have given to them two-thirds of the value, believing them entitled in proportions different from the fact, cannot now be urged. We must abide by the words of the award, which the treaty declared to be final and conclusive.

I think that there is no doctrine of equity qualifying the right of the two partners and that, as the fund is not a property in which *Coopman* has an interest, it is not subject to the claims of the joint creditors.(3)

(1) *Samuel Thompson* of London, and *Philip Ryan* resident at *Copenhagen*, were in partnership, the business consisting of the purchase of coffee, sugar, and tobacco at London and *Liverpool* by the former, and the sale of those articles at *Copenhagen* by the latter, for the equal benefit of both. In March 1807, *Thompson* purchased a quantity of coffee, sugar, and tobacco, the invoices of which amounted to £24,000, which was shipped to *Copenhagen* in four vessels and there received by *Ryan*. Some part was sold by him, the proceeds of which he remitted to *England*, and in September 1807, the remainder unsold in his hands of the value of £15,000, was, on the declaration of war between this country and *Denmark*, seized by the *Danish* government; but *Ryan* then resident at *Copenhagen*, representing that he was interested in the goods, one moiety was soon afterwards restored to him, and the other moiety confiscated, and sold for £7000.

About the same time, *Ryan* consigned some *Russian* produce of the value of £15,000, by a vessel, the property of himself and *Thompson*, to *Leghorn*, for sale, on their joint account. The vessel was captured by a *British* cruiser, and in May 1808, condemned as lawful prize, but the cargo was restored to *Thompson*, on behalf of himself and *Ryan*, who had lately died.

On his death, *Robert Barnewall* procured limited letters of administration of his goods, and became his personal representative in *England*, and to him *Thompson* paid in respect of *Ryan's* share in the cargo of the ship restored, £6600, which on the death of *Robert Barnewall*, came into the hands of his executors, *Bartholemew Barnewall* and *Robert Butler*.

*Thompson* having advanced various sums, to the amount of £906, 13s. 6d., on account of *Ryan*, transmitted to his administratrix, for her examination, a statement of accounts, setting forth the sums advanced, by which it appeared that *Thompson* was indebted to *Ryan* in the sum of £1042, 12s. 3d.; but that account was not signed by *Thompson*, nor considered by him as a final statement of account of his dealings with the Plaintiff, but, as he insisted, contained several errors and omissions; for though *Ryan* was therein credited with his full share of the proceeds of the cargo of the ship condemned, he was not debited with any portion of the loss arising from the confiscation in *Denmark*, nor had he allowed *Thompson* any part of the moiety of the goods so confiscated restored to him, which he had sold at an advanced price.

In *Michaelmas* Term 1816, *Elizabeth Ryan*, the administratrix of *Philip Ryan*, brought an action against *Thompson* for £1042, 12s. 3d.

The bill filed by *Thompson* prayed an account of all transactions between *Thompson* and *Ryan*, and of all sums paid or received by *Thompson* on account of *Ryan*, or of the joint transactions between them, and of all sums paid or received by *Ryan* on account of *Thompson*, or of the joint transactions between them, and that in taking the account *Ryan* might be charged with the moiety of the coffee and sugar restored to him, or with the proceeds thereof, and that the whole of the transactions between *Thompson* and *Ryan* might be finally liquidated and adjusted, and that *Thompson* might be repaid what should be found due to him from *Ryan* out of the sum of £6600 paid by *Thompson*, and that that sum, or a competent part thereof, might be restored to *Thompson* for that purpose, or otherwise that *Elizabeth Ryan* as the sole legal personal representative of *Philip Ryan*, might be decreed to pay the same out of his effects; that *Barnewall* and *Butler* might be directed to pay the sum of £6600 into the bank, in the name of the accountant-general in trust in the cause, and might in the mean time be restrained by injunction from paying away or disposing of any part of it; and that *Elizabeth Ryan* might be restrained from proceeding in the action at law.

The answer of *Elizabeth Ryan*, stated her information and belief that a moiety

of the goods confiscated was restored to *Ryan*, as being a *Danish* subject, for his own individual use, as his share or proportion of the goods, and that the remainder was confiscated as the property of *Thompson*, who was considered by the *Danish* government a *British* subject, and as such an alien enemy; that she knew not nor could form any belief, whether the goods so restored were afterwards sold; admitted payments by *Thompson* to the representatives of *Ryan* to the amount of £6611, 14s. 4d.; such payments being made after *Thompson* knew and had notice of the confiscation by the *Danish* government, and of the restitution to *Ryan* of his moiety as the property of a *Danish* subject; and submitted that if *Thompson* was entitled to any proportion of the goods so restored to the possession of *Ryan*, he had not any right as a creditor of *Ryan* to be paid out of his assets in *England*, but must resort to his assets in *Copenhagen* in the hands of the commissioners appointed according to the laws of *Denmark*, for managing his personal estate; and insisted that the account delivered by *Thompson* was final, and contained no errors or omissions, and that *Thompson* had agreed to pay the balance, and had given directions for preparing a release.

On the 25th of *Nov.* 1816, it was ordered that service of the subpoena on the Defendant *Elizabeth Ryan's* attorney at law, should be deemed good service on the Defendant, *Reg. Lib. B.* 1816, fol. 43; on the 14th of *December* 1816, an injunction was granted for want of answer; on the 11th of *April* 1817, the answer having been filed, it was ordered that the injunction be dissolved, unless cause shewn on the first day of next term, *Reg. Lib. B.* 1816, fol. 680; and on the 23d of *April* 1817, the time to show cause was enlarged for a week.

On showing cause against dissolving the injunction, it was suggested that a case should be stated for the opinion of a court of law, but the parties could not agree on a statement; and no farther proceedings appear in the cause.

(2) 6 *Ves.* 127. *Ex parte Fell*, 10 *Ves.* 347. *Ex parte Williams*, 11 *Ves.* 3. *Ex parte Rowlandson*, 1 *Rose*, 416. *Ex parte Harris*, 1 *Madd.* 583.

(3) The following report of *Skipp v. Harwood* (cited by Lord *Mansfield* from his own note in *Fox v. Hanbury*, *Cowp.* 449, and reported on another point, 3 *Atk.* 564), is extracted from a MS. in the possession of the Editor.

[586] *Skipp v. Harwood and Others, et c contra. Trinity Term, 21 Geo. 2, 1747.*

Rights of the separate creditor of one partner, against the partnership property.

"Messrs. *Harwood* and *Skipp* were partners in the trade of a brewer, and *Harwood* being justly indebted to his sisters, he gave them a warrant of attorney to confess judgment for securing the debt. The sisters enter up judgment, and, by execution sued out thereon, the sheriff takes the separate effects of *Harwood*, and also one moiety of the partnership goods, which (at the time of the seizure), were in *Harwood's* custody, and delivers back a moiety thereof to the other partner; and the sisters suffer *Harwood* still to keep the goods taken in execution, and to trade with them; the judgment being given by him to his sisters to protect his goods against other creditors.

Upon a bill and cross bill brought by the partner, &c., for an account of the trade, and satisfaction for mutual breaches of covenant, &c., the principal question was, whether the goods taken in execution are not subject to the debts and demands of *Skipp* (the other partner). due on the partnership account, before the sister's debt?

And it was argued by Mr. *Noel*, for the sisters, that by taking the goods in execution (especially as they were solely in the hands of the debtor), a specific lien is laid thereon, and therefore these creditors ought primarily to be satisfied, and if in such a case, the partnership goods should be subjected to the demands of the other partners, especially such as were not liquidated, it would be attended with great inconvenience; for then the creditors, suing out execution, might be overhauled in *Chancery*, and (perhaps) recover nothing in the event, and yet the person of the debtor will be discharged by taking out a *fieri facias* or *elegit*; there would therefore be no safety in having any thing to do with partners. And it was urged in answer to the objection made by the Plaintiff's counsel, that the judgment was fraudulent, because it was confessed to defraud the other partner, and therefore the goods shall remain in *Harwood's* hands; and therefore it was not *bona fide*

according to *Twyne's* case (*Co.* 3, 80 *b*) that the consideration [587] therefore was good, and it being sworn only that some part of the partnership goods taken in execution, and retained by the sheriff (without saying what), were used by the partners, it is unreasonable that this should make the whole transaction void as collusive : besides if these goods were used, *Skipp* had the benefit thereof.

*Lord Chancellor* said, that the share taken in execution was liable, in the first place, to all such demands as the other partner had against *Harwood*, on the partnership account, either in law or equity, antecedent to the execution ; but not to such demands as he might have on a separate account, nor to such as were subsequent to the execution ; because, as to the goods taken in execution, the partnership ended thereupon, and the creditor became a tenant in common with the other partner. And as to the goods being taken out of *Harwood's* possession, this was immaterial, because that in the case of chattels follows the property, which was here joint, and therefore the possession must be so too. He also said, that here the whole partnership goods should have been taken, and a moiety delivered back ; and so is *Lord Holt's* opinion.—1 *Salk.* 392 (*Haydon v. Haydon*) and 1 *Show.* 174 (*Bachurst v. Clinkard*).

The case was, however, adjourned for the parties to agree ; but they not agreeing, the *Lord Chancellor* afterwards this Term pronounced his final opinion as follows :

Supposing the judgment to be a fair one, the creditors taking out execution could not be in a better condition than the debtor himself ; and they must take the goods exactly in the same state as the debtor had them, that is, subject to the partnership demands ; by the seizure of the goods, the jointure between the partners was severed, and the creditors became tenants in common with the other partner. But now as to the judgment itself, supposing the consideration to be a good one, yet the creditors suffering *Harwood* to continue in the possession of them after the *elegit*, is a badge of fraud, and destroys the *bona fides* of the transaction according to *Twyne's* case ; and besides this, it appears that they took a confession of the judgment in order to protect their brother's goods against another creditor ; so that [588] they cannot be considered as coming in *bona fide*. I shall, however, consider the sisters as partners with *Skipp*, and *Harwood* as their agent, and shall make them parties to the account. It is no objection that the goods taken in execution have been since frequently changed, for the specific lien which the other partner had on those goods, devolves on those which have been taken in the place thereof, and always continues. (*Vide* 2 *Swans.* 577.) And so it is in the case of a mortgage of stock, and goods in trade, for in such case if the lien was to fall on the goods in trade when the mortgage was made, and not on those taken afterwards, the trade must stop.

*Lord Chancellor* decreed accordingly, that an account be taken between the partners, and between them and the sisters, on the foot of the partnership articles, and that the master inquire what breaches of covenant have been made by the partners, and what damages sustained thereby, and that such damages be brought into the account, &c. ; and also that an account be taken of the partnership debts, and *Skipp's* proportion paid him, with interest. Decreed also that *Sleorgin* (a party to one of the bills, and a servant of the partnership, who was to receive money and pass accounts), make up an account before the master, if he hath never stated it before, but if he has, it is not to be unravelled ; that a receiver be appointed to receive the debts of the partnership, and bring execution for the same in the name of the partners, &c., and that Defendants, the *Harwoods*, pay the Plaintiff his costs in the first cause to this time (on account of the gross breaches of covenant committed by them and their great misbehaviour) ; and that the costs of the cross bill and the subsequent costs be generally reserved," &c.

The entry in the Registrar's book of the decree on the hearing, *Reg. Lib.* B. 1746, fol. 522-528, agrees in substance with the preceding statement ; the order appointing a receiver may be found, *ibid.* fol. 383, and orders restraining removal of partnership goods, *ibid.* fol. 410, and committing one of the Defendants for contempt, *ibid.* fol. 429.

## [591] APPENDIX.

*Note* : Of the following cases, the first, connected with the doctrines discussed in *The Attorney-General v. Warren*, 2 Swans. 291, was not previously to be found in print. The two succeeding Cases, of both which the printed accounts are extremely imperfect, have been extracted from Lord Nottingham's MSS., vide 2 Swans. 83. The former, *Grey v. Grey* (1 Ca. in Cha. 296 ; *Reports tempore Finch*, 338 ; 2 Freem. 6), is one of the earliest and most important authorities on the doctrine of advancement, in application to purchases by a father in the name of his son ; a doctrine considered in *Murless v. Franklin*, 1 Swans. 13. The latter, *Salsbury v. Bagot* (1 Ca. in Cha. 278 ; 2 Freem. 21), has been the subject of much remark, 1 Schoales & Lefr. 47, and affords material illustration of the principles discussed in the late case of *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1-206. A reference to the entry in the Registrar's book is inserted, *ibid.* 47, n.

" ATTORNEY GENERAL *ex relatione* REID v. The MAYOR, ALDERMEN, and BURGESSES of STAMFORD & al. *Easter Term*, 20 Geo. 2, 1747.

A charity established, on an information praying relief which is refused. Leases by trustees of a charity.

Information against the Mayor, Aldermen, and Burgesses of *Stamford*, the representatives of some of the preceding mayors, the lessee and tenants of the charity lands, the representatives of the late schoolmaster, for the misemployment of the profits of certain [592] lands given to the free school at *Stamford* (whereof the Mayor, Aldermen, and Burgesses were heretofore trustees, and now the Mayor solely), particularly in applying part of the rents for the benefit of the corporation.

And it was laid down by Lord Chancellor ; 1. That where a lease is made by trustees at an undervalue, by collusion between them and the lessee, this court can not only make a decree against the trustees, but also against the lessees for the surplus money ; but this is to be done only where the circumstances of such collusion are very strong. 2. That where power is given to the trustees of a charity to make leases generally (as in this case), they have a power both in law and equity, either to take fines or reserve rents, as is most beneficial for the charity. 3. That where in the donation the feoffees are directed to apply the rents towards the necessary finding a master, and for the pains of such master, and they apply part of the profits towards rebuilding and repairing the school-room and school-house, this is a good pursuance of the trust, because a school-room and house are necessary, and if these are not provided by the trustees, they must be provided by the master himself, and so it is (in effect) applied for the pains of the master ; and here the words of the donation being, that Mr. Ratcliffe, ' Intending to found and erect a school, ' &c. ; these seem to shew that a new school was to be built. 4. That (in this case) in the leases made by the Mayor, Aldermen, and Burgesses (the trustees), there being covenants from the lessees, for grinding at the corporation mill, such covenants were improper, and ought not to be inserted. 5. That though this information, as to the matter of relief, ought to be dismissed (there being no misapplication of the rents or collusion), yet as this charity was never established either by a commission of charitable uses or by decree, it is now [593] proper to establish it ; and Lord Chancellor mentioned the case of Dr. Friend, and the Dean and Chapter of *Westminster* (when Sir Robert Raymond was Attorney-General), when the same thing was done.

The information as against the representatives of the past Mayor of *Stamford*, and the late school-master and the lessees, was dismissed with costs (no misbehaviour being proved against them), but as against the corporation of *Stamford*, without costs (*Note* : As against the Corporation the information was retained ; see the decree) (on account of an order made by them, that in the charity leases there should be covenants for grinding at their mill) ; and Lord Chancellor said he would not give costs for this reason, rather *in terrorem*, than because the charity, suffered by such order ; and Lord Chancellor declared the charity to be established, and decreed the same accordingly ; and it was referred to the master to consider what

is the properest way of making leases, and of keeping the school-room and house in repair, and report the same.

His Lordship doth order that the information do stand dismissed out of this Court, as against the Defendants *Turner* and *Hawes*, with forty shillings costs, according to the course of the Court, the cause as to them being heard on bill and answer; and that the information do also stand dismissed out of this Court, as against all the other Defendants, except the Defendants, the Mayor and Aldermen and capital Burgesses of the borough of *Stamford*, in their corporate capacity, with costs to be taxed, &c.; and as between the relator and the Defendants, the Mayor, &c., in their corporate capacity, his Lordship doth declare that the said charity ought to be established, and doth order and decree the [594] same accordingly; and that it be referred to the said master to consider what may be the most proper method of granting leases of the said charity estate for the future, and in what manner the school-house, and the school-master's house, ought, for the future, to be kept in repair, &c., and as between the relator and the Mayor, &c., in their corporate capacity, no costs to this time are to be paid, but his Lordship doth reserve the consideration of the subsequent costs between them, &c.

Reg. Lib. A. 1746, fol. 621-624.

\* *FORD* Lord GREY, *Plaintiff*; KATHERINE Lady GREY, *Defendant*. And KATHERINE, RALPH, and CHARLES GREY, *Infants, Plaintiffs*; *FORD* Lord GREY, and KATHERINE Lady GREY, *Defendants*. 26th March 29 Car. 2. 1677.

[See *Sayre v. Hughes*, 1863, L. R. 5 Eq. 380.]

Purchase by a father in the name of his son, an advancement.

These cases involve the concerns of a family, in which I would be glad to avoid the delivery of any opinion, because I foresee that a victory on either side can never produce the peace of it, but will rather occasion great, and perhaps endless breaches. The case is a very short one, but of a very nice and curious debate.

*William* Lord Grey purchases *Gosfield* in the name of *Thomas Grey*, his eldest son, without any trust declared; whether, upon the whole matter, with all its circumstances, this be a provision for *Thomas Grey*, the son, by way of advancement, or a trust for the Lord *William* [595] Grey? What judgment soever be given in this case, it must wound the honour, and perplex the interests of the family. 1st. The honour of the family will be wounded every way; for if it be a trust, as the now Lord Grey would have it, then the £6000 charged on *Gosfield* by *Ralph* Lord Grey fails, and is become unjust and illegal, and so the honour of the Plaintiff's father lies at stake; on the other side, if it be an advancement and no trust, as the widow would have it, then all the provisions made by *William* Lord Grey to incumber *Gosfield*, will fail as to *Gosfield*, and so the honour of the grandfather lies at stake. 2d. Again, the interests of the family will be perplexed; for if it be a trust, as the now Lord Grey would have it, then *Katherine*, *Ralph*, and *Charles*, will lose their £2000 a-piece charged on *Gosfield* by the Lord *Ralph*; and, moreover, £4000 more given by Lord *William* to *Katherine*, and transferred by the Lord *Ralph* from a charge on the personal estate of the Lord *William*, to be a real charge upon *Gosfield*, falls hence to *Gosfield*, for the Lord *William*, if he was *cestui que trust*, has so settled it, that Lord *Ralph* was but tenant for life; so that question affects the now Lord Grey £10,000 deep in point of interest. On the other side, if it be an advancement, as the widow would have it, then all the charges laid on *Gosfield*, *inter alia*, by the Lord *William*, fall hence to *Gosfield*; and the consequence of that consequence is, 1st. The £6000 a-piece, given by the Lord *William* to *Ralph* and *Charles*, the grandchildren, must charge other lands, not *Gosfield*. 2d. *Gosfield* will be so much the abler to bear the £2000 a-piece charged upon it by the Lord *Ralph* to his three younger children. 3d. And also the £4000 more transferred from the Lord *William*'s personal estate to *Gosfield*, for *Katherine*'s portion. 4th. And then the remainders in tail to *Charles* Lord Grey of *Rollston*, and *Katherine*, his lady, will also fail, which is a valuable [596] possibility, though never so remote. To make this easy to the Court, and honourable to himself the Lord Grey advances so far as to offer to pay the £6000, charged by his father on *Gosfield* for the three younger children, and the £6000 a-piece charged by his grand-



father for the two younger grandsons, and £1000 more of the £4000 transferred by his father upon *Gosfield*, leaving the rest of his sister's portions to his mother, who has two or three personal estates to help her, viz. Lord *William's*, Lord *Ralph's*, and *Thomas Grey's*. By this offer *Ford Lord Grey* takes upon himself £19,000, so as to him the loss would not be great if judgment was given against him. The widow, to acquit herself, offered to pay £3000 to her daughters, and all the debts and legacies of Lord *William* and Lord *Ralph*, and to free her son from the creditors, so as she might enjoy her jointure, and be assisted in the getting in the personal estate, and both might account for their receipts. By this offer, the loss, as to the widow, would not be great, though judgment were given against her, and yet perhaps the offer is not great neither; but whatever the agreement be, the personal estate must come into the reckoning. An agreement thus far advanced is now broken off, I will not inquire how, but am bound to give judgment, since both sides demand it. I will, *ergo*, first state the facts and the evidences on both sides; then I will deliver my opinion what the law is upon those facts.

The evidence to prove this purchase in the name of the son to be a trust for the father consists of, 1st, Deeds: 1. Father possessed the money; 2. Received the profits twenty years; 3. Made leases; 4. Took fines; 5. Enclosed part in a park; 6. Built much; 7. Provided materials for more; 8. Directed Lord Chief Justice *North* to draw a settlement; 9. Treated about the sale of it. 2dly, Words: 1. *Thomas Grey* confessed [597] the truth; 2. Advised his father to sell, and buy *York House*; 3. 'If it was mine,' says he, 'I would sell it'; 4. Before he made his will, said it was his father's; 5. After he made his will, said it was to keep his brother from pretending.

The disproof of the trust stands upon the like evidence, Deeds and Words: 1st, Deeds; For *Thomas Grey* bound with Lord *William*, for £7000 of the purchase-money. 2dly, Words of the Lord *William*. 1. Before the purchase, said he would buy it for his son; 2. After the purchase, said he had bought it for his son; 3. The now purchased land mine, but *Gosfield* my son's, *T. G.*; 4. *Gosfield* was the inheritance of my son's mother, hence would better have bought *Hatton Garden*. I have no title but by my son's will, it being the purchase of my son *T. G.* 3dly, Words of *Thomas Grey*: 1. I believe my father will give me all, but *Gosfield* is mine already; 2. *Thomas Grey*, when he lay dying, excused it to his brother *Ralph*, that he had by his will given *Gosfield* to his father. Now, though this proved but an estate for life, when, perhaps, he thought he had given an inheritance, yet what needed any excuse at all, if *Thomas Grey* was but a trustee for his father?

Upon these facts, the law will best appear by these steps. 1. Generally and *prima facie*, as they say, a purchase in the name of a stranger is a trust, for want of a consideration, but a purchase in the name of a son is no trust, for the consideration is apparent. 2. But yet it may be a trust, if it be so declared antecedently or subsequently, under the hand and seal of both parties. 3. Nay, it may be a trust, if it be so declared by parol, and both parties uniformly concur in that declaration. 4. The parol declarations in this case are both ways; the father and son sometimes declaring for, and some-[598]-times against, themselves. 5. *Ergo*, there being no certain proof to rest on as to parol declarations, the matter is left to construction and interpretation of law. 6. And herein the great question is, whether the law will admit of any constructive trust at all between father and son?

1. For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and, *ergo*, the father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law; for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions.

2. The wisdom of the common law did so; for all the books are agreed on this point, that a feoffment to a stranger, without a consideration, raised a use to the feoffer; but a feoffment to the son, without other consideration, raised no use by implication to the father, for the consideration of blood settled the use in the son, and made it an advancement. How can this court justify itself to the world, if it should be so arbitrary as to make the law of trusts to differ from the law of uses, in the same case?

3. Again, as land can never lineally ascend, so neither shall the trust of land lineally ascend, where it is left to the construction of law ; for the reason why land doth not lineally ascend, is not, as my Lord *Coke* says, from natural philosophy, *quia gravia deorsum*, but from moral philosophy, *quia amor descendit non ascendit*, and from divinity, because fathers are bound to provide for [599] their children, but children do not provide for their fathers ; therefore, when a father, according to his duty, has provided for his son, it were hard to take away that provision by a constructive trust.

4. And therefore it is not reasonable that the father's perception of profits, or making leases, or doing such other acts as these, which the son, in good manners, does not contradict, should turn a presumptive advancement into a trust.

5. Examine all the cases in this Court, whenever this point has been stirred, and you shall find all the resolutions to agree, and out of them all may at large be collected a clear difference to rest upon. 1st. If a father makes his son a joint purchaser with him, and receives all the profits, and disposes of the rents, this is no evidence of a trust ; but the son takes the whole by advancement if he survives. So it was thrice agreed in the case of *Windham v. Windham*, *Strode v. Strode*, and *Adrian Scroop* (1 *Ca. in Cha.* 27 ; 2 *Freem.* 171). Here a learned *Custos* did once seem to take a difference, by saying, true, so it is, when the son is joint purchaser, for then the father, as joint tenant, may, by law, receive the profits ; but where the son is the only purchaser, there the father's perception of profits being against law, may be some evidence of a trust, for else the father has no colour to receive them. Plainly, this difference could not be the reason of these resolutions, for had the father been joint purchaser with a stranger, and received all the profits, without contradiction or suit, in necessity the perception of profits would have been evidence of a trust, yet there it might be said, still one joint tenant may, by law, receive all. *Ergo*, it was the sonship, not the joint tenancy, which ruled those cases. 2d. If a father purchases lands in [600] the name of an infant child, and receives all the profits, and makes leases, this is no evidence of a trust. So adjudged in the *Lady Gorge's* case (cit. *Cro. Car.* 550), in whose name, her father, the *Earl of Lincoln*, purchased. Here some before me have taken another difference ; where the father has colour to receive the profits as guardian, there perception of profits is no evidence of a trust, otherwise it would be if the perception of profits were without any such colour. Plainly, the reason of the resolutions stands not upon the guardianship, but upon the presumptive advancement ; for a purchase in the name of an infant stranger, with perception of profits, &c., will be evidence of a trust.

6. *Ergo*, where the father intends a trust, he ought to see it declared in writing, or supported by direct proof, and not rest upon constructions ; for in *Sir Adrian Scroop's* case, when the court had adjudged it an advancement and no trust, a concealed deed was after found, declaring the trust, which shews that good advice had been taken upon it.

7. Lastly, the difference I rely upon is this ; where the son is not at all or but in part advanced, and where he is fully advanced in his father's lifetime. If the son be not at all or but in part advanced, there if he suffer the father, who purchased in his name, to receive the profits, &c., this act of reverence and good manners will not contradict the nature of things, and turn a presumptive advancement into a trust ; the rather because in this family there were neither debts nor casualties, so no occasion to create trusts ; but if the son be married in his father's lifetime, and by his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated, there [601] a subsequent purchase by the father in the name of such a son, with perception of profits, &c., by the father, will be evidence of a trust ; for all presumption of an advancement ceases.

So it was decreed an advancement of *Thomas Gray*, and no trust for the *Lord William*. It followed that the £12,000 given by *Lord William* must be raised out of the lands in *Northumberland*, the lands in *Epping*, and the now purchased lands in *Gosfield* ; and, *ergo*, an account was decreed. 1. The *Lady* must account for what the *Lord Ralph* received, as far as she has assets. 2. And for what she herself received. 3. And for the personal estate of *Lord Ralph* ; but to this last point her counsel opposed, saying, that the *Lord Ralph* having charged *Gosfield* with the portions, as it seems by this resolution he had power to do, has thereby exempted the personal estate from being subject to this account ; to which I declared, that though an express clause may exempt a personal estate from being applied to ease the land, to which it is

otherwise subject, *prima facie*, as in the Duke of *Richmond's* case, where there was such an exemption, yet this is never to be done by implication. In case of creditors, it is clear, that no implication can exclude them from that right which they have by law, of resorting to the personal estate; nor can any express clause exclude the creditors; and in case of an heir, it is clear that he is concerned, that no more of the land be sold than is necessary, and has right and equity to demand that the personal estate may ease him, as far as it will go; from which right no implication can exclude him."

"1 June, 30 Car. 2, 1678. *Ford Lord Grey v. Lady Grey*. The matter arose upon two exceptions, one by the Plaintiff, another by Defendant, to the master's re-[602]-port. The first was touching a sum of £1000, in the *African Company*, which the master reported to be the estate of *William Lord Grey*, to whom the Defendant is executrix; but the Plaintiff excepted to it and would have it the estate of *Ralph Lord Grey*, to whom the Defendant is also executrix, but then it would be liable to *Ralph's* debts, which are many, *William's* debts being none at all.

Now for that the case was, that *Grey* adventured £2000 in the first company and lost it, then he subscribes £100 more to the second stock in the new company, and pays in but £50 and dies. *William Lord Grey* pays in the rest, and, as the proof was, refused to pay in the money till his son *Ralph* declared the trusts, yet the Plaintiff would have had it an advancement of *Ralph*, who was advanced before, so that exception was overruled.

2. The next question arose touching paraphernalia, under which title the Defendant claimed her jewels, and her chamber plate, and excepted to the Master's report, for not so allowing it to her, not only in respect of her quality, as the widow of a Peer, but also because the question was between the son and the mother, not between the mother and the creditors; yet I allowed the master's report; for if the son will contest this point with his mother, he ought to prevail, because in consequence it concerns all the creditors, whose security is weakened if the assets be diminished, and there is no reason to consider any lady's quality, so far for the sake of it to prejudice the just satisfaction of creditors." Lord *Nottingham's* MSS.

[603] SALSBURY v. BAGOTT. June 22, 29 Car. 2, 1677.

Effect of fine and non-claim in equity.

"This case held three days debate in court; for *Saturday* the 16th was taken up by the Plaintiff, *Monday* the 18th by the Defendant, *Tuesday* the 19th was allowed to sum up the evidence, and then I took time till this day to consider what had been said, and to deliver my own opinion; which was this:—

The Plaintiff is the son and heir of *Owen Salsbury*, who was the son and heir of *William Salsbury*, the Defendant's wife is daughter and heir of *Charles Salsbury* who was a younger son of the same *William Salsbury*. The bill prays an execution *in specie* of certain articles of agreement, made 9 Jac., upon the marriage of *William*, the grandfather, with *Dorothy Vaughan* the daughter of *Owen Vaughan*. By these articles *William Salsbury* was so to settle his lands in *Merioneth* and *Denbighshire*, that *William Salsbury* was to be but tenant for life, with remainder to his first and every other son in tail, with divers remainders over; and this was to be done at any time within seven years, upon the request of *Owen Vaughan*; and accordingly in 13 Jac. the *Merionethshire* lands are settled on *William Salsbury* for life, the remainder to *Owen Salsbury* who was then born, in tail, the remainder over, as by the articles is directed; but the bill complains that the *Denbighshire* lands are unsettled, and that *Charles*, the Defendant's father, obtained a settlement of those lands upon his marriage with the daughter of *Thelwall*; and the bill charges that *Charles* and *Thelwall* had notice of these articles at the time of that settlement, and long before; and that Sir *Walter Bagott* the Defendant, before his marriage with his lady, had also notice of the Plaintiff's title [604] otherwise than as heir; and upon this case relief is prayed.

The Defendant makes many defences against this demand. 1st. There are no articles of agreement proved. 2d. If they be proved, yet it is to be presumed they were waved and discharged, or otherwise satisfied by some new agreement. 3d. If not so, yet *Charles Salsbury* was a purchaser without notice. 4th. If not either, yet Sir *Walter Bagott*, was so. 5th. If there be notice, yet length of time

has barred this demand. 4th. If not barred by the common law, and course of this court, yet the fine and non-claim have barred it by the statute, 4 H. 7.

These are the six points of the case. If any of these points be for the Defendant, he ought to be in possession of the whole; if they be all for the Plaintiff, he must have a decree for some part.

I. *First point.* For the first point, whether there be any sufficient proof of articles of agreement in this case, that point is clearly with the Plaintiff. For :

1st. That there were articles of agreement as to the *Merionethshire* lands, is without all dispute.

2d. That *Owen Salsbury* had a copy of the articles upon his father's marriage, and that this copy did comprehend the *Denbighshire* lands, is more plain; for that copy was twice produced by *Owen Salsbury*; once to *William Humphrys* alone, another time to him and *John Wynn* together; who advised a suit upon them.

3d. That the copy now read, if not the same, was at least an ancient copy, is plain upon the view; and *ergo*, [605] as it could not be made to serve this turn, so it is not fit the small mistakes and errors in clerkship should discredit it.

4th. That there was an original kept by *Owen Vaughan*, and by his death came to the hands of *Edward Vaughan*, is plain; for *Humphry Wynn* saw them there; and that all the writings in *Lludyard* came to the hands of *Charles Salsbury* is plain too; *ergo*, by these hands they are suppressed.

5th. Two witnesses swear there were articles, and that the *Denbighshire* lands were comprehended in them; which is enough to give credit to any probable copy.

6th. *Wynn* swears that he believes the copy now produced to be a true copy, and it is in the Defendants' power to falsify it, if it be not so; for they have the original, or else they or their father have suppressed it. Wherefore the copy is justly read.

7th. *William Salsbury's* own confession. For *Gabriel Humphrys*, swears that *William Salsbury* said, if he had seen the settlement upon *Owen Salsbury's* marriage he would not have done what he did to *Charles*, and hoped *Charles* would prove an honest man. The words of *William Salsbury* against himself, are more to be credited than the words he spoke for himself, when he said I may give my *Denbighshire* lands where I please, which may be well expounded of the new purchased lands.

8th. The forgery of the deed seems to me a strong evidence that such articles there were, for it had been not only wicked, but foolish, and a folly next to madness, to go about to forge a settlement in performance of articles, if there had not been indubitable proof that such [606] articles there were, which might give countenance to such a forgery.

9. *Lastly, the testimonium rei.* The constant hopes and fears in this family, that the articles would one day rise up in judgment, which have made both sides overact their parts, viz. The Plaintiff's brother to forge a deed, the Defendant's father to suppress the original articles; and yet neither side needed to have done this if the rest of the points be with them.

II. *Second point,* Whether it may not be fairly presumed, that these articles have been waved or satisfied by some new agreement? This point also is clearly with the Plaintiff. It involves two considerations: 1. In law, whether tenant in tail of an equity can, by any collateral agreement with recompense, bar his issue of that equity? 2. In fact, whether there be any ground to presume such an agreement in this case?

1. *First,* Of the law, there is no doubt; for an equity in tail is not within the statute of *Westminster* the 2d, *de donis conditionalibus*; but it is a mere creature of the Chancellor, which is to be governed and disposed according to rules of conscience. So it was ruled in 1674 between *Norcliff* and *Worsly* (1 Ca. in Cha. 234), where an equity in tail was made subject to a marriage-settlement; and so it had been ruled before between *Roscarrock* and *Barton* (1 Ca. in Cha. 217), where an equity of redemption was entailed.

2. But the fact will not bear this point; for that agreement, which is supposed to be a recompense of the first articles, and to amount to a waiver of them, viz. [607] The settlement of the new purchased lands in *Merionethshire*, and *William Salsbury's* quitting his estate for life in the old estate in *Merionethshire*, which was done after *Owen Salsbury* had married *Goodman's* daughter, can never be so construed; for in all that transaction there was a plain and express intent of a purchase;

for *Owen Salisbury* paid his father £2500, which is as much as all that exceeded the articles was worth ; and, *ergo*, no other intent is to be presumed, nor will this be strained to make a waiver of the former articles.

III. *Third Point*,—If the articles remain in force, the next question is, whether *Charles Salisbury*, upon the marriage of *Thelwall's* daughter, became such a purchaser, without notice, as ought to be free from these articles ? This point is also for the Plaintiff, for *Thelwall* had a clear notice long before the marriage of his daughter to *Charles Salisbury*, knew the secrets of the family, and, while he stood unconcerned, expostulated with *William Salisbury* for not performing the articles to *Owen Salisbury* ; and though he afterwards ventured upon the marriage of his daughter to *Charles Salisbury*, yet he saw the hazard was not great, for the portion was but small, and the new purchased land a sufficient estate. 2. *Charles Salisbury* had notice too, and timely notice, even before marriage ; else, why did he say, in the presence of *Ravenscroft*, where *William Salisbury* was discoursing with *Thelwall* about the articles, I had rather take an annuity than involve myself in trouble ? Why did he say, my brother may come and lay his hand upon my shoulder, and turn me out as in *Boidewithin* ? Why so much care to possess the original articles and then suppress them ?

IV. *Fourth Point*,—The next question is, whether *Sir Walter Bagott* be a purchaser without notice ? This [608] point is not otherwise material, than upon supposition, that *Charles* stands unaffected with notice ; for a purchaser with notice from him that had no notice, or a purchaser without notice from him that had notice, are equally free. And here the first thing to be considered in point of fact is, the time when *Sir Walter Bagott* became a purchaser. Plainly, not at the time of his marriage ; for his lady was an infant, and could not contract for her estate, though she might contract for her person ; and, *ergo*, articles to settle her estate are void, and work not in the case ; nor at the time of *Sir Edward Bagott's* settlement, for that could not make him a purchaser till there could be a seller, and that could not be till Mrs. *Jane Salisbury* came of age, though her mother and all her friends were privy, and consented to her agreement ; *ergo*, the first time of his purchase was two years after the marriage, when Lady *Bagott* levied a fine of her estate, and settled it in lieu of these provisions, which are made for her upon her marriage. Any notice before this time is sufficient ; two notices are insisted on : One an express message sent by the Plaintiff, to tell *Sir Walter* that the Plaintiff had a title otherwise than as heir. This notice will not do, for it is no direct nor intelligible notice, and is the worse, because he that sent this notice might have spoken out more clearly, if he pleased. It is true, it puts *Sir Walter Bagott* upon the inquiry ; but it is such an inquiry as can never inform him, unless he will go to the Plaintiff in *Wales*, which he is not bound to do ; and as Mr. Solicitor observed, the notice is true if meant of the forged deed ; and shall so ambiguous a notice be afterwards made use of as notice of the articles ? It looks a little more suspiciously, that the Plaintiff gave so dark a notice, and shews some kind of inclination to make use of the forged deed ; for had he given notice of a title by the articles, this had discredited the deed ; if he had [609] mentioned the deed, the matter had taken air too soon. *Ergo*, the notice is less than a common bruit, and the rule, *notitia non debet claudicare*, was never more seasonable than now, for perhaps *Sir Walter* might think it a trick to break his marriage ; and, *ergo*, had no reason to regard it. 2. But yet the other notice of the articles, by hearing a copy thereof read at the trial of the deed, is full and conclusive notice, before seventy-two ; and for this reason only this fourth point is also for the Plaintiff.

V. *Fifth Point*, Admit the articles and the notice, yet since the articles from 1611 to this day, which is 66 years, have been without any execution, whether this length of time alone be not in itself a sufficient bar in equity from any former demand, is the next point ? This fifth point also is clearly for the Plaintiff, for length of time is not to be measured by revolutions of years only, but by the wilful and inexcusable negligence of him that pursues, of which there is none at all in this case. 1. *Owen Salisbury* came of age in 1634, and died in 1657. 2. The time when *Owen Salisbury* first had a copy of the articles does not appear. It is probable he had them not in 1640, when he came to an agreement with his father for the *Merioneth* lands. 3. When he had got a copy, it is plain he shewed it, and insisted upon it in all companies. 4. If the excuse had been only upon the account of his piety, that he would not

sue his father, lest he should bring his grey hairs with sorrow to the grave, as the witnesses swear, it had been very allowable. 5. But I think he had another, and more powerful excuse, which has not yet been taken notice of, and that is, it was against his interest to sue his father, till he must needs ; for his father had new purchased lands in *Denbighshire*, to the value of £500 *per annum*, and until the conveyance in 1652, which was followed with a fine in 1656, *Owen Salisbury* was not [610] quite out of hopes to have some of the new purchased lands ; but as soon as he began to despair, he complained grievously, and in 1657 he died. *Ergo*, though length of time be in most cases very considerable, because in our law 60 years bar a writ of right, 20 years bar an entry, and in the civil law 40 years make a prescription, yet when length of time is not accompanied with any considerable laches of suit, there is no great weight to be laid upon it.

VI. *Sixth Point*, Therefore the last question is, whether the fine in 1656, and the non-claim insisted upon have not barred the Plaintiff by the statute of 4 H. 7. 2. And this point is clearly against the Plaintiff, and will prove very fatal to him. Wherein it will be fit to proceed by these steps.

1. A fine doth bar a trust or any other right in equity ; for it is within the very words and meaning of the law, which concludes all persons, as well privies as strangers, who do not make their claim as the act directs ; and the mischief were intolerable, if a right in equity should still subsist after a fine ; for no man living could know when his inheritance was in peace. This point was never doubted since Lord *Coventry's* time, who first referred it to all the Judges in *England*, in a case between Sir *Thomas Thynn* and *John Cary, Esq.*, 4 Car. 1 (*Thynne v. Cary, W. Jones*, 416). For Sir *Thomas Thynn* supposed himself to have a right in equity to some lands, whereof by his bill he charged *Cary* to have obtained a conveyance from the Lady *Knivet* by some indirect means. *Cary* pleaded in bar a fine, with proclamations and non-claim ; and, by opinion of all the Judges, Sir *Thomas Thynn* was barred. The differences are these ; where [611] a man has the right in equity in the land itself, and where he has right in equity is only against the person in respect of the land. In the first case, a fine will bar, not in the latter. As in the case of the Earl *Kenoul* against *Grevil*, H. 28 Car. 2 (*Lord Kennoull v. The Earl of Bedford*, 1 Ca. in Cha. 295), where the Earl of *Carlisle* having mortgaged the manor of *Sowly* to *Tryon*, for £1500, did by his will devise certain lands to trustees for payment of debts, and an annuity of £1000 *per annum* to the Earl of *Kenoul* for life, out of the demesne of *Waltham*, and then demised the manor of *Sowly* to the Lady *Manchester* for life, remainder to Mr. *Grevil*. Now though the manor of *Sowly* ought to have borne its load, the mortgage money due upon it being no part of those debts in the schedule with which the trustees were charged, yet such collusion was used, that the trustees were prevailed with to pay off the mortgage upon *Sowly*, and then the rest of the lands being not sufficient to pay off the rest of the debts, part of the demesnes of *Waltham*, were by the will to be sold to supply that defect, and so the security of the Earl of *Kenoul's* annuity would have been straitened ; to prevent this, the Earl of *Kenoul* exhibits his bill against *Grevil*, and prays that he may reimburse the £1500 of which *Sowly* has been unjustly eased, that so no part of *Waltham* might be sold. *Grevil* pleads a settlement of the manor of *Sowly*, by a fine, with proclamations, in bar of this bill, which was overruled, for the Plaintiff's demand was not against the land at *Sowly*, but against the person of the Defendant in respect of the land, and so the fine was not material. Another difference is, where the equity rises by the fine itself, and where it rises by some collateral agreement. If the equity rises by the fine itself, as if it be a fine upon a trust or mortgage, there this fine can never bar this equity ; for that were absurd, that the same fine which creates [612] the equity should bar it too. But if it rise by some collateral agreement, and be an equity against the land itself, there a fine and five years will bar this equity, unless it be saved by a due and reasonable claim ; and this was ruled lately in the case of *Gifford and Phillips*, M. 27 Car. 2 ; where *George Low*, against whom a decree had passed for £8000, did by his will subject his land to the payment of his debts, in case the personal estate was not sufficient ; the heir of *George Low* sold the land in 1649, to Sir *Harbottle Grimstone*, and he in 1653 to the Defendants, by fine and recovery, and a bill being exhibited to have satisfaction of this money, out of that land, the fine and non-claim were allowed to be a good plea in bar.

Another difference is this ; where the fine is obtained by fraud and practice, or is infected with notice, or any way criminal, such a fine and non-claim bar no man's pursuit. Otherwise it is of a fine and non-claim, severed from these circumstances. As in the case of *Bovy and Smith*, 18th of *December* 1676, where a trustee made a conveyance in breach of trust, and presently after retook the estate by fine ; this being all one entire act, and a purchase with full notice, could not prevail against the *cestui que trust* by non-claim, for *dolus circuitu non tollitur* ; but a fine innocently levied to a stranger, had barred the *cestui que trust*.

This foundation being laid,

2. It remains now to be considered what has been done in this case, to save the Plaintiff's right in equity, from that bar which the fine levied by his grandfather, would otherwise operate. Plainly nothing at all. The right which should be saved is an equity, which the Plaintiff's father *Owen Salsbury* had to be made tenant [613] in tail in remainder, after the death of *William* the grandfather. Had such an estate been settled on the Plaintiff's father, by act executed, then the fine levied by *William*, the grandfather, had not concluded the Plaintiff, till five years past after the death of the grandfather, which is the natural time for the remainder man to enter, and then enough has been done to avoid the fine ; for there is an entry in 1662, which is within two years after the grandfather's death ; which was the first time the remainder man was bound to take notice of his right of entry ; for of a right of entry for forfeiture, no man is bound to take advantage, though he doth know it. But *Owen Salsbury* having only an equity and no estate executed, this has quite changed the state of the case, and altered all the measures of it ; for now the Plaintiff's claim to preserve this right is neither in due time, nor in due manner.

1. It is not in due time ; For the right which *Owen Salsbury* had to a remainder after an estate for life, though it were future as to the possession, yet it was a present right to demand such a settlement ; and he had a present occasion to make that demand, when in 1652 *William Salsbury*, for £1900, settled it on *Charles*. And *ergo*, when *William Salsbury*, in 1656, levied a fine to the uses of that settlement, *Owen Salsbury* ought presently to have made claim ; for the five years did immediately commence and attach in his person ; and though he died shortly after in 1657, yet the five years do still run on against the Plaintiff during his minority. So that the Plaintiff's entry in 1662, being six years after the fine levied, is quite out of time, and comes too late.

2. If it had been in due time, yet it is not in due manner. For the only way to preserve a right in equity from being bound by a fine, is by bringing a subpoena, [614] and not by an entry into the land ; and, *ergo*, all the strife at bar to prove the Plaintiff's entry in *Belega* to have been upon the new purchased lands, and not upon the old estate, is wholly impertinent. For let the entry be where it will, no kind of entry can avail the Plaintiff, nothing but a subpoena can help him ; and the reason is most evident, from the words of the statute : for the statute of 4 H. 7, saves no rights, but such as are pursued by action or lawful entry ; and, *ergo*, such rights as are pursued neither way, are quite barred. Hence it is, that the ancient way of entering a claim at the foot of the fine is now quite abrogated ; for this statute prescribes another way, viz. action, or lawful entry, 2. *Inst. de modo levandi*, &c. ; and for this reason, if tenant in tail discontinue by feoffment, and the feoffee levies a fine, and then tenant in tail dies, and the issue enters within five years, this avoids not the fine ; because the entry upon the discontinuee is no lawful entry, but the issue ought to have brought a *formedon*. So here, the Plaintiff's entry, who was only entitled to a trust or an equity, was not a lawful entry, and by consequence does not avoid the fine ; but the Plaintiff ought to have brought a subpoena. I see plainly it is the forgery of the younger brother, which has abused the Plaintiff, and undone him, while it pretended to serve him ; for the Plaintiff, supposing the deed to be a good deed, has been lulled to sleep by it, and provided only to save his right of entry at law, but never thought of using the means to save his right in equity, till it was too late ; for he filed no bill in Chancery till 1672 ; so that, although the five years which attached in his father's lifetime should not run on against him, yet there is a great laches in former time, even from 1662 till 1672, which is ten years before that trial, which only gave notice to *Bagott* of the articles. And for direct authority on the point, it was so directly resolved in the Exchequer by the Lord

Chief Baron [615] *Hale* and the Court, in a case between Sir *Nicholas Stoughton* and Mr. *Arthur Onslow*, viz. 1. A fine and non-claim bar a trust or an equity. 2. An entry upon the land will not avoid the bar of such a fine, because it was no lawful entry, but he ought to have brought a subpoena. After so great an authority as this there is no more room left for doubting, wherefore the Plaintiff's bill must be dismissed.

*Note*: The order of dismissal is directed to be drawn up generally without mention of the grounds or reasons of it.—Lord *Nottingham's* MSS.



Reports of CASES ARGUED and DETERMINED in the HIGH COURT OF CHANCERY, during the Time of LORD CHANCELLOR ELDON; from the Commencement of the Sittings before Hilary Term, 1818, to the End of the Sittings after Michaelmas Term, 1819. By CLEMENT TUDWAY SWANSTON, Esq., Barrister-at-Law. Vol. III.

- [1] The Rev. ADAM JOHN WALKER and LOVEDAY his Wife, late LOVEDAY WHITMORE Spinster, WILLIAM ROBERTS since deceased, and JOHN SANDERSON, *Plaintiffs*; WILLIAM SYMONDS since deceased, JOHN LILLY, ISAAC HARRIS, and JOHANNA WHITMORE (by Original Bill), *Defendants*. The Rev. ADAM JOHN WALKER and LOVEDAY his Wife, and JOHN SANDERSON, *Plaintiffs*; WILLIAM SYMONDS, THOMAS COOKE, and JOHN LILLY (by Bill of Revivor), *Defendants*. April 2, 8, 11, 16, 18, 21, 25, May 26, June 2, 10, 13, July 6, 1818.

[See *In re Brogden*, 1888, 38 Ch. D. 557.]

A deed of compromise executed by a *cestui que trust*, with the representatives and creditors of a deceased trustee guilty of a breach of trust, rescinded, and co-trustees declared responsible.

- [2] The bill filed in July 1802, and amended in April 1804, stated, that by indenture, dated the 17th of January 1780, made between Isaac Donnithorne, of the first part; Nicholas Donnithorne, Thomas Griffith, and William Symonds, one of the Defendants, of the second part; John Whitmore, and Johanna his wife, another of the Defendants, of the third part; reciting that John Whitmore by his bond, dated the 26th of June 1772, became bound to Isaac Donnithorne in the penal sum of £12,000, conditioned for payment of £6000 at a day then long past; and that there was then due for principal and interest thereon £7912, 12s.; and that Isaac Donnithorne being desirous of making some provision for his daughter, Johanna Whitmore, had agreed to assign the bond, with the sum of £7900, principal and interest due thereon, to Nicholas Donnithorne, Thomas Griffith, and William Symonds, upon the trusts therein mentioned: It was witnessed, that Isaac Donnithorne, in consideration of natural love and affection towards his daughter, and in order to make some provision for her and her children, and for other considerations therein mentioned, assigned unto Nicholas Donnithorne, Thomas Griffith, and William Symonds, and the survivors, their executors, administrators, or assigns, the bond, and the sum of £7900 thereon due, upon trust, with all convenient expedition to call in the sum due upon the bond, and as soon as it could be received, to lay out the same upon mortgage of freehold lands, or upon government or other securities, in the names of the trustees; and during the lives of John Whitmore and Johanna his wife, and the life of the survivor, upon trust, to pay the yearly

interest, dividends, and produce thereof, or such part thereof as the trustees should in their discretion think fit, to or for the use of *John Whitmore* and *Johanna* his wife, and the survivor, and to the use of their child or children, in such shares, and at such times, as they should think fit ; and after the death of *John Whitmore*, and *Johanna* his wife, to pay the said £7900 to and among all and every the child or children of *John Whitmore* and *Johanna* his wife, share and share alike, if more than one, and if but one, to such only child, at his or her attaining the age of twenty-one years, or day of marriage.

The bill further stated, that *Isaac Donnithorne* died soon after the date of the indenture, and that the trustees accepted the trusts ; and in execution thereof, in the year 1783, called in, and received from *John Whitmore*, the sum of £7900, which was secured, not only on the bond of *John Whitmore*, but also on some mortgage or other real security ; and *John Whitmore*, in order to increase the trust monies to an even sum of £8000, when he paid the £7900 to the trustees advanced to them a further sum of £100 upon the same trusts as the £7900 ; that *John Whitmore* and *Johanna* his wife had but one child, the plaintiff, *Loveday Walker*, who, at the date of the indenture, was an infant of very tender years, and resided with *Johanna Whitmore*, her mother, who lived apart from her husband, and to whom the trustees paid three-fourths of the interest of the trust-sum, paying the other one-fourth to *John Whitmore*.

The bill further stated, that the Plaintiff *Loveday Walker* attained the age of twenty years in *December 1795* ; and having separated herself from her mother, and not having any separate provision, and having understood that she would become entitled, at the death of her father and mother, to a considerable sum of money, and that she was entitled to some provision for her maintenance in the mean time, but being ignorant of [4] the amount and particulars thereof, she, on or about the 23d of *December 1795*, wrote a separate letter to each of the trustees, to inform them of her situation, and to request that some provision should be made for her support, whereupon the trustees thought proper to allow her £100 a-year out of the income of the trust property. That in *June 1799*, the Plaintiffs *Adam John Walker* and *Loveday Walker* intermarried ; and previous to their marriage, an indenture of settlement was executed, dated the 11th of *June 1799*, between *Loveday* of the first part, and *Walker* of the second part, and the Plaintiffs *William Roberts* and *John Sanderson* (as trustees) of the third part ; whereby, after reciting that *Loveday*, after her father and mother's decease, would become entitled to a legacy, or portion of £8000, given by the will of her late grandfather to *Nicholas Donnithorne*, *William Symonds*, and *Thomas Griffith*, in trust for her benefit, it was witnessed, that in consideration of the intended marriage, *Loveday*, with the consent of *Walker*, covenanted with *William Roberts* and *John Sanderson* that the sum of £2000, part of the sum of £8000, should, from and after the decease of her father and mother, be paid to *Walker*, and that the sum of £6000, the residue thereof, should be paid to *William Roberts* and *John Sanderson*, or otherwise settled upon the trusts therein mentioned.

The bill further stated, that *Nicholas Donnithorne* died on the 26th of *September 1796*, and by his will appointed his son, *Isaac*, who had assumed the name of *Harris*, his executor, who proved the will, and possessed himself of the personal estate of his late father, and became his legal personal representative. That *John Whitmore* died in *December 1799*, upon which event *Loveday Walker* applied to *William Symonds* and *Thomas Griffith*, as the [5] surviving trustees, named in the indenture of *January 1780*, and they consented to make an additional allowance of £50 per annum, part of the interest of the trust-money, which had, in the life-time of *John Whitmore*, been paid to him. That *Thomas Griffith* died in *October 1800*, having appointed the Defendant *John Lilly* his executor, who proved his will, and had possessed assets to pay the debts of the testator : and that *Walker*, and *Loveday* his wife, being desirous that the sum of £8000 should be invested in the public funds, or on real security, or otherwise properly secured for their benefit, according to the trusts of the indenture of *January 1780*, had called on the Plaintiffs *Roberts* and *Sanderson*, as trustees under their marriage settlement, to concur with them in having the same so invested or secured ; and all the Plaintiffs had therefore applied to *William Symonds*, since deceased, as the surviving trustee in the indenture,

to invest the sum of £8000 on some public or real security, upon the trusts of the said several indentures.

The bill charged, that after the trust-money had been paid by *John Whitmore* to the trustees, it was by them invested in a mortgage security ; but in 1790, the mortgagee, or the purchaser of the mortgaged estates, gave six months' notice to the trustees of his intention to pay off the mortgage-money, and it was accordingly, in or about that year, paid to them, or to one of them, by the direction, or with the consent and concurrence, of the rest, and they all joined in the receipt for the same ; but although they had six months' notice that such trust-money was to be paid, they took no steps to procure any other real or effectual security on which to invest it. That after the money was so received by the trustees, they ought to have invested it in the public [6] funds, or on some real security ; but instead of doing so, they preferred the interest of *John Whitmore* and his wife, to that of the Plaintiff *Loveday Walker* ; and for the sake of procuring some small addition of interest beyond what the public funds would have yielded, or for some other improper cause, took upon themselves to invest the money in bills or notes of the *East India Company* : And that the trust money was afterwards, by agreement between the trustees, called in and received by *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, but they did not provide any security or mortgage, or endeavour to procure any such, on which to invest it ; but received, or authorised *Nicholas Donnithorne* to receive it, and joined in the receipt or acquittance for it to *John Whitmore* ; and after the trust-money was received, it never was laid out or invested, according to the directions of the trust-deed ; but *Thomas Griffith* and *William Symonds*, instead of investing it on real or government security, as they ought to have done, consented and agreed to lend, or to permit *Nicholas Donnithorne* to retain it in his hands, by way of a loan or otherwise, until the time of his death : for the payment of which, with interest, he, several months after he had been so permitted to receive it, gave to *Thomas Griffith* and *William Symonds*, who consented to accept the same, a bond, or other personal security. And the bill charged, that *Thomas Griffith* and *William Symonds*, and *Nicholas Donnithorne*, by having so neglected to lay out and invest the trust-money, in a proper manner, and *William Symonds* and *Thomas Griffith*, by having so consented to lend, or permit *Nicholas Donnithorne* to hold and retain it, were all guilty of a breach of trust ; by reason of which they, and their estates, ought to be severally charged with, or answerable for the trust-[7]-money, or such part thereof as had been, or might be lost, by such breach of trust.

The bill also charged, that *Loveday Walker*, at the time she attained twenty-one, was, and long after remained, ignorant of the trust-deed, and of the contents thereof, and of the exact nature of her interest therein, and in what manner such interest was derived to her, and in what manner the money ought to have been invested : and that none of the trustees ever distinctly explained to her the same, as they ought to have done ; but on the contrary, for a long time concealed the same from, or kept her in ignorance thereof ; and it was not until many applications had been made to them, and until a considerable time had elapsed, that she was able, at last, at different times, to obtain some information of the trust-deed, by short and imperfect extracts therefrom : and that for a long time after she attained twenty-one, she supposed that her interest in the trust-money was devised to her by some will of her grandfather, *Isaac Donnithorne*, and was wholly ignorant of the existence of the trust-deed ; and as evidence thereof, the bill charged, that in *January* 1796, about six months after she attained twenty-one, being desirous to be correctly informed as to the state and amount of her fortune, she wrote to *William Symonds* as follows, " I am at present in a great degree ignorant, with regard to my grandfather's will. I apprehend you have a copy of it, and I cannot conceive any impropriety in my requesting to see it." But *William Symonds* never gave any answer to such application, although he then had in his possession the original trust-deed, or a full and correct copy thereof ; and *Loveday Walker* having afterwards, through the medium of her friends, again applied to *William Symonds*, he furnished only some short extracts of the trust-deed, and declared that the trust-deed itself was [8] in the possession of *Nicholas Donnithorne*, her uncle, to whom he accordingly referred her ; and that sometime in the spring of the year 1796, having been advised by *Nicholas Donnithorne*, her uncle, to make a will, for the purpose of disposing

of her fortune, in case of her death, and having some inclination so to do, but being still ignorant of the particulars of her fortune, she, in consequence thereof, and of *William Symonds* having so referred her to *Nicholas Donnithorne*, wrote a letter to *Nicholas Donnithorne*, dated the 8th of May 1796, to the following effect :—" The will you recommend, and which I have thus long delayed making, I would wish to be done before I leave this neighbourhood, where I have a friend able and disposed to assist. The paper in your possession which gives me this right, and of which I had extracts sent, while I was with Mr. *Symonds*, I would therefore be obliged to you to enclose me as early as you can. A professional gentleman, who saw those extracts, says, that the complete paper would be more satisfactory, and that this original is the proper authority to proceed upon." To which *Nicholas Donnithorne* wrote an answer to the following effect :—" Since I received your letter this morning, I have been ransacking my shattered memory, to bring to mind the paper you mentioned, as being in my possession. It is all in vain ; I have not the most distant recollection of it. If there is such a paper, and Mr. *Symonds* furnished you with extracts, it must still rest with him ; but what it can be, I cannot conjecture. Your right is derived from my father's will, the probate of which (I believe) is in *Cornwall* ; and this, I apprehend, must be the complete paper, the original, the proper authority, as you call it. As the will was proved at *Hereford*, your friend may easily procure a copy, or such extracts as may answer the purpose. If I can recollect any other paper, or matter, I will write again. Let me know what your [9] friend says, as nothing on my part shall be wanted." That *Nicholas Donnithorne* never gave *Loveday Walker* any further information, or shewed her the original deed, or gave her any copy thereof ; but after various applications had been made by means of her friends, she at length procured from *William Symonds* a copy of the trust-deed, but without any information of the state of the trust-property, or how it had been applied, or on what security it was standing : and that having afterwards understood that the trust-monies were in the hands of *Nicholas Donnithorne*, and that at his death he had left his affairs much involved, and that *Isaac Harris* had, by entering into various money engagements for his father, become also much embarrassed, she, on the 19th of December 1796, wrote the following letter to *William Symonds* and *Thomas Griffith* : " The present state of the funds is so advantageous for purchasing, that I think (if you have no objection) no time should be lost in investing the money you have in trust in government security. An addition to our income is an object by no means inconsiderable ; and though I have no opportunity of consulting my mother, yet I think it must be what she wishes. I hope, sir, you and Mr. *Griffith* will converse on this subject, and soon favour me with your opinions. I trust you will see no objection to comply with this request, unless it be the reluctance you may feel to call on my cousin (meaning *Isaac Harris*) at a time when I greatly fear, from report, that his affairs are very much deranged. I should greatly lament putting him to any inconvenience ; yet I cannot think it a sufficient reason for neglecting to dispose of the money to such advantage as the present time offers ; nor do I think I can, with justice to ourselves, neglect taking any step for an addition, which I understand a different disposal of the money would produce. In answer to which, she received from *William* [10] *Symonds* and *Thomas Griffith* the following letter, dated December 24th, 1796 : " In reply, madam, to your favour of the 19th instant, we can have no objection of investing the money in the funds, agreeable to your wishes ; but we apprehend it will not be convenient to Mr. *Isaac Donnithorne* (meaning *Isaac Harris*) to advance the sum at this juncture. Mr. and Mrs. *Whitmore* met us last Saturday respecting the business ; and our joint sentiments thereon were transmitted to Mr. *Hardy*, the solicitor, who was informed of your intention of being in town ; therefore we referred him to you on the same occasion, and presume by this time you have either seen or heard from him."

The bill charged, that no farther notice was taken to *Loveday Walker* of her application to have the trust-monies called in and invested ; nor did she see Mr. *Hardy*, who was an attorney employed by the creditors of *Nicholas Donnithorne* to act for their interest ; nor did she see the paper, nor hear any thing of the joint sentiments of *William Symonds* and *Thomas Griffith*, and of her father and mother, in the letter mentioned to have been transmitted to Mr. *Hardy*, until the 11th of February 1797, when she was on a visit at *Felcham* in *Surry*, at the house of Mr.

*Sherson*, whose wife was the daughter of *Nicholas Donnithorne*, and sister of *Isaac Harris*, and cousin of *Loveday Walker*; but on the morning of that day, she was informed that a *Mr. Hardy*, accompanied by another person, would be at *Fetcham* that day to dinner, at the house of *Mr. Sherson*; and she was wholly ignorant of the purpose of their coming, save only as she understood they were bringing some papers with them from *Hereford*. That, in the afternoon of the 11th of *February 1797*, *Mr. Hardy*, accompanied by another person, whom *Loveday Walker* since understood to be a considerable [11] creditor of *Nicholas Donnithorne* and *Isaac Harris*, and who was one of the trustees under some trust-deed relating to their affairs, arrived at the house of *Mr. Sherson* at *Fetcham*; and at a late hour in the evening, after dinner was over, *Mr. Hardy*, and such other person, made some statements or representations to her of the embarrassed state of the affairs of her uncle *Nicholas Donnithorne*, and of her cousin *Isaac Harris*, and the distress of the family, and of some arrangement for adjusting their affairs; and represented and assured her, that all the creditors would be ultimately paid; that the property was perfectly safe; and that the purpose of arrangement was to enable *Isaac Harris* provide the money for satisfying the claims of the creditors, by means the best adapted to effect that end, with least inconvenience and loss to him and the family of *Nicholas Donnithorne*; and they then, for the first time, produced to her some written paper, which they represented to contain the joint concurrence of *William Symonds* and *Thomas Griffith*, and of *John Whitmore* and *Johanna* his wife (her father and mother), in the arrangement (which was the same referred to by *William Symonds* in his letter), and their entire approbation thereof; but of the expediency and propriety of the measure thereby recommended, she was not then sufficiently informed to have a proper judgment: and she, having been then called on for her consent and approbation, and having no proper person to consult with and advise her what to do, in circumstances so new and embarrassing, gave credit to the representations made to her, respecting the ultimate security of the property; and under the influence of the advice and opinion of her friends *William Symonds* and *Thomas Griffith*, who, as it appeared to her by the said writing, recommended a compliance with the proposed arrange-[12]-ment, was induced to express her willingness to concur in what was so approved; and thereupon *Mr. Hardy* produced a voluminous draft of a deed, and read over a part only, which occupied about three hours in the reading, and which she did not understand; after which, being asked if she approved of it, she answered, that she did not understand matters of that nature, but took it for granted that what was so proposed for her approbation was right; and, as the night was then far advanced, she was desired to consider of what she had heard until the next morning; and, being again, the next morning, asked for her consent, expressed her willingness to concur in what she understood could be no prejudice to her own interest, and would be a great accommodation and relief to the family, to which she was so nearly related, and under whose roof she then was. That she was then desired to sign some paper or instrument, which she accordingly did; and was told, it would be a satisfactory thing for *William Symonds* and *Thomas Griffith* to be informed by herself of her having consented to the arrangement; in compliance with which request she accordingly wrote to them a letter to some such effect.

The bill further charged, that *Hardy*, having thus effected the object of his journey to *Fetcham*, namely, to obtain the consent and signature of *Loveday Walker*, for which purpose he was desired by *William Symonds* to apply to her, returned to *London*, and took with him all the deeds, papers, and writings he had brought, without leaving with her any copy or abstract thereof, or any memorandum of what the same consisted, and of what she had been so induced to do. That *Loveday Walker* never signed or executed any other paper, authority, or consent as to the trust-mones, and that [13] she was ignorant of matters of business, and of the nature and effect of the deed of arrangement or compromise, and of the act she was called upon to perform, when she signed the authority and gave her consent or approbation. That such authority and consent were obtained by surprize, circumvention, and contrivance; and that the procuring such consent and signature was designed by *William Symonds* and *Thomas Griffith* as a means of protecting themselves, who were also creditors on their separate account of *Nicholas Donnithorne*, from the consequences of the breach of trust which they had incurred, or apprehended, by their having lent, or permitted *Nicholas Donnithorne*, their co-trustee, to retain

the trust-monies without sufficient security, and was a fraud on her ; that on the 12th of *April* 1797, Mr. *Hardy* sent to her the engrossment of a deed, accompanied with a letter containing (among other things) as follows :—" Mr. *Hardy* is very sorry he is so circumstanced he cannot wait on Miss *Whitmore* with the deed for her signature. The instrument which Miss *Whitmore* signed at *Fetcham* was an authority from Mr. and Mrs. *Whitmore* to the trustees (Messrs. *Symonds* and *Griffith*) to execute the deed of trust; and, had not Mr. and Mrs. *Whitmore* executed in the country, he (Mr. *Hardy*) would not have deemed Miss *Whitmore's* signature necessary ; but, as they have executed, her executing will make it, for form's sake, more regular. The deed is the same as the draft which Miss *Whitmore* has already perused at *Fetcham*, except the alterations which he mentioned. The bearer shall wait till Miss *Whitmore* or her friends have perused the draft and deed ; and Mr. *Hardy* regrets that he cannot leave either, as he takes them into the county of *Cornwall* to-morrow morning. Mr. *Hardy's* clerk will deliver to Miss *Whitmore* a check for £50 on account of the interest money, the [14] like sum having been paid to her father and mother ; and the arrears of interest will very soon be paid." That *Loveday Walker* having informed her friends of what had passed at *Fetcham*, as well as she could recollect or explain the same, and they having cautioned her against signing any deeds or papers respecting her property, without being properly advised as to the nature and effect of such papers, she did not sign and execute the indenture ; but by three letters requested Mr. *Hardy* to leave a draft or copy of the deed with her, so as to afford her an opportunity of reading and considering it, and taking the advice of her friends thereon, and also a copy of the paper she signed at *Fetcham*, and a copy of the " Reasons " (as they were called), which *William Symonds* and *Thomas Griffith* had caused to be written and prepared by Mr. *Fallowes* (an attorney employed by them at *Hereford*), to which they, by the letter of the 24th of *December* 1796, referred her, as containing their joint sentiments on the arrangement ; and Mr. *Hardy*, after a separate application to him on her part for a copy of each of such respective papers, furnished her with them, one by one, as they were respectively called for ; and she, after having read and considered them, and consulted her friends thereon, discovered, and was advised, that the deed was such as she ought not to execute or accede to, as being greatly injurious to her, and such as no person having any regard for her interest could advise, and she therefore declined to execute it. The bill therefore insisted that her consent, or concurrence and authority, were fraudulently obtained, and not binding, or at least that they ought not to have the effect of discharging the trustees, and their respective estates, from liability in respect of the trust-monies ; but that the trustees, and particularly *Symonds* and *Griffith*, having been guilty in the first instance of a breach of trust, ought to be held answerable [15] for the consequences, and bound to make good the trust-monies.

The bill prayed, that the consent of *Loveday Walker* to the deed, and her signature to the writing expressive of such consent, might be declared to have been improperly obtained, and to be fraudulent and void ; and that it might be declared that *William Symonds* (deceased) and *Thomas Griffith*, and *Nicholas Donnithorne*, ought, upon receipt of the said sum of £8000 trust-money, to have invested the same on real or government security ; and by lending the trust-money to *Nicholas Donnithorne*, one of the trustees thereof, upon his personal security, or permitting him to retain the same in his hands, were guilty of a breach of trust, and became personally liable to answer for, and make good, the same, and all loss that had arisen therefrom, or been occasioned thereby ; and that *William Symonds* (deceased) and the respective estates of *Thomas Griffith* and *Nicholas Donnithorne*, might be charged with the amount of such trust-money accordingly ; and that *William Symonds*, and *John Lilly*, and *Isaac Harris* out of the estates of their respective testators, or some, or one of them, might be decreed to pay the said £8000 into the Bank of *England*, in the name of the accountant-general ; and that, when paid in, it might be laid out on real securities, or invested in capital stock, under the directions of the court, as to the interests and dividends thereof, during the life of *Johanna Whitmore*, upon the trusts of the indenture of the 17th of *January* 1780, or such of the trusts as remained to be performed, and as to the capital of the trust-monies, and all other the interests and dividends thereof, after the death of *Johanna Whitmore*, upon the trusts of the settlement of the 11th of *June* 1799, so that the trust-monies might be properly secured for the benefit of the Plaintiffs [16] *Adam John Walker* and

*Loveday Walker* his wife, and the issue of their marriage, according to their respective rights and interests ; and that the interest and dividends might, during the life of *Johanna Whitmore*, be paid to *Loveday Walker*, or to *Adam John Walker* in her right, in such shares and proportions as the same had theretofore been paid, or as the court should direct ; and, if *Lilly* and *Harris* should not respectively admit assets of their respective testators, that the usual accounts might be taken.

*William Symonds* and *John Lilly*, by their joint answer, filed on the 7th of *May* 1803, stated that in or about *June* 1772, *John Whitmore* (deceased) intermarried with *Johanna Whitmore* (then *Johanna Donnithorne*, daughter of *Isaac Donnithorne* deceased) ; and that upon the treaty for the marriage, *Isaac Donnithorne* agreed to advance the sum of £6000 as the portion of his daughter, in consideration of an adequate settlement to be made upon her, and the issue of the marriage ; and that he advanced £6000 to *John Whitmore*, accordingly ; and for securing the same with interest, *John Whitmore* gave his bond, but no settlement was then, nor until the time thereafter mentioned, executed in pursuance of the agreement ; and, denying that any real security was ever given by *John Whitmore* for the sum of £6000, or any other security except the bond, they stated that in or about the month of *January* 1780, *John Whitmore*, being greatly reduced in his concerns, and unable to make any settlement, according to the terms of the agreement, and there being an arrear of £1900 interest, *Isaac Donnithorne* determined to make a settlement of the principal and interest due in respect of the bond, and accordingly the indenture of the 17th of *January* 1780, was executed ; in which was contained a declaration or proviso, that the trustees [17] should be accountable for their own acts and defaults only, and not for any loss or miscarriage by any security of the trust-money, in case the same happened without their wilful default or neglect, nor for more than what should be actually received by them, or their order respectively ; the answer admitted that *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, accepted the trusts of the indenture ; that *Isaac Donnithorne* died in *June* 1782, having by his will devised freehold and leasehold estates in *Cornwall*, of considerable value, comprising lucrative tin mines, to *Nicholas Donnithorne* his son, for life, with remainder to his son *Isaac Harris* (then *Isaac Donnithorne*) in fee simple ; that *Nicholas Donnithorne*, upon the death of the testator, entered on the devised estates, and continued in possession till his death ; being a merchant in *London* of very considerable credit and reputation : That in 1783, the principal and interest due on the bond were paid by *John Whitmore*, and the amount, £7900, was lent by him with the approbation of the trustees to one *Pritchard*, on the security of a mortgage of certain real estates, which, in 1790, were sold to *John Keysall*, who thereupon gave notice to the trustees of his intention to pay off the principal and interest due on the mortgage, at the end of six months ; that in consequence of such notice, *William Symonds* made application to different solicitors of eminence in *Hereford*, and caused diligent inquiry to be made for some landed security whereon to invest the money ; but no opportunity occurred of so investing it, and neither he, nor *Thomas Griffith*, were at that time able to find any such security ; and the sum of £7900 with the then arrear of interest, was afterwards paid in *London* by *Keysall* to *Nicholas Donnithorne*, pursuant to the notice ; that, as the interest of that [18] sum formed the principal part of the income of *John Whitmore* and *Johanna* his wife, and would have been much diminished by investing the money in the public funds (which did not then produce an interest of 4 *per cent.*) it was agreed by the trustees, that it should be invested in bills or notes of the *East India Company*, payable in two years, which then produced an interest of 5 *per cent.*, and it was accordingly so invested by *Nicholas Donnithorne*, with the approbation of his co-trustees ; and the interest of the bills from time to time paid to *John Whitmore* and *Johanna* his wife (who then lived separate from each other) in the proportions in the bill mentioned.

The answer stated that in the month of 1795, the principal sum of £7900 due on the bills was paid in pursuance of a public notice, and was received in *London* by *Nicholas Donnithorne*, who having informed *Johanna Whitmore* that he had received that sum, and that intelligence having been communicated by her to *William Symonds* and *Thomas Griffith*, *Symonds*, in or about the month of *May* 1795, wrote a letter to *Nicholas Donnithorne*, stating it to be the joint and earnest request of *Griffith* and himself, that the whole of the £7900 should, as soon as convenient, be invested in the public funds, in the names of the three trustees ; that

*Nicholas Donnithorne* soon afterwards proposed to *Johanna Whitmore*, on behalf of himself and his son *Isaac Harris* to join in securing the trust-money, by a mortgage of their estates in *Cornwall*, and requested her to consult *Symonds* and *Griffith* as to the propriety of acceding to such proposal; and *Johanna Whitmore* being desirous that the proposal should be accepted, and it appearing to *Symonds* and *Griffith*, that the estates in *Cornwall*, would be a very ample security, they expressed their [19] consent to *Johanna Whitmore*, who thereupon wrote to *Nicholas Donnithorne*, informing him of such consent, and requiring that the mortgage should be executed with all possible despatch, and that, for the security of the money, until a mortgage could be completed, a joint bond should be given; that in *July 1795*, *Nicholas Donnithorne* transmitted to *Symonds* and *Griffith* the joint bond of himself and *Isaac Harris* for £8000 (being the principal sum of £7900 together with £100, part of the interest arising therefrom, added by the desire, or with the consent of *John Whitmore* and *Johanna* his wife); and he at the same time assured *Symonds* and *Griffith* that he would very shortly send them a joint mortgage of the *Cornish* estate, for securing the principal and interest of the trust money.

The answer admitted that *John Whitmore* and *Johanna* his wife had but one child, *Loveday*, who, at the time of executing the settlement, was an infant of tender years, and resided with *Johanna Whitmore* her mother, who then lived apart from her husband; that subsequent to such separation, the trustees allowed one-fourth part of the interest of the trust money to *John Whitmore*, and the remaining three-fourths to his wife; and that *Loveday* attained twenty-one in *December 1795*, and then separated herself from her mother, and soon after she attained that age, made an application to the trustees for an allowance for her support, in consequence of which they allowed her £100 *per annum* out of the interest.

The answer further stated, that *Nicholas Donnithorne* not having, in pursuance of his engagement, sent to his co-trustees a mortgage for securing the trust-money, *William Symonds* made several applications to him on [20] the subject, and wrote to him several letters, earnestly requesting him, in the name of himself and *Griffith*, either immediately to invest the money in the public funds, or to give them landed security for it; That *Nicholas Donnithorne* died on the 20th of *September 1796*, during the course of such applications, without having executed a mortgage, leaving *Isaac Harris*, his eldest son and heir at law, who thereupon became entitled, under the will of his grandfather *Isaac Donnithorne*, to the estates in *Cornwall* at a yearly rent of £1500, and also to considerable copyhold and leasehold estates; and that *Nicholas Donnithorne* died intestate, and *Isaac Harris* took out administration to his personal estate. That in the beginning of *November 1796*, *William Symonds* wrote to *Isaac Harris*, and requested him to invest the sum of £8000 in the public funds, without further delay; but about the 19th of that month *Symonds* received a letter from Messrs. *Wadeson* and *Hardy* (the solicitors of *Harris*) informing him that the affairs of *Nicholas Donnithorne* appeared, on investigation, to be in a very embarrassed state, and that a meeting of his creditors was intended to be held in *London*, in order to determine what steps ought to be taken for obtaining payment of their debts, which meeting Messrs. *Wadeson* and *Hardy* requested *Symonds* and *Griffith* (as bond creditors of *Nicholas Donnithorne*), to attend: That by reason of the distance from their place of residence to *London*, it was impossible for them to attend; but *William Symonds* shortly afterwards received a letter from Mr. *Hardy*, informing him that the meeting had taken place, and it appearing that the bond and simple contract debts of *Nicholas Donnithorne* amounted to £30,000 and that the immediate sale of his real and personal estate would, from the nature of the property, be attended with considerable loss, whereas by continuing [21] the same in the hands of trustees, an ample fund would be provided for the discharge of his debts by instalments, a proposal for creating a trust for the benefit of the creditors had been submitted to them on the part of *Isaac Harris*, to which the greater part of them were disposed to accede, and that a trust deed was accordingly prepared to carry the proposal into effect; to which Mr. *Hardy*, on the part of *Isaac Harris*, and the creditors, requested the concurrence of *Symonds* and *Griffith*; that the proposal of *Isaac Harris* (to which the letter referred) was at the same time transmitted to *Symonds* and *Griffith* for their consideration, and was to the effect following:—

“That all the freehold, copyhold, and leasehold estates and other chattel interests



of *Nicholas Donnithorne* deceased, and *Isaac Donnithorne*, situate in or near *Lad-lane*, *London*, in *Cornwall*, and at *Croydon*; and all outstanding debts owing to *Nicholas Donnithorne*, and also, all mining and farming stocks and utensils belonging to him, should be respectively conveyed and assigned to *Richard Walpole*, *William Curtis*, and *Thomas Wood*, of *London*, upon the following trusts; that the premises in or near *Lad-lane*, and the freehold estates of *Genown*, in *Cornwall*, and the leasehold premises, in that county, demised by letters patent of the 3d of *August* 1762, should be sold at such time as the trustees should think fit, if they should think a sale necessary, and the monies arising yearly to be applied, first in payment of the principal money and interest due upon a certain mortgage of the *Cornish* estates, and other charges thereon, specified in the proposal; and the ultimate surplus (if any) to be applied in manner thereafter directed, in respect to the general fund; but if the same should not be sufficient for the discharge of the mortgage debt, then the deficiency to [22] be discharged out of such general fund, and until a sale, the rents and profits of the mortgaged estates should be applied first in payment of the interest of the mortgages, and the surplus of the rents and profits in reduction of the principal monies; and that the leasehold premises at *Croydon* should be immediately sold, with such part of the farming and mining stock and utensils in *Cornwall*, as the trustees should think fit, and the outstanding debts immediately got in, and the monies applied as part of the general fund, in manner thereafter directed; and that the mines should be worked, and the stamping mills and other businesses in *Cornwall*, carried on by the trustees, except such part as they might judge it expedient to dispose of, and that the produce thereof, and the toll-tin, and the rents, and profits of the other parts of the *Cornish* estates, should be received by the trustees, who should thereout pay the expenses of the trust; and should also have power to raise by mortgage, such further sums as might be necessary for that purpose, or for insuring any life or lives upon which any of the leases might depend, and for renewing any of the leases; and that subject to the expenses aforesaid, the residue of the monies arising as aforesaid, should be applied, first in payment of the interest of a sum due on mortgage therein mentioned, and then of the interest of the specialty debts, and then in payment to the house of *Richard Walpole* and company, of certain sums, which they were under engagement to pay; and after the several payments aforesaid, to pay the yearly sum of £500 to *Isaac Donnithorne*, during the continuance of the trusts, if he should so long live unmarried; but in case of his marrying during the pending of the trust, then the same annuity was to be continued to his executors, &c., until the trust should be determined; and also to pay £300 a year to *Anna Donnithorne*, the widow of *Nicholas Donnithorne*, during [23] the continuance of the trust, if she should so long live, and in case of her death, then the £300 a year to be continued to her three daughters, *Sophia*, *Catherine*, and *Loveday Donnithorne*, in equal shares, during the continuance of the trusts, subject to a proportionable reduction in case of the death of any of the daughters; and afterwards in payment of the interest of a sum of £1400, due to *James Donnithorne*, and then in payment of the other specialty debts, and that subject to the several payments aforesaid, the accruing interest of the specialty debts should be discharged, and that the clear surplus of such monies should be applied in discharge of the said sum of £1400, by certain yearly payments to *James Donnithorne*, his executors, &c., and in the next place, in discharge of the specialty debts, and also of the simple contract debts, by an equal pound-rate; and after full payment and discharge of the debts, that the trust estate should be conveyed to *Isaac Donnithorne*, and so much of the personal estate as should not have been disposed of for the purposes aforesaid, should be assigned to the widow and children of *Nicholas Donnithorne*, according to their respective interests therein, under the statute of distribution; and that in case all the debts should not be paid within the space of twelve years, the trustees should have power to raise by sale or mortgage, so much money as should be necessary for the full discharge of the debts remaining unpaid; That in consideration of the fund to be provided for payment of the debts, and the additional security for the discharge thereof, contributed by *Isaac Donnithorne*, the creditors executing the deeds of trust, should release all claims and demands on *Nicholas Donnithorne* and *Isaac Donnithorne*, and their respective estates."

The answer further stated, that [24] *William Symonds* and *Thomas Griffith*

having some objections to the proposal, which they afterwards stated to *Loveday*, and not chusing to execute the trust-deed, without the direction and authority of the persons interested in the debt, submitted the proposal and terms of trust, together with their objections, to *Whitmore* and his wife, then resident at *Hereford*, and they having considered of the same, an instrument, or power of attorney, was prepared and signed by *Whitmore* and his wife, whereby, after reciting the indenture of settlement, and that the trust-money, after it had been paid by *Keysall*, was invested in *East India* bills, payable in two years after date, and that the bills were received on account of himself, and his trustees, by *Nicholas Donnithorne*, who, in breach of his trust, converted the principal sum to his own use, and that *Thomas Griffith* and *William Symonds* had obtained a joint and several bond from *Nicholas Donnithorne* and *Isaac Donnithorne*, for securing the debt; and after reciting the intended deed of trust for the payment of the creditors of *Nicholas Donnithorne*, and that *John Whitmore* and *Johanna* his wife, and *Loveday*, their daughter, were the only persons beneficially interested in the trust-money, and that the mode provided by the deed of trust, appeared to them that which was most eligible, and would best conduce to the discharge of the debts of *Nicholas Donnithorne* and *Isaac Donnithorne*; It was witnessed that, for the reason and considerations aforesaid, *John Whitmore* and *Johanna* his wife, and *Loveday*, did authorize and direct *Thomas Griffith* and *William Symonds* to execute the indenture of release and assignment, as creditors in respect of the bond, and to receive the dividends, or share of the produce of the trust estates, according to the stipulations of the indenture, in satisfaction of the principal and interest due upon the bond, and they thereby confirmed [25] all that *Griffith* and *Symonds* should lawfully do, or cause to be done, in pursuance of the said authority and direction.(1)

The answer then stated, that at the time of these trans-[26]-actions, *Loveday* was on a visit at *Fetcham*, near *London*, and being fully informed of the state of the trust-property, [27] wrote a letter to *Symonds*, dated the 19th of *December* 1796 (*vide* 3 *Swans.* 9), to which a joint answer was sent by *Symonds* and *Griffith*, dated the 24th of the same month (*vide* 3 *Swans.* 10); and that *Symonds* and *Griffith*, having drawn up certain observations to be submitted to *Loveday*, together with the necessary papers relating to the transactions, transmitted the same, with the power of attorney, executed by *Whitmore* and his wife, to Mr. *Hardy* (the solicitor of *Isaac Harris*), with a request that he would deliver them to *Loveday*, at the same time with the papers relating to the intended trust; the observations being to the effect following: "Mr. and Mrs. *Whitmore* being the persons interested in the seven thousand nine hundred pounds, it is obvious, that whatever proposal they concur in accepting, their trustees, Messrs. *Griffith* and *Symonds*, may safely adopt, but without their consent (and particularly without Miss *Whitmore's*, to whom the money appears to belong, subject to her father and mother's life interest), the trustees will incur a great risk, in acceding to any proposal, however equitable and advisable it may be in their own opinions. It has been intimated to the trustees, by a gentleman, who professes to act as the friend of Miss *Whitmore*, that they ought to use every possible means to get in the money, without regard to family considerations, and to place it in the funds, by which means it would produce more than five pounds *per cent.*: the trus-[28]-tees for their own part think such measures by no means advisable, in the present state of things, as being likely to produce great loss and inconvenience, and they would prefer the proposed trust, with some alterations, as more likely to secure the interest of the *Whitmore* family; but it seems doubtful, whether they have any right to think upon this subject. If they adopt such measures as that family (and Miss *Whitmore* in particular) may call for, however ruinous to the interests of all parties, they will stand acquitted as trustees, nor can they be blamed for the consequences, their advice to the contrary not being followed; but if they accept an arrangement, contrary to the wishes of the family, they may then be considered as the persons who gave credit, and become liable personally to pay the money and take the security upon themselves; no difficulty will arise with Mr. and Mrs. *Whitmore*, and Miss *Whitmore* will do well to consider that when the £7900 was paid up by Mr. *Keysall* (purchaser of the estates upon which it then stood as a mortgage), the funds were at a very high price, and would not have paid near four *per cent.*; it was also then very difficult to get a good mortgage, and if such security could have been obtained,

it would have been very unhandsome to call up the money, in a time of such difficulty to procure it ; not to mention, that a mortgagor may have found it impossible to pay it in ; many persons whose property is invested upon mortgages feel the difficulty of getting it in to place it in the funds, and are obliged to submit to let it remain upon the present securities. Having premised these reasons for obtaining Miss *Whitmore's* consent, Mr. *Hardy* will see the necessity of applying to her, and supposing it to be obtained, the trustees desire the following observations to be made upon the trust-deed, submitted to their consideration ; they continue to think the allowance of £800 a-year too considerable in this case, added to the other [29] funds for the support of the *Donnithorne* family, and that £500 a-year, divided as they think proper, would be enough to enable them, by living together, and acting with proper economy, to enjoy every comfort of life : perhaps it may be thought right to allow £300 of this to Mr. *Isaac Donnithorne*, and the rest for Mrs. *Donnithorne*, and in addition to the portion of the young ladies ; they think the continuance of £500 a-year to the executors, administrators, and assigns of Mr. *Isaac Donnithorne*, still more inadmissible : his death, it is to be hoped, is an event not to be reckoned upon, in favour of the trust ; but should it happen, where can be the good sense of empowering him to leave £500 a-year to whom he pleases, which was intended only for his personal support ? They think the discretionary increase of Mr. *I. Donnithorne's* allowance, improper and unnecessary, and that more particularly, if he is to have an allowance of £500 a-year ; it may be right to observe, that every increase of these allowances will not only retard the execution of a very complicated trust, but in the end be detrimental to himself, as every shilling his trustees pay off, will operate with the power of compound interest in his favour ; they consider the specialty creditors in a worse situation than the simple contract creditors, the trustees having a discretionary power to pay off such of the latter as they think proper, and then they must pay all the creditors *pro rata* ; the arrangement, it was expected, would have been to pay interest to the specialty creditors first, and then to the simple contract creditors ; it seems to be inconvenient to compel the trustees to pay the debts *pro rata* ; if the trust goes on well, some persons may have no objection to wait for their money, while others may be much distressed for want of it ; perhaps there should be a power to the trustees to give a preference to the specialty creditors, with consent at least of a meeting of those creditors : the power of two [30] of the trustees to act without the third, seems improper, unless it be restricted to the case of one of them being absent more than a certain time from *London* : in case of a difference of opinion between them, the one who dissents may be right, and a meeting of specialty creditors should be called to turn the scale. If Miss *Whitmore* should, however, approve of the deed in its present form, and should disapprove of the observations of her trustees, they will again consult Mr. and Mrs. *Whitmore*, and the family being unanimous, the trustees will be satisfied with having given their opinion, leaving it to the parties interested to determine for themselves.

The answer further stated that Mr. *Hardy*, accompanied by *William Curtis* (now Sir *William Curtis*, Bart.), one of the trustees named in the indenture of assignment, about the 11th of *February* 1797, called upon *Loveday* at *Fetcham*, and fully explained to her the embarrassment of *Isaac Harris's* affairs, and the arrangement which had been formed for vesting his property in trustees, to be applied in payment of his debts, together with the nature and particulars of the trust created for that purpose ; and that they, at the same time, produced to her the writing containing the observations, together with a draft of the trust-deed, which they fully explained, and offered to give her any further information which she might desire : and they also produced to her the power of attorney signed by father and mother ; and she, having fully considered the several papers, and appearing perfectly to understand the nature of the trust, expressed herself to be entirely satisfied therewith, and on the following day executed the power of attorney in the presence of *Curtis* and *Hardy*, to whom she delivered the same ; and, in the course of two or three days after, wrote to *William Sy[31]-monds* the following letter, dated the 14th of *February* 1797.

" In consequence of your last letter, I have long been expecting to hear from Mr. *Hardy* ; on *Saturday* he and Mr. *Curtis* came to *Fetcham*, and brought with them the paper already signed by my father and mother : it has my entire approba-

tion, and I have added my name to it. With regard to your observation on the proposed allowance of my cousin and aunt, I cannot quite agree with you : my cousin's case is certainly a very bad one, and I think, considering the great sacrifice he makes, of what he might have reserved entirely to himself, £500 is not much more than what he might reasonably expect :—it is most probable the family may be separated in a very few years, and my aunt, I think, ought not to have less than £300 which is mentioned by Mr. *Hardy*. I think the regular increase of *Isaac's* income by no means necessary, unless he were to marry, and then it will be with the consent of his friends, as the debts decrease, to make an addition to his income, if he should wish it. Were he deprived of the power of disposing of the £500 in case of his death, it would be an insuperable bar to his marrying. To a wife or children I think it should be continued, but if he should die unmarried, with him it should cease : I have said as much to Mr. *Hardy* ; and I trust, upon further consideration, you will have the same opinion. I shall always be happy in assenting to what you and Mr. *Griffith* propose, to whom I beg my compliments and respects.

“ P.S. I have taken the liberty of inclosing a few lines, which I shall be obliged to you to convey to him.”

The answer further stated, that, in pursuance of the authority contained in the power of attorney, and after [32] having received the last-mentioned letter. *Symonds* and *Griffith*, as creditors by virtue of the bond, duly executed the trust-deed.

That deed, dated the 21st of *March*, one thousand seven hundred and ninety-seven, between *Isaac Donnithorne*, described as the eldest son and heir at law of *Nicholas Donnithorne*, and also a devisee and legatee named in the will of the Reverend *Isaac Donnithorne*, and administrator of the effects of *Nicholas Donnithorne*, of the first part ; the Honourable *Richard Walpole*, *William Curtis*, and *Thomas Wood*, three of the principal creditors of *Nicholas Donnithorne*, *Richard Walpole*, and *William Curtis*, being also creditors of *Isaac Donnithorne*, as well as trustees nominated on the part of their other creditors for the purposes therein-after mentioned, of the second part ; and the several other persons who, by themselves or their respective partners, agents, or attorneys lawfully authorised, had sealed and delivered the deed, or a duplicate thereof, also creditors either of *Nicholas Donnithorne* and *Isaac Donnithorne* jointly, or one of them separately, of the third part ; after reciting various leases, and letters patent from the crown, by way of demise of divers stamping mills, tolls of tin, and other hereditaments in *Cornwall*, *London*, and elsewhere ; and a devise of certain estates by *Isaac Donnithorne*, the grandfather, to *Nicholas Donnithorne* for life, subject to certain legacies, with remainder to *Isaac Donnithorne* in fee, and the descent of certain other estates on *Isaac Donnithorne*, as heir to his father *Nicholas Donnithorne* ; and that *Nicholas Donnithorne* had been engaged in certain tin mines, and had become indebted to various persons ; and that the immediate sale and disposition of the real and personal estate of *Nicholas Donnithorne* would, as to the greater part, from its nature, be at-[33]-tended with a considerable loss whereas by working, and continuing it, an ample fund would be provided for the discharge of those debts by instalments, without occasioning such injury to the property as would result from an immediate sale, and therefore *Isaac Donnithorne* lately submitted a proposal to the creditors of himself and his late father, to the effect expressed in the proposals, and in the declaration of the trusts of the deed ; witnessed, that *Isaac Donnithorne* conveyed freehold and leasehold estates specified, and certain tin-mines, farming stock, and chattels, and all his other chattels, as administrator of his father, to *Walpole*, *Curtis*, and *Wood*, and their heirs, &c., upon trust, to sell part of the premises, except certain tin-mines, which they were to carry on, and pay, first, certain mortgages, and the legatees of *Isaac Donnithorne* the grandfather, and such debts as from their nature required immediate payment ; then £500 *per annum* to *Isaac Donnithorne* during his life, and other annual sums to different members of the family ; next, keep down the interest of the specialty debts ; and afterwards satisfy all specialty and simple contract debts ; and convey the surplus to *Isaac Donnithorne*, or his representatives.

The deed contained a clause, that in pursuance of the agreement of the parties of the second and third parts, and in consideration of the provision thereby made for the discharge of the several debts, and of the covenants and agreements on the part of

*Issac Donnithorne*, the trustees, and all other the creditors of *Nicholas Donnithorne* and *Isaac Donnithorne*, for themselves severally and respectively, and for their several and respective executors, accepted of the deed of conveyance and assignment in full satisfaction of all the debts, and sums [34] of money set opposite to their respective signatures, and all other claims and demands whatsoever, on *Nicholas Donnithorne* and *Isaac Donnithorne*, jointly or separately, in respect of their joint trade, and all actions, &c.; and they severally and respectively released, and discharged *Isaac Donnithorne*, his heirs, &c., from all the debts, set opposite to their respective signatures, and from all other debts, sums of money, claims and demands whatsoever, then due to them, or any of them, &c., and from all actions and suits, which the creditors might have &c., against *Nicholas Donnithorne's* estate, or *Isaac Donnithorne*, or either of them, &c.; provided that the release, or any other clause therein contained, should not extend, or be deemed to extend, to release, discharge, or in any degree affect, any debt then due to any of the creditors separately from *Nicholas Donnithorne* or his estate, or *Isaac Donnithorne*, in conjunction with any other person or persons; but that every such debt should, as against such other persons, be and remain subsisting and unreleased.

The answer then stated, that by that deed, executed by the direction and under the authority of *Loveday Walker*, *Symonds* and *Griffith* relinquished all claim in respect of the bond, as a separate debt of *Isaac Harris*, who was then perfectly solvent, and capable in time of paying the debt, and whose responsibility had since been greatly increased by a considerable real and personal property, acquired by him, in right of his wife, in consequence of which he assumed the name of *Harris*; that they believed the executing the deed was, under all the circumstances, the most advisable measure for the creditors of *Nicholas Donnithorne* and *Isaac Harris*, and the best calculated for obtaining payment of their debts; and that the fund provided by that arrange-[35]-ment for the satisfaction of the debts was a solvent fund, and would ultimately be sufficient for that purpose; but they insisted that *Symonds*, and the estate of *Griffith*, ought not to be made responsible, in case of a deficiency of the fund; although they would be perfectly ready to submit to such responsibility, in case they could be put in possession of the personal security of *Isaac Harris*, relinquished by them under the authority of *Loveday Walker*. The Defendant submitted that the sum of £7900 after it was received from the trustees, was duly invested on real security, by being lent on mortgage as aforesaid, and that the receipt for the sum paid by *Keysall* was signed by *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds* (deceased), but the money was received by *Nicholas Donnithorne* only; and they denied that they and *Thomas Griffith* (deceased) ever consented, or agreed to lend the sum to *Nicholas Donnithorne*, except on real security, or that they (except as aforesaid), permitted him to retain it by way of loan, upon personal security; and they stated, that *Nicholas Donnithorne* received it from Mr. *Keysall*, and also the produce of the *East India* bills, voluntarily and without direction or authority, from *William Symonds* (deceased), or *Thomas Griffith*, who were, during the whole of the transactions, resident at *Hereford*; and after the trust-money was received by the payment of the *East India* bill, *Thomas Griffith* and *William Symonds* (deceased) used their utmost endeavours and made the most urgent application to *Nicholas Donnithorne*, during his life-time, and after his death to *Isaac Harris*, at first to procure the trust-money to be invested in government security, and afterwards to obtain a mortgage upon the *Cornish* estate; and they persevered in such endeavours until they were authorised by *Loveday Walker* and her father and mother, to execute the trust-[36]-deed; that if she was, at the time when she attained the age of 21 years, ignorant of the settlement made by her grandfather, or of the trust-money secured thereby, and her interest therein, and the various particulars relating thereto, which they did not admit, she did not long continue in ignorance thereof; and they denied that *Wm. Symonds* (deceased) or *Thomas Griffith*, did in any manner conceal or withhold the settlement from her knowledge, or keep her in ignorance thereof; or that she was under any difficulty in obtaining information respecting it; but they said that, on the contrary, they were at all times desirous of giving her every information in their power, and of answering, in the most unequivocal and satisfactory manner, every inquiry made by her relative to the same; and *William Symonds* (deceased) did in part answer all such inquiries, and explain to her the nature and valuation of the trust-property, when called upon by her, or on her behalf for that

purpose ; and neither he, nor *Thomas Griffith*, ever gave her any reason to belief, that her interest in the trust-money was derived under the will.

*William Symonds*, since deceased, admitted that *Loveday Walker*, some time in *January 1796*, sent to him the letter, in the bill mentioned ; but he not having the possession of the will of her grandfather, or any knowledge of the particulars thereof, and having no concern in the trusts thereby created, did not return any answer to such letter, and at the time of receiving it, he had no reason to believe, and did not believe that it had any reference to the property of which he was a trustee ; he admitted that, after receiving the letter, he was applied to by *Adam John Walker*, who desired, on behalf of *Loveday*, to examine the settlement or trust-deed ; and that the Defendant informed *Walker*, that he had [37] not then the deed, or any copy in his possession, but that it was in the possession of *Thomas Griffith*, to whom he referred *Walker* ; that, shortly afterwards, *Walker* repeated his application to the Defendant, who, having in the mean time procured the settlement from *Griffith*, produced it to *Walker*, who carefully examined it, and either took extracts, or the Defendant took extracts therefrom, as he desired, and delivered them to him, and he was at liberty to take a copy of the deed, or the Defendant would willingly have furnished him with a copy in case he had desired it ; but he appeared to be perfectly satisfied with the extracts, and with the information which he then received.

The Defendant did not recollect, whether he then informed *Walker* of the situation of the trust-property, or in whose hands it then was, and under what circumstances, and upon what security, or whether or not any inquiry was then made on that subject ; but he never declined, or refused, to give such information, and would have willingly furnished it in case any inquiry had been made on the subject ; and he denied that any application was ever made to him, by, or on the behalf, of *Loveday Walker*, for a sight or perusal of the settlement, or for any information respecting it, except as aforesaid ; and he denied that he ever informed her, or any person on her behalf, that the deed or settlement was in the custody or power of *Nicholas Donnithorne* ; and he believed that he, in consequence of the first application made to him on her behalf, furnished *Adam John Walker* with a copy of the settlement ; and that *Loveday* must have been perfectly acquainted with the situation of the trust-property, long before she wrote the letter of the 19th of *December 1796* ; that, in case *Loveday* had persisted in her intention of calling in the sum of £8000, and had re-[38]-quested the Defendant and *Thomas Griffith* so to do, they would by no means have executed the trust-deed, but would immediately have instituted some legal proceedings against *Isaac Harris*, to enforce the payment of the bond.

The Defendant, *W. Symonds*, since deceased, further said, that in case *Curtis* and *Hardy* made any representations or assurances, of the nature alluded to in the bill, which he did not admit, they must have been understood as making them, in their individual characters, and not as authorised by *Thomas Griffith*, and the Defendant, or as speaking their sentiments ; and that, *Curtis* and *Hardy* were not authorised to act, and did not appear in the transactions as agents of the Defendant and *Thomas Griffith*, except in delivering to *Loveday* the writing, containing their joint observations on the intended trust.

The Defendants denied, that *Loveday Walker* was, at the time when she signed the instrument, incompetent to form a correct judgment of the nature and effect of the arrangement, or of the propriety of the act, or, that her consent or approbation and signature were obtained by surprise, circumvention, and contrivance, or under false, or improper representations, inasmuch as she was, at the time, well acquainted with the situation of the property, and appeared, by her letter of the 14th of *February 1797*, to have been well acquainted with the nature of the intended arrangement, and to have fully considered, and deliberately approved it. The Defendants denied, that the Defendant, *William Symonds*, deceased, and *Thomas Griffiths* had any design in the transaction of obtaining her signature to the instrument as a means of protecting themselves from the [39] consequence of any breach of trust, or that they considered themselves as having been guilty of any breach of trust, or in danger of being made responsible, in consequence of the trust-money having remained in the hands of *Nicholas Donnithorne*. They stated, that *Loveday Walker* did not communicate to *Thomas Griffith*, and *William Symonds*, deceased, her change of opinion as to the propriety of acceding to the proposed arrangement, nor had they

any knowledge or suspicion thereof at the time when they executed the trust-deed, or until a considerable time afterwards.

By their answer to the amended bill, *William Symonds*, since deceased, and *John Lilly* stated, that they believed that the interest of all parties concerned in the trust-fund was best consulted, under the circumstances of the times, by investing the money in *East India* bills, until an eligible landed security could be procured for it; that, at the time when the trust-money was so invested by *Nicholas Donnithorne*, no landed security could be procured, and, by reason of the very high price of the public funds, there was a considerable danger, in case of a fall in the price (which in fact took place within a very few years afterwards), that the capital of the trust-money might be greatly diminished.

The Defendant, *Isaac Harris*, by his answer insisted on the benefit of the trust-deed, and that, under the circumstances, *Loveday Walker* was not to be considered as a creditor on the personal estate of *Nicholas Donnithorne*, nor entitled to any account of it, and that *Harris* was not in any manner liable out of or in respect of the personal estate of *Nicholas Donnithorne* to make good the trust-moneys.

[40] The cause having been heard before the *Master of the Rolls*, on the 4th, 5th, and 6th of May 1807, the following judgment was given :

The *Master of the Rolls* [Sir Thomas Plumer]. (From a note read on the argument of the exceptions to the Master's report.)

The bill prays that the signature of the Plaintiff *Loveday* to the power of attorney, may be declared to have been fraudulently obtained and void : this is introductory to the rest of the relief prayed ; the former must be made out to entitle the Plaintiffs to the latter. The foundation of the Plaintiff's case is, that her consent was improperly obtained. The objection is, that it would be impossible to replace the parties in the situation in which they were when the deed was executed ; it would not, however, therefore follow, if the signature to the power of attorney had been fraudulently obtained, that it should not be declared void. It is true, that the parties would have had a very different judgment to exercise respecting Mr. *Nicholas Donnithorne* from that which they would have now to exercise ; they might have assented to some deed ; they probably would not have assented to such a deed as has been executed ; and though this does not preclude the Plaintiffs from all relief, it throws the *onus* very strongly on them, to shew that the trustees were entirely blameable, and that there was an improper practice in obtaining the deed.

The questions are first, whether the trustees practised any imposition on her ? second, whether they withheld from her any facts which it was essential she should have known ?

It is hardly alleged that any imposition was actually [41] practised on her. The trustees were at a distance, the observations transmitted by them held out mere inducements, but not so as improperly to influence her judgment.

2dly, Information is said to have been withheld from her. Did they withhold any information she desired to have, or refuse to communicate what she required ?

It is said that, in *January* 1796, she desired to be informed of the contents of her grandfather's will, and that she did not receive that information. The trustee says he did not understand that she meant what respected the trust. If she had been ignorant of the contents of the deed of trust under which she was entitled when she executed the power of attorney, it might have been material ; but the power of attorney recites the deed of trust. There is no other instance of her requiring information that she did not receive.

It comes therefore merely to a question, whether the trustees ought spontaneously to have put her in possession of information which she had not respecting the trust ?—What are the transactions ? The money had been properly laid out ; it had been paid in without any act of the trustees ; the trustees did no act to call in the money or change its situation ; they were obliged to receive it ; so far they were blameless. It came to *Donnithorne's* hands, and the trustees were not to blame in letting it come to his hands ; but they might have afterwards made themselves responsible, by merely not doing what was incumbent on them ; by permitting the money to remain a considerable time in the hands of their co-trustee, they might, without any positive act on their part, have made themselves liable ; that will depend on the degree and extent of their laches in suffering the [42] money to remain in the hands of the trustee. *Brice v. Stokes* (11 Ves. 319) proceeds upon

the doctrine that a trustee may become liable by knowing that his co-trustee had the money, and leaving it there. They being authorized to put the money out on mortgage, it would be rather hard to say that they were guilty of laches by giving *Donnithorne* a little time to find a mortgage, taking his bond in the mean time. What passed in the interval between to the death of *Donnithorne*, does not at all appear. If it were necessary to decide the point, an inquiry before the Master must be directed. In *December 1795*, the money came again into *Donnithorne's* hands, and the trustees being informed by *Mrs. Whitmore*, apply by letter to have it invested : it appears that *Miss Whitmore* then, and not before, knew what the trust-property was. It does not appear that she knew any thing of the proposed arrangement, but on the *19th December*, she writes to say, that the money then in *Donnithorne's* hands ought to be laid out in government security. She knew it was in his hands, that it was not properly there, and that she had a right to have it laid out on government security. When the proposal of *Mr. Donnithorne* was communicated to her, she proceeded to consider it, with this knowledge of the trustees having before left it where it ought not to be. The power of attorney recited, that *Donnithorne* had been guilty of a breach of trust. It recited too, that which was not true, namely, that all the trustees had received the money ; they had no intention therefore to gloss over the transaction. It does not appear that she had a claim against the surviving trustees, or that they were liable for a breach of trust. Without any direct communication from the trustees, she is left with this knowledge to exercise her own discretion. The persons who commu-[43]-nicated with her are fair and honourable men : she saw the observations of the trustees, and it appears that she fully understood the transactions : this appears clearly from her letter of *16th February*, three days after he had executed the power of attorney.

If the trustees had known that they were personally answerable to the Plaintiff *Loveday*, I should have said that they ought to have communicated their knowledge to her, but it does not appear that they had the least suspicion that they could be personally answerable. *Mr. Hardy* in his letter to them, does not represent them to be in any danger ; he considers them by *Mr. Donnithorne's* bond, as being perfectly secure ; but they declined acceding to the proposal without the approbation of the *Whitmores*, and thought they would be incurring a risk by not having that approbation. If the Plaintiff *Loveday* had been advised as to what her situation really was, she must have been told that it was very doubtful whether the trustees were personally answerable ; and I have no reason to presume that, if she had been so advised, she would have resorted to the trustees, which would have made it necessary for them to enforce all the remedies they had against *Nicholas Donnithorne*.

I should have required a very strong case against the trustees, when I cannot place them again in the situation in which they would have been if she had refused her consent. It is not immaterial in such a case, that after the trust-deed she receives the interest under the deed from the trustees of *Donnithorne*. The acting under the deed, brings her assent to the deed, down to the time of her marriage. In *Brice and Stokes*, the party was held to have precluded himself from relief, because [44] he had received interest from one of the trustees. There is no difference between the receipt of interest from *Brice*, and the Plaintiff's receipt of her allowance out of the trust-fund. *Trafford v. Boehm* (3 Atk. 444).

The receiving interest under the arrangement which proceeded on the breach of trust, and was the only compensation to be received for it, is at least as strong as receiving interest from one of the trustees. *Smith v. French* (2 Atk. 243).

Can I say under all these circumstances that her consent was fraudulently obtained ?

Bill dismissed without costs, as to all the Defendants, except *Johanna Whitmore*, whose costs were to be paid by the Plaintiffs.

The cause was heard before the Lord Chancellor on the 17th, 18th, 19th, and 25th of *June 1811*, *Isaac Harris*, and *Johanna Whitmore*, not appearing ; and on the 24th of *August 1812*, his Lordship pronounced the following decree :—

That the order of dismissal made on the hearing of the cause be reversed, and that it be referred to *Mr. Thomson*, one, &c., to inquire and report in whose hands the trust-money, mentioned in the pleadings, had been since the year 1782 ; and



when the same should appear to have been placed out upon any security or securities to report on what security or securities the same was [45] placed out ; and it was ordered, that the Master should state specially and particularly the nature of such security or securities, when the same were not government or real securities, and also report in whose custody, possession, order, or disposal, the instruments of security were from time to time ; and that the Master should also inquire and report what were the acts of each of the trustees respectively, as to the receipt and placing out of the trust-money from time to time, and the possession of the securities for the same ; and it was ordered that such inquiry should be made, not only as to the acts of the trustees respectively, but as to the consent, permission, or privity, of each of the trustees respectively, to any act of the others, or other of them ; and that the Master should inquire and report whether the trust-money was at any time, and for what time, in the hands of any of the trustees without security, and whether the same was so with the consent, privity, or permission of the others, or other of them ; and in case, upon such inquiries, it should appear to the Master, that the Defendant, *William Symonds*, deceased, or *Thomas Griffith*, by any act, neglect, or default, committed any breach of trust, in respect of which they, or either of them, were or was answerable, personally, for the trust-money, or any part thereof, that the Master should state in what such breach of trust took place ; and it was ordered that the Master should inquire and report whether the Plaintiff *Loveday*, previous to her executing the power of attorney in the pleadings mentioned, had any knowledge or notice, that, by reason of such breach of trust, they, or either of them, were or was so answerable ; and it was ordered that the Master should state all special circumstances ; and for the better discovery of the matters, the parties were to be examined upon interrogatories, &c., and his Lordship reserved the consideration of costs, and of all [46] further directions, until after the Master should have made his report ; and any of the parties were to be at liberty to apply to the Court as they should be advised. Reg. Lib. B. 1811, fol. 1211.

The master's report certified, that in *June 1772*, *John Whitmore*, the father of *Loveday Walker*, intermarried with *Johanna*, daughter of *Isaac Donnithorne*, upon which marriage *Isaac Donnithorne* paid to *John Whitmore* £6000 as the marriage portion of *Johanna*, in consideration whereof, *John Whitmore* agreed to make an adequate settlement on her and her issue ; and, as a security for effecting it, executed a bond to *Isaac Donnithorne* for re-payment of the sum of £6000, with interest ; that, on the 17th of *January 1780*, no settlement having been made pursuant to the agreement, *Isaac Donnithorne*, by indenture of that date, assigned the bond, and £7900 (the principal and interest due thereon) to *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds* (all since deceased), upon trust that they should call in the money due upon the bond, and place it out upon a mortgage or mortgages of freehold lands, or upon government or other securities, in the names of themselves, their executors, &c., and pay the interest and produce to or to the use of *John Whitmore* and *Johanna* his wife, and their children, for their maintenance and education, in such shares and proportions as the trustees should think fit, and after the death of *John Whitmore*, and *Johanna* his wife, upon further trust, to pay the £7900 to and among their children, if more than one, and if but one, then to such only child, on his or her attaining the age of twenty-one years, or day of marriage ; and in the indenture was contained a proviso, that the trustees should be answerable for their own acts and defaults only, and that they should not be accountable for any loss or miscarriage, [47] by any security or securities of the trust-money, in case the same happened without their wilful neglect or default, and that they should not be accountable for any more money than what should be actually received by them or their order respectively : that in 1783 the £7900 were paid by *John Whitmore*, in discharge of the bond, and invested by, and in the joint names of *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, deceased, as trustees under the indenture of settlement, on a mortgage of a real estate in the county of *Hereford*, and the trustees received the interest of such mortgage as it became due, and paid one-fourth part thereof to *John Whitmore*, and the remaining three-fourth parts to *Johanna Whitmore* (who lived apart from her husband) for the separate use of herself and the Plaintiff, *Loveday*, who was the only child of the marriage ; that in *January 1790*, the mortgaged estate was purchased by, and conveyed (subject to the mortgage), to *John Keysall*, who thereupon gave to all

the trustees six months' notice of intention to pay off the mortgage, which notice expired in *August* 1790, and was enlarged to the 2d of *October* following, when a reconveyance of the mortgaged estate was executed by all the trustees to *Keysall*, but the mortgage money was not paid off till the 12th *January* 1791, when *Keysall* paid it at his banking-house in *London*, to *Nicholas Donnithorne*, with the privity and consent of his co-trustees, and *Nicholas Donnithorne* signed a receipt which had been previously signed by his co-trustees, *Thomas Griffith* and *William Symonds*. deceased, and indorsed on the deed of reconveyance.

The Master found by the affidavit of *Benjamin Fallows*, deceased, of the city of *Hereford*, sworn on the 11th day of *June* 1813, that soon after notice was given by *Keysall* to pay off the mortgage, *William* [48] *Symonds* informed the deponent of such notice, and on behalf of himself, and *Thomas Griffith*, directed and requested the deponent to inquire for a good mortgage or real security, by the time it was to be paid off, pursuant to the notice; that a great deal of money was offered to the deponent about that time on landed securities, and that it was then, in the deponent's opinion, and as far as his experience extended, very difficult in that part of the country, and as he believed generally in other parts of *England*, to procure eligible real securities for money; and many persons in that part of the country were content to accept of more scanty securities than were desirable, or usually thought sufficient, under the circumstances, to prevent their money from lying dead, and to avoid placing it in the funds; and that money might easily have been procured, to the best of his recollection, to a very large amount at that time at  $\text{£}4$  per cent. interest, on such securities in that part of the country; that he did not recollect whether *Thomas Griffith* personally did or did not ever speak or apply to him, about procuring a security upon that occasion, but that he considered *William Symonds* to have acted therein with the concurrence of *Thomas Griffith*, and that the Deponent was not able himself to procure an eligible real security for the money, although he made all the inquiries, and used all the endeavours in his power so to do; and he had every reason to believe, that *Wm. Symonds* and *Thomas Griffith* endeavoured, and most sincerely wished to procure a proper real security for the money, and could not succeed therein.

The Master further found that *Nicholas Donnithorne* wrote the following letter to *William Symonds*, dated the 31st of *January* 1791: "Dear Sir, I was every [49] day last week in expectation of receiving a line from you, but a letter from my daughter yesterday surprised me much; from my note-book the following is almost an exact copy of what I wrote you a fortnight ago. In consequence of the letter I received from you a long time since, I have waited with impatience for Mr. *Fallows*, but all in vain. My friends and I have been constantly making inquiries for a mortgage for Mr. *Whitmore's* money, but we have never had a prospect of more than  $\text{£}4$  per cent. and even that without any security for the punctual payment of the interest. As to the funds, there has not been a probability of late of obtaining more than  $3\frac{1}{2}$  per cent. which would have been sad starving work. As I am now receiving in bills on the *East India Company*, dated at two years, to the amount of about  $\text{£}90,000$ , I called on Mr. *Keysall*, and we were both of opinion that it would be best to lay out the money in those bills, especially as the interest is  $4\frac{1}{2}$  per cent. (paid down); and, in case of a proper mortgage offering, they may at any time be turned into cash at a week's notice. Mrs. W.'s money was  $\text{£}7900$ ; but as I had not bills to the exact sum, we took  $\text{£}100$  from the interest, and discounted  $\text{£}8000$  bills. The interest for two years, less nine days, amounted to  $\text{£}711$ ; but then you must deduct  $\text{£}100$  added to her capital, so that the interest received is  $\text{£}611$ ; half of this sum I will lay out in the best manner I can for her, and for the other part she must draw on me from time to time, as she may have occasion. The  $\text{£}8000$  bills are to remain in Mr. *Keysall's* hands till the mortgage is properly assigned; and (with your consent) they may afterwards be continued with him for Mrs. *Whitmore's* use. Mr. *Keysall* told me, his notice ended [I think] the 2d of *October*, and that I must not expect him to pay interest after that day, to which time I suppose he has settled with you. Pray, are not the trustees of Mr. *Powell* liable to some [50] part of the loss which Mrs. *Whitmore* has sustained? Mr. *Keysall* said he should write to you last week.—The above was the substance of what I wrote you on the 17th. As my mother expresses great anxiety, please to acquaint her with the accident which has happened. Mrs. D. and I sent three letters to the office the same day. Two miscarried, the other went safe; which makes the matter still more unaccountable. Please to tell me if you

have heard from Mr. *Keysall*, as he was very desirous to have the assignment made with all expedition."

The Master found, from the several affidavits and letters aforesaid, and from the answer of *William Symonds*, that after the receipt of the trust-money from *Keysall*, it was not placed out upon any mortgage of freehold lands, or in the government funds, on account of the difficulty of procuring an eligible mortgage, and the low rate of interest from the government funds, and that the trust-money, amounting (with the addition of £100 from the interest) to £8000, was possessed or retained by *Nicholas Donnithorne* for the purpose of being applied in the discounting of certain bills of exchange, drawn by him upon and accepted by the *East India Company*, payable at two years after date, agreeably to the proposals contained in his letter to *William Symonds*; and that *Nicholas Donnithorne* retained the sum of £8000 accordingly, with the consent, permission, or privity of *Thomas Griffith* and *William Symonds*, his co-trustees; but the Master did not find, from any evidence laid before him, or otherwise (except as it might be inferred from the letter of *Nicholas Donnithorne*, dated the 31st January 1791) that *Nicholas Donnithorne* ever actually laid out the trust-money, or any part thereof, in discounting the bills of exchange on the *East India* [51] *Company*, or upon any other security whatever; and therefore he was unable to state in whose custody, possession, order, or disposal the instruments of security for the trust-money were from time to time, or what were the acts of the trustees respectively, or the consent, permission, or privity of each of them to any act of the others or other of them, as to the possession of such securities. The Master also found, that *Nicholas Donnithorne* continued in the absolute possession, controul, or management of the trust-money, and the securities, if any, on which it was placed, without any interference of *Thomas Griffith* and *William Symonds*, his co-trustees, or either of them, except as to the receipt and payment of the interest by *Nicholas Donnithorne*, at the rate of  $4\frac{1}{2}$  per cent., to the parties entitled thereto under the settlement; and that no inquiry appeared to have been made by *Thomas Griffith* and *William Symonds*, or either of them, touching the bills of exchange on the *East India Company*, or the deposit thereof in any safe custody, or the receipt of the trust-money when the bills became payable, or the investment thereof in any security, from the month of January 1791 (when it was paid by *Keysall* to *Nicholas Donnithorne*), until the 23d May 1795, when *William Symonds*, on the behalf of himself and *Thomas Griffith*, wrote the following letter to *Nicholas Donnithorne*:—"Dear Sir, Mrs. *Whitmore* was so kind as to communicate the contents of your letter relating to our trust—I had yesterday the pleasure of dining with Mr. *Griffith*, when we had some conversation respecting our trust, and it was our joint opinion that the most beneficial step that could be taken is to invest the sum in the funds, which, from the present price, will produce nearly £5 per cent., with the prospect of an increase of the principal; therefore, Mr. *Griffith* [52] hath requested me to signify our earnest wish and desire that you will, as soon as you can conveniently, invest the whole sum in the funds, in the names of the three trustees.

The Master further found, that, in consequence of the last-mentioned letter, *Nicholas Donnithorne*, either directly, or through *John Whitmore* (his brother-in-law), requested *William Symonds* and *Thomas Griffith* to permit the trust-money to remain in his hands, and proposed to give a mortgage for it upon some estates in *Cornwall*, of which he and his son, *Isaac Harris*, were seized, and, in the mean time, to give the joint bond of himself and his son for the money, until such mortgage could be effected; that *William Symonds*, on behalf of himself and *Thomas Griffith*, wrote the following letter to *Nicholas Donnithorne*:—"Dear Sir, this morning I had an opportunity of seeing Mr. *Griffith*, when he called on Mr. *Whitmore*, who communicated the contents of your last letter, from which we find it very much your wish for the trust-money to remain in your hands: therefore it is by no means our intention to subject you to any inconvenience; and, as you are prevented from going into *Cornwall* so soon as you proposed, he requested me to express our joint desire that a bond may be prepared immediately for the whole sum, including your brother and son in it, who, you mentioned, would readily comply in the business, which would afford you time for adjusting the proposed security. You may transmit the bond to Mr. *Griffith* or me, which is most agreeable." To which *Nicholas Donnithorne* wrote the following answer:—

"London, 1st July 1795. Dear Sir, my son being absent for a few days, it was not in my power to pay immediate attention to your letter. Enclosed you have the bond signed by myself and *Isaac*. How you came to name my brother I cannot imagine. We are very friendly when we [53] meet; but I am sorry to say, ever since my father's death, we have not been upon such terms as would justify my making the request you mentioned. I shall now very shortly finish my account for the season at the *India House*, and then I shall prepare for my journey into *Cornwall, &c.*" The Master found, that the bond alluded to in the last-mentioned letter was executed by *Nicholas Donnithorne* and *Isaac Harris*, dated the 19th of June 1795, to *William Symonds* and *Thomas Griffith* therein described as two of the trustees under the will of *Isaac Donnithorne*, then deceased, in the penal sum of £16,000, conditioned for payment of £8000 and interest, on the 29th December 1795; and that *Nicholas Donnithorne* transmitted this bond in his letter of the first July 1795, to *William Symonds*; which bond appeared to have been the first and only security ever given for the trust-money, since the same had been paid by *Keysall* in January 1791.

The Master also found, that *Loveday Walker* attained the age of twenty-one years on the 21st of July 1795, whereby she became entitled to a vested interest in the trust-money, to her own absolute use, after the death of her father and mother, who were entitled with her to the interest thereof, during their lives, under the trusts of the settlement; and that on the 21st of June 1796, *William Symonds*, on behalf of himself and *Thomas Griffith*, wrote the following letter to *Nicholas Donnithorne*:—"Dear Sir, as you have not favoured Mr. *Griffith* or me with a line respecting the further security of Mrs. *Whitmore's* money, makes me conclude you have some intention of seeing this quarter, and bringing it with you. From a late conversation with Mr. *Griffith*, he seems much dissatisfied relating to it, and hath requested me to signify his sentiments thereon; that it is his urgent wish, that it might be im-[54]-mediately invested in the funds. I hope and trust that you will comply with his wishes, or, if more agreeable to you, to transmit without delay landed security, &c." The Master found that it did not appear, from any evidence laid before him, that any other correspondence passed between the trustees respecting the trust-money, or the proposed mortgage, prior to the 26th of September 1796, when *Nicholas Donnithorne* died, without having executed such mortgage, or repaid any part of the trust-money; and the Master was of opinion, that *William Symonds* and *Thomas Griffith* did commit a breach of trust, in respect of which they were answerable personally for the trust-money; and that such breach of trust consisted in their having permitted the trust-money to remain in the possession, or under the absolute controul and management of *Nicholas Donnithorne*, without any security, from January 1791 to July 1795, and in their having afterwards permitted the trust-money to remain in the hands of *Nicholas Donnithorne*, from July 1795 to the 26th of September 1796, the time of his death, upon the joint bond of himself and *Isaac Harris*. And the Master did not find that *Loveday Walker*, previous to her executing the power of attorney, had any knowledge or notice, that, by reason of such breach of trust, *William Symonds* and *Thomas Griffith*, or either of them, were or was so answerable.

To the report was annexed a monthly statement of the prices for sale of bank three per cent. consols, in the years 1790-1795.

*William Symonds* (deceased) and *John Lilly* took three exceptions to the report: the first, that the Master had certified that he was of opinion that *William Symonds* and *Thomas Griffith* did commit a breach of trust, in respect of which they were personally answerable for the trust-money, and that such breach of trust consisted [55] in their having permitted the trust-money to remain in the possession, or under the absolute controul and management of *Nicholas Donnithorne*, without any security, from January 1791 to July 1795, and in their having afterwards permitted the trust-money to remain in the hands of *Nicholas Donnithorne* from July 1795 to the time of his death, upon the joint bond of himself and *Isaac Harris*: whereas the Master ought to have certified that *William Symonds* and *Thomas Griffith* did not commit such breach of trust, inasmuch as the trust-money at first came into the hands of *Nicholas Donnithorne*, and afterwards remained in his possession, or under his absolute controul or management, without the knowledge, consent, or privity of the Defendants, inasmuch as the bond was accepted

by them only as a security in the mean time, and until some real or other sufficient security could be obtained : The second, that the Master had certified that he did not find that *Loveday Walker*, previous to her executing the power of attorney, had any knowledge or notice that by reason of such breach of trust, *William Symonds* and *Thomas Griffith*, or either of them, were or was answerable personally for the trust-money, or any part thereof ; whereas the Master ought to have certified, that *Loveday Walker* had, previous to the time aforesaid, sufficient knowledge or notice of all the facts from which it was or might be inferred that *William Symonds* and *Thomas Griffith*, or either of them, were or was so answerable : The last, that the Master had not stated all the special circumstances of the case, from which it might be inferred either that *William Symonds* and *Thomas Griffith* were not so answerable, or that *Loveday Walker* had such knowledge or notice as aforesaid, and particularly had not set forth her letters of the 8th of *May* 1796, and the 19th of *December* 1796 ; and also that the [56] Master did not state, that previously to her executing the power of attorney, she was attended by the solicitor for *Isaac Harris*, who, in the presence of Sir *William Curtis*, a personal friend of her and her family, read to her the trust-deed in the pleadings mentioned, and fully explained to her its provisions, so far as it affected her own interest, and that she was not called upon to sign, and did not in fact sign the power of attorney, until the day following that upon which the trust-deed was so read and explained to her ; and also that the Master had not in like manner set forth her letter of the 14th of *February* 1797, and had not stated that *Nicholas Donnithorne* (the co-trustee of the Defendants) was brother to the Defendant *Johanna Whitmore*, and uncle to *Loveday*, and a merchant of great eminence, residing in *London*, and as such constantly applied to and corresponded with by *Johanna Whitmore*, and by *Loveday* after she came of age, on all matters of business, and especially on all matters connected with the trust property ; and that *William Symonds* and *Thomas Griffith* (deceased) were then in advanced life, residing in the country, at a considerable distance from *London*, which they seldom or never visited, and wholly unacquainted with the general habits of business ; and that it did not appear that they withheld from, or neglected to give to, *Loveday* any information in their power respecting the state of the trust property.

In *January* 1816, the Defendant *William Symonds* died, and the suit was revived against his executors, *William Symonds* and *Thomas Cook*.

*April* 2, 8, 11, 16, 18. The cause was now heard on exceptions, and for further directions.

[57] Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Treslove*, and Mr. *Merivale*, for the Defendant, in support of the exceptions. (Note : The detailed statement of the case, which was thought necessary fully to explain the effect of the judgment and decree, may dispense with a more particular report of the argument.)

The object of the bill is to rescind a transaction to which the Plaintiff, Mrs. *Walker*, was a party, with full knowledge of all the circumstances, and, consequently, to charge the trustees with a breach of trust, when, by the effect of that transaction at this distant period, they can never be restored to the rights and remedies which they previously possessed. The facts were all known to the Plaintiff ; the legal consequence, that the trustees were responsible to her for a breach of trust, could not be communicated to her by them ; they knew it not themselves. Whatever loss occurs is the effect, not of taking the bond of *Nicholas Donnithorne*, which was confessedly a breach of trust, but of relinquishing it, as one term of that arrangement which the Plaintiff expressly sanctioned.

They cited *Brice v. Stokes* (11 *Ves.* 319), *Joy v. Campbell* (1 *Sch. & Lef.* 328), *Doyle v. Blake* (2 *Sch. & Lef.* 231), *Bacon v. Bacon* (5 *Ves.* 331), *Balchen v. Scott* (5 *Ves.* 678), *Trafford v. Boehm* (3 *Atk.* 440), *Smith v. French* (2 *Atk.* 243).

Mr. *Hart*, Mr. *Agar*, Mr. *Roupel*, and Mr. *Collinson*, for the Plaintiffs, supported the report for reasons stated in the judgment.

During the argument, the following remarks were made by [58] the Lord Chancellor.

The investment of the trust-money in *East India* bills, as stated in the power of attorney, is no breach of trust ; but as stated in the report, it is. The representation of the report is, that two of the trustees permitted their co-trustee to draw bills on the *East India* Company, payable not to them, but to him ; and it

is extremely difficult to maintain that that is not a breach of trust, if done with their consent, as in effect placing the amount under his controul. The money is then received by him, and converted to his own use ; it might be, that neither the receipt nor the conversion by him was a breach of trust in him : but whether studiously, or from whatever motive, the power of attorney recites a breach of trust in him, making no mention of a breach of trust by them.

It is the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust-fund ; all the information of which they are, or ought to be, in possession : a trustee may involve himself in serious difficulty, by want of the information which it was his duty to obtain.

The questions are, first, whether the power of attorney accurately stated all the facts ; next, supposing that it did so state them, and that there was no other instrument, whether the trustee and the *cestui que trust* were bound to know the law ; but the latter question cannot arise unless the trustee and the *cestui que trust* were on equal terms. The representation contained in the power of attorney must be considered, recollecting the reference to *Fallowes*, the attorney of the trustees, to fill up the blanks, which he did, as the representation of those whose attorney he was. That instrument is studiously prepared to express that there had been no breach of [59] trust till the money came into the hands of *Nicholas Donnithorne* ; but I never saw a case in which there was a plainer breach of trust by the act of the trustees, in placing the money under the controul of their co-trustee.

Till her marriage, the Plaintiff, Mrs. *Walker*, had no property sufficient to enable her to institute a suit, depending entirely on the discretion of the trustees.

*April 21.* The Lord Chancellor [Eldon]. This case, which comes before me on exceptions to the Master's report, has been argued as if on farther directions ; and it is extremely difficult, regard being had to the nature of the exceptions, to discuss the matter in any other way. The duty which I mean now to discharge is to state what occurs to me on the case, considered as a case heard on farther directions. I do not see how it is possible to support the exceptions. The comprehensive view which I have taken of the case, and a reference to my own notes, render it proper to say, that if the parties desire to address me, by one counsel on each side, I shall be ready to hear them.

The bill is filed to charge the representatives of certain trustees with the consequences of a breach of trust, and to render them responsible for a sum of about £8000. I take notice at the earliest moment, that whether the trust-money was £7900 or £8000, a circumstance immaterial in many respects, may be material in this respect, that the person who was *cestui que trust* of the money seems not very accurately informed whether it [60] was one sum or the other, or whether it was derived under a settlement or a will.

I have been furnished with a copy of the judgment of the *Master of the Rolls* (3 *Swans.* 40), and I have also read the decree embodying that judgment in the form and language of the Court. I observe that the record states, that when the cause was heard before the *Master of the Rolls*, no documents were read except three letters ; no part of a correspondence most material to be considered. I do not differ from the principles which the *Master of the Rolls* adopts in his judgment.

In proceeding to consider the facts, I am first bound to say, that if, when this cause was heard before me, I was wrong in directing a reference to the Master to make the inquiries which the decree specifies, still the cause is in such a state that I am bound to consider myself right ; if wrong, the course of proceeding was by rehearing or appeal. I will add, however, that looking again at the record, and the evidence which was read to me on the hearing (I see by the decree that all the correspondence and other documents were read), looking at the pleadings, and recollecting the principles on which the Court must act, that it proceeds *secundum allegata et probata*, not permitting a new case, I think that the record not only justifies but requires the relief which I gave.

The *Master of the Rolls* observes, that the foundation of the Plaintiff's case is that the consent of *Loveday Walker* was improperly obtained ; that the objection is that it would be impossible to replace the parties in the situation in which they were when the deed was executed ; but that it would not therefore follow, if the [61] deed had been improperly obtained, that the Plaintiffs were precluded from relief. This observation applies to the effect of the transaction of the trustees, in signing the deed of arrangement with the representatives of *Nicholas Donnithorne* under the

authority, if they had the authority, of the Plaintiff *Loveday*. If there is any proof of the day on which the deed was executed, it has escaped me. (Note: It was stated from the bar that the deed appeared to have been executed on the *Wednesday* preceding the 9th of *April* 1797.) The day is extremely material, for supposing the power of attorney exposed to fewer objections than I think, still it was in its nature revocable; and the circumstances before the 11th of *February*, when *Hardy* attended *Loveday Walker*, must be recollected. The observation of the *Master of the Rolls*, that the objection that the Defendants are placed in a different situation, would not prevent relief, I understand thus, and I agree in it; that though the *cestui que trust* has done an act which places the trustee in a different situation with regard to relief against third persons, yet if the circumstances are such that the act may be considered as the trustees' own act, rather than the act of the *cestui que trust*, it will not bar relief.

The *Master of the Rolls* adds, the trustees "would probably not have assented to such a deed as has been executed." The accuracy of that proposition remains to be proved.

I agree with the *Master of the Rolls*, that there is no pretence for a charge of fraud; because whatever ground there may be in any case, I say not that in the present case there is any ground, to suspect imposition, it ought not to be imputed unless clearly proved. But whether there was communication from the trustees to the Plaintiff *Loveday*; whether any personal influence was at-[62]-tempted to be used for inducing her to accede to the proposed arrangements, are questions that cannot be determined without adverting to the transactions in which *Hardy* was engaged; and I take the liberty of observing that it was impossible for the *Master of the Rolls* to attain a satisfactory conclusion on so little evidence as was before him.

The next proposition adopted by the *Master of the Rolls* is, that there was no concealment. Concealment is of different natures; an intentional concealment, and an actual concealment where there may be an obligation not to conceal, even if disclosure is not required. But the view in which it appears to me that this case must be examined is this; and the questions which it raises are, first, whether a trustee is not bound to communicate facts which he knows relative to the disposition of the trust-money; next, whether, supposing he is not bound, yet in the circumstances of this case, *Hardy* and *Fallowes* are not to be considered as agents of the trustees, and also, as their agents, taking on themselves to make representations and give information; whether they have not said to the *cestui que trust*, we state to you certain circumstances; you know nothing of many other circumstances which we might have communicated; you act on that information, and we are now entitled to say, you shall require no farther information from us.

The principles on which the liability of trustees must be decided cannot be mistaken; though it appears from a book for which the profession is this day indebted to Mr. *Eden*, that Lord *Northington* held doctrines different from those on which we have been accustomed to proceed. The judgment in *Harden v. Parsons* (1 *Eden*, 145) is, [63] in more respects than one, a curious document in the history of trusts as administered by this court. Lord *Northington* says, "the lending trust-money on a note is not a breach of trust, without other circumstances *crassæ negligentiae*. That is plain from the case of *Ryder v. Bickerston*, where a sum of money was left to be placed out on security, with the best interest that could be got. The executor had lent it on a note without interest. Did the Court say that it was a clear breach of trust to lend it on a personal security? no." The fact is, that the Court said, yes; declaring that the trustee having placed out the money neither at interest nor on security, had committed a direct breach of trust in both respects. (1 *Eden*, 149, n. See *Ryder v. Bickerton*, 3 *Swans*. 80, n. *Adye v. Feuilloteau*, 3 *Swans*. 84, n.) Lord *Northington* proceeds to state a most material circumstance in the case; a "deliberate, uniform, and steady confirmation." The editor of this valuable work has taken the trouble to subjoin a great variety of cases, all of which contradict the doctrine that investing trust-money on personal security is not a breach of trust. (2)

Without going through all the cases, it is obvious, that *prima facie* there is this distinction between executors and trustees; that one executor can, and one trustee cannot, give a discharge; and it may frequently happen, as in *Brice v. Stokes* (11 *Ves*. 319) it actually happened, [64] not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in

which all the trustees join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the controul of the money; that rule is now altered: whether the alteration is wholesome may be a question. It may be laid down now, as in *Brice v. Stokes*, that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule that joining alone does not impose responsibility, scarcely two Judges agree.

It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees: but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is on the one hand, to secure the property of the *cestui que trust*; and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude.

In this case, the effect of the whole correspondence is very different from the effect of that part of it which was read to the *Master of the Rolls*; and it becomes necessary, therefore, minutely to consider the whole. In December 1795, *Loveday* wrote a letter to the trustees, [65] requesting information and a provision; the trustees allowed her £100 *per annum*. She afterwards wrote to inquire the effect of her grandfather's will. The materiality of that circumstance, though much affected by what passed afterwards, consists in this; that the bond executed by *Nicholas* and *Isaac Donnithorne*, is not executed to the trustees under the will: it is executed to *Griffith* and *Symonds* as trustees, but in fact they were not trustees under the will. It becomes material, recollecting *Hardy's* letters, to know whether they had any claim under the will.

In September 1790, *William Symonds* writes to *Keysall*, acknowledging the receipt of a sum on account of the interest of the mortgage, and stating that *Fallowes* had provided a security for the principal, which would be ready before *Keysall's* notice expired. In examining the evidence to show the activity of the trustees, and of *Fallowes*, who was their agent, to provide a proper security for the trust-money, I have not found that *Fallowes* has given any explanation of this circumstance, or even mentioned it.

Between January 1791 and May 1795, I find no correspondence proved in the cause; no communication when the bills were paid in 1793; no inquiry what had become of the money, till the 23d of May 1795.

When this cause was reheard, following what the *Master of the Rolls* intimated he should have thought right if he had given a different judgment, I directed an inquiry relative to the period between 1791 and 1795. The case comes back with a report stating a clear breach of trust in leaving the trust-fund in the situation represented, from 1791 to 1793, and [66] from 1793 to 1795. The report states that the money was laid out, with the consent of the trustees, in *India* bills, payable to *Nicholas Donnithorne*; a palpable breach of trust, by placing the fund under his controul, secured by little more than a promissory note payable to himself. It was probable that in 1793 he would receive the money, and it would be lodged in his hands; and I repeat, that although the Court in directing an inquiry, will proceed as favourably as it can to trustees who have laid out the money on security from which they cannot with activity recover it, yet no judge can say that they are not guilty of a breach of trust, if they suffer it to lie out on such a security during so long a time. Here is a distinct breach of trust; and I lay the more stress on it because it has been represented in argument that the chief breach was the laying out the money on bond.

The Plaintiff *Loveday*, who appears to have had nothing beyond her expectations under this settlement, who was living separate from her father and mother, themselves separated, was so little informed of her rights, that she knew not whether she was entitled under a will or under a settlement.

\* Whether the letters which passed between *Nicholas Donnithorne* and his co-trustees relative to the investment of the fund were communicated to the *cestui que trust*, appears not; I therefore take it for granted that they were not communi-



cated. Between *July 1795*, and *June 1796*, I do not find any transaction, though the bond was payable at *Christmas 1795*, except three letters.

Receipt after receipt by the Plaintiff *Loveday* of her [67] annual allowance is in evidence: but will any one contend that this sort of receipt, while she yet knew nothing of the breach of trust, can amount to acquiescence?

It appears that in *November 1796*, his co-trustees were pressing for security from *Nicholas Donnithorne*, and giving the strongest evidence, that from regard either to the situation of their *cestui que trust*, or to their own, they thought themselves bound to use exertions in obtaining this money from him.

*Hardy*, in his letters, assumed to represent to the Plaintiff *Loveday*, that it was of no consequence whether she executed the deed of composition; and while it has been gravely contended before me, that he supplied her with ample information concerning the trust-money, it appears that long after that time he was himself seeking information, as knowing nothing of it; and in every letter he holds out the expectation of punctual payment of interest.

In *November 1796*, the matter stood thus: The trustees had been guilty of a breach of trust, in permitting the money to remain on bills payable to *Nicholas Donnithorne* alone, and in leaving the state of the funds unascertained for five years; they had the bond of *Nicholas Donnithorne*, who was dead, which affected his assets as a specialty debt; whether they had a judgment no one knows; they had also a claim on *Isaac Donnithorne*, in his own right and as his father's executor. I knew enough of Mr. *Hardy* to be satisfied that he must have been aware that without the signature of the Plaintiff *Loveday*, no deed executed by the trustees could have discharged *Isaac Donnithorne* from a demand on behalf of the *Whitmore* family; that her consent was necessary to discharge the trustees, and that without it, *Isaac* [68] *Donnithorne*, as the representative of a deceased trustee, could never be discharged.

There is another observation, material towards ascertaining whether the Plaintiff *Loveday* understood her situation. The trust-deed relates to a person engaged in great commercial concerns in *London*; and I find in it a proviso usual in such deeds, that no one who has signed it shall thereby be taken to discharge any person but the parties to that deed; now, if the Plaintiff *Loveday* had been informed that *Griffith*, *Symonds*, and *Isaac Donnithorne* were liable, and asked whether she chose to release them by signing the deed, more especially when pressed by *Fallowes*, representing that all the creditors thought it for their satisfaction, is it to be supposed that she would have placed herself in the situation of releasing other persons, when no other creditor executed any such release?

It appears that in *December 1796*, she knew that the money was in the hands of *Nicholas Donnithorne*; but whether she knew that it was there by breach of trust is a different question. The letter of the trustees, dated the 24th of *December*, in reply to her inquiries, merely refers her to *Hardy*, and then he is their agent for the purpose of making representations.

In a very material letter of the 20th of *January 1797*, to *Symonds*, *Hardy*, whom they had made their agent for the purpose of communication to the Plaintiff *Loveday*, applies through them to *Fallowes* for information of the circumstances under which the money came into the hands of *Nicholas Donnithorne*, the most important subject of that communication.

I admit that if these transactions had been fairly re-[69]-cited in the power of attorney, there would be no question in this case; having regard that the protection of the Court to infants is continued after they have attained 21, until they have acquired all the information which might have been had in adult years.

In a subsequent letter, *Symonds* directs *Hardy* to use his utmost endeavours to prevail on the Plaintiff *Loveday* to execute the deed.

We come now to the acts of *Hardy* in the performance of his mission. It appears that on the 11th of *February 1797*, *Hardy* attended the Plaintiff *Loveday*, then Miss *Whitmore*, with the draft of the trust-deed, and a paper of observations, written, as I understand, by Mr. *Fallowes*; and it becomes material to attend to the whole of that paper, as supplying very strong observations in favour of the Plaintiff, and, it is but justice to add, as laying the foundation, so far as concerns the allowances to be made to the *Donnithorne* family, of the most effectual point of defence in the present case. This is the representation of the trustees, drawn by *Fallowes*, and

delivered by *Hardy*, who must have known that it was the interest of the trustees to conclude this arrangement, otherwise they acted at the risk of making a communication which would not be complete, and where the Plaintiff would not have acceded to the arrangement if the communication had been complete. It is, I admit, very unfortunate that trustees acting without a supposition of liability, are afterwards made liable; but it would be impossible to maintain this proposition, that, because trustees are not aware that they have committed a breach of trust, they are not responsible. It is said, that Miss *Whitmore* did not apply to them to know what they had done; my answer is, that, without waiting for an application, they made to her an imperfect representation. [70] They take on themselves by their agents to make a representation, not being required so to do; and that representation is not adequate to the circumstances of the case. There had been much correspondence with Mr. and Mrs. *Whitmore*, not one syllable of which was communicated to Miss *Whitmore*.

If there were a clear statement of a breach of trust on this power of attorney, I was wrong in directing an inquiry.

To a certain extent, *Donnithorne's* family have had the benefit of this arrangement; they have had the benefit of a trust-deed executed otherwise than it would have been executed, if Miss *Whitmore* had considered only her own interest. It is immaterial whether the instrument was written or engrossed in the country; but it was drawn by *Fallowes*, because *Hardy* had not sufficient information to know how to draw it.

The recitals in the power of attorney are such as, in all human probability, for I can carry it no farther, *Fallowes*, at the desire of *Hardy*, had thought proper to insert relative to the manner in which the money had been disposed of. It has been insisted here that Miss *Whitmore* must have known that which I am sure *Hardy* himself would say he knew not.

I stop not to inquire, whether the investment of the money in *East India* bills was a breach of trust; but it is clear, that this power of attorney states a different breach of trust; stating nothing of the bills being payable to *Nicholas Donnithorne* only, or, when the money was received, it proceeds to state that he, "in breach of his trust," applied the money to his own use. [71] I should be glad to know whether this is information which would have communicated to the most experienced man in this court the circumstances of the case; or, whether any one could hesitate to conclude, that the statement purported that there was no breach of trust, until the receipt of the money by *Nicholas Donnithorne*, omitting the period from 1793 to 1795?

It was necessary to recite the bond; and I do not mean to say that the mention of the bond would not satisfy the ordinary notion of reciting it; but the materiality of the recital consists in this, that it refers the bond to the indenture of settlement, while the bond states the money to be due to the obligees as trustees under the grandfather's will. It is impossible not judicially to infer the purpose of *Fallowes* in drawing this instrument, and I will add, of *Hardy*, if he permitted himself to give instructions for preparing it, without farther information. I cannot doubt whether Miss *Whitmore* understood her claims; it is clear that *Curtis* did not understand the deed.

The *Master of the Rolls* seems to have thought, that the only breach of trust was taking the bond; that was a breach of trust; but he says, and I think rightly, that if he had not found other grounds for dismissing the bill, inquiry would have been necessary. I agree with the *Master of the Rolls*, that inquiry might, on the principles of this court, have discharged the trustees in given circumstances from breach of trust. If, without previous participation, they, in June 1795, had found that they, being implicated in no breach of trust till that time, had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts, instead of [72] filing a bill in this court against him, which, perhaps, might have destroyed his means of giving security, I should have hesitated long before I charged them, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage, instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee; in such circumstances. I should readily agree

with the *Master of the Rolls*. But when they take no steps on the arrival of the period, at which the bond becomes payable, and choose to communicate to the *cestui que trust* that they have taken a bond, but not what is the effect of it, that is not a communication which can entitle them, in this stage of the cause, to insist on circumstances of which, if inquiry had been directed, they might possibly have availed themselves for their protection.

This young lady, who had sought information from her trustees, what were her interests under her grandfather's will, was so little acquainted with her rights as to suppose that she claimed as legatee under a will, while her real title was as a purchaser under a settlement. In the house of Mr. *Sherson*, nearly connected with *Isaac Donnithorne*, pressed both by her father and mother, with whom it appears that communications had been made; having no other property, for so the trustees state; with an offer of £50 when she is solicited to execute this instrument, and a promise that the arrears of interest shall be punctually paid after the execution; compelled, on not executing, to leave the house of *Sherson*, and because she would not act under the suggestion of her father, become the object of his bitter reproach; in such circumstances, I desire to know whether, but for the allowances, any question could be made in this case?

[73] Where the trustee and *cestui que trust* are equally informed, or the *cestui que trust* requires no information, desiring to speak most guardedly, I think that the doctrine of this court would not protect the trustee; but supposing that it would, as in *Brice v. Stokes*, that case is not applicable to this. I cannot allow to these trustees the benefit of the observation, that information was not required; they volunteered to give information, and gave it in a way which was calculated to induce the *cestui que trust* to believe that it was all that was to be given. The *Master of the Rolls* has recorded his opinion, that if any fraud or surprise was practised, the execution of the power of attorney would not have barred relief. He who, undertaking to give information, gives but half information, in the doctrine of this court, conceals. The authority being in its nature revocable, the mere signification of a purpose not to be bound by it was sufficient. The receipt of interest is not binding, unless it can be shown that she was previously apprised of all the circumstances. The trustees have had the opportunity of explaining the case before the Master, and have proved nothing; on the contrary, the report brings forward a case of breach of trust, such as was not thought before, and such as authorises me to say that she knew not how the money was disposed of after it was received in 1793. Payments were made to her at the time, for the purpose of procuring her to execute what would be useful to *Isaac Donnithorne*, under the pretence that it would be useful to her, placing before her eyes money which she was to receive in case she signed the instrument; she at that time having nothing for her support except what she could acquire through all the difficulties which encumber a *cestui que trust*, to whom the trustees have not done their duty.

[74] This is a case of great importance to trustees in general, and illustrates the necessity of attending to every word in transactions of this nature. It is one of the cases which convince me at a mature period of my judicial life, that it is impossible to comprehend such questions without minute examination of every fact, and reference to all the documents.

The Plaintiff *Loveday Walker* is entitled to relief, and the trustees must stand in her place under the deed.

April 25. Mr. *Hart* proposed, that the decree should declare the trustees personally liable for the trust-money; leaving them to proceed for their indemnity against the estate of *Nicholas Donnithorne*.

Sir *Samuel Romilly* objected, that it was unprecedented to allow a *cestui que trust* seeking compensation for a breach of trust to select two of the trustees, and prosecute no claim against the third; and that the Defendants could effectuate their equity only by means of the Plaintiff.

May 26. The Lord Chancellor. The result of the case is, that the Plaintiff *Loveday Walker* has a demand against both the Defendants for the amount due; and that they must take their remedy against those who made the composition, to recover it as their own debt. The question is, whether this is not to be considered as a case of concert between *Isaac Harris* and the two trustees: the consequence of which is, that they must arrange with each other as they can, [75] making up to

the Plaintiff the amount. The compensation cannot be rescinded, unless the Plaintiff files a bill against all the parties to that deed : and the single question now is, whether in all the circumstances of this case, and having regard to general principles, the Plaintiff was at liberty to abandon her remedy under the trust-deed, and charge the surviving trustees personally !

June 12. The Lord Chancellor [Eldon]. When three trustees are involved in one common breach of trust, a cestui que trust suffering from that breach, and proving that the transaction was neither authorised nor adopted by him, may proceed against either or all of the trustees. The present case comprises this peculiarity, that *Isaac Harris*, being the son and representative of a deceased trustee, by deed delegates all his own fortune and the assets of his father, to the payment of debts, including the trust-fund : and by the form of the arrangement, he becomes the debtor of the co-trustees, and they become his creditors : if with the approbation properly obtained of the Plaintiff *Loveday Walker*, she has no reason to complain. Her demand against the assets of the deceased, it appears to me, might be enforced under the trust-deed, but then all persons interested in it must be parties to the suit. The real question is, whether on this record in its present state, supposing the Court right in declaring the two surviving trustees guilty of a breach of trust with the deceased trustee, the Plaintiff is not entitled to abandon all benefit of the trust-deed, and charge the survivors with breach of trust, and also the representative of the deceased ; to say that the assets have, without her concurrence, been placed in such a state [76] that she is not bound to pursue them, but may leave the survivors to indemnify themselves thence ! If she abides by the trust-deed, she must abandon her claim against the survivors.

June 13. The Lord Chancellor. I have again read the papers, and the view which I take of the case is this.

The first question is, with reference to the exceptions, whether there was a breach of trust ? It clearly appears to me that there was ; and the result is, that *Nicholas Donnithorne* and the other two trustees were responsible for the consequences of that breach of trust. The defence of those who represent the co-trustees was founded in this, that the Plaintiff Mrs. *Walker* had given to them authority, by the power of attorney, to conclude the compromise with *Isaac Harris*, the representative of *Nicholas Donnithorne*, and that she must be considered in their persons as a creditor, not on the assets of *Nicholas Donnithorne*, but on the funds provided by the trust-deed, to which, as it was insisted, she was a party. On the former occasion I reviewed the whole evidence and correspondence for the purpose of stating the grounds of my opinion, that she could not be considered as a party to that instrument, so as to exclude her from a demand against the trustees : and I particularly adverted to the circumstance, that the other parties to that deed saved their rights against third persons. It is necessary for me to point out to those whose duty it may be to review my judgment, that I arrived at this conclusion after an examination of all the circumstances of the case.

[77] The principal difficulty was to do justice among the trustees and their representatives. *Nicholas Donnithorne*, if the trust-deed had not been executed, was first liable : but the consequence of that was no more than this, that Mrs. *Walker* would be bound to place the other trustees in her situation, that they might have every remedy which she might have had against him. The difficulty arises from this, that the trust-deed has made all the property of *Donnithorne* a trust-fund for the creditors executing that deed, and has therefore taken the property out of the situation in which it would otherwise have stood as his real or personal assets. But if Mrs. *Walker* is compelled, in consequence of the execution of that deed, to pursue his assets under all the difficulties which that deed has interposed, by which, in the circumstances of the case, she is not bound to abide, the question is, whether she is not entitled to an equity of this kind, to say to the surviving trustees that the bond of *Nicholas Donnithorne* is discharged as a bond, not by her act but by theirs, and to require them to replace the trust-fund, leaving them to seek justice through the means provided by this deed ? The Court is justified in holding, that they would have no reason to complain, having constantly stated that, holding the bond for Mrs. *Walker*, they were consulting her interests, and doing the best that could be done for her in executing the trust-deed.

A declaration must be inserted in the decree, that all demands which the Plaintiff

Mrs. Walker may possess under the trust-deed, or against the assets of *Nicholas Donnithorne*, as assets, the surviving trustees will be entitled to enforce for their own benefit.

[78] July 6. The Lord Chancellor. Either the bill must be dismissed as against *Harris*, or some mode must be provided of proceeding between the Defendants.

The assets of *Nicholas Donnithorne* must be considered as assets, and as subjects of the trust-deed; in this suit, they cannot be treated as subjects of the trust-deed, because the trustees are not before the Court; nor as assets, because under the trust-deed, they are the subjects of that deed. It appears to me, that the remedy to which the Plaintiff Mrs. Walker is entitled, is to charge the two Defendants personally, leaving them to proceed over for their indemnity; but that they cannot do in this suit. (3)

[79] The decree ordered, that the exceptions be over-ruled as insufficient, and that the sum of £5 deposited with the register, &c., be paid to the Plaintiffs; and his [80] Lordship declared, that the late Defendant *William Symonds*, and *Thomas Griffith*, were proved to have committed a breach of trust, in respect of which they were [81] answerable personally for the trust-money in question; and that, under all the circumstances of the case, the Plaintiff *Loveday Walker* ought not to be considered as [82] having relinquished or barred herself from the right to consider them as being so answerable for the said breach of trust, or as having bound herself to accept [83] such provision only, in respect of the trust-money, as she or *Wm. Symonds* and *Thomas Griffith* were or might be entitled to under the trusts of the inden- [84] tures of lease and release of the 24th and 25th days of March 1797, but that, under such circumstances, either the Plaintiff *Loveday Walker*, under the true con- [85] struction of the said indentures, remained entitled to charge *William Symonds* and *Thomas Griffith* personally, or, if she was not so entitled under such con- [86] struction, she was not bound to take the benefit of such provisions, and relinquish her demands against them personally on account of such breach of trust. [87] And his Lordship declared, that *William Symonds* and *Thomas Griffith*, having made themselves, by having executed the said indenture of release, and other acts, [88] creditors of the Defendant *Isaac Harris*, as in the said indenture of release is mentioned, and the Plaintiff *Loveday Walker* not having been bound to accept the benefit of their demands, as such creditors, the Plaintiffs were entitled to have such payment made out of, and such account directed, as thereafter was ordered and directed, as to, the assets of *William Symonds* and *Thomas Griffith* respectively, without compelling an account to be taken of the assets of *Nicholas Donnithorne*, deceased, which appear to be included in the trusts of the said indenture of release, or enforcing in the said suit any demand which by the Plaintiffs, or on their behalf, could be enforced under the trusts of that indenture; but with such liberty reserved to the respective representatives of *William Symonds* and *Thomas Griffith* as therein- after provided. And it was ordered that it be referred to the Master to take an account of what remained due to the Plaintiffs for principal and interest of the trust-money in question; and that the Defendants *William Symonds* and *Thomas Cooke*, out of the assets of the late Defendant *William Symonds*, deceased, and the Defendant *John Lilly*, out of the assets of *Thomas Griffith*, pay what the Master should find to remain due for principal and interest on taking the said account, into the bank, with the privy of the accountant-general, [89] to be there placed to the credit of the cause, "the Plaintiff's account"; subject to the further order of the Court; and the Plaintiffs were to be at liberty to make such application to the Court touching the same as they should be advised. And, in case the Defendants *William Symonds* and *Thomas Cooke* should not admit assets of *William Symonds*, deceased, sufficient for the purpose aforesaid, then they were to come to an account before the Master for his personal estate come to their or either of their hands, &c.; and unless the Defendant *John Lilly*, should admit assets of *Thomas Griffith*, it was ordered, that the Master do take an account of his personal estate, come to the hands of *John Lilly*, his executor, &c.

And his Lordship declared, that, in case after having satisfied what they were liable to pay under the directions therein before contained, the Defendants *William Symonds* and *Thomas Cooke* and *John Lilly*, as such representatives respectively as aforesaid, or any representative of *Symonds* or *Griffith* respectively, should be advised to make any claim or demand against the assets of *Nicholas Donnithorne*,

deceased, or against the trust-premises or the trustees, in the said indenture of release contained and named, or against the Defendant *Isaac Harris*, which it should be necessary, or they should be advised, to make in the names of the Plaintiffs, or any of them, they were to be at liberty to use the names of the Plaintiffs, or any of them, in any such proceedings, they giving to the Plaintiffs a proper and sufficient indemnity against the costs and expenses of all such proceedings. And it was ordered, that such indemnity be settled by the Master, if the parties differ about the same. And it was ordered that it be referred to the Master to tax the costs of the Plaintiffs, and that such costs, when taxed, be paid by the Defendants, the executors, out of the assets of their respective testators. [90] And it was ordered that the Plaintiffs' bill, as against the Defendant *Harris*, be dismissed, without costs between the Plaintiffs and him ; but such dismissal was to be without prejudice to any such proceedings as aforesaid for the benefit of the representatives of the other deceased trustees, either in their own names, or those of the Plaintiffs or any of them, thereafter to be taken, relative to the matters in question. And, for the better taking of the said accounts, the parties were to produce before the Master, upon oath, all books, &c. And the Master was to be at liberty to make a separate report or separate reports, of any of the matters aforesaid. And his Lordship reserved the consideration of all further directions, until after the Master should have made his report ; and any of the parties were to be at liberty to apply to the Court as there should be occasion." Reg. Lib. B. 1817, fol. 1977.

(1) The power of attorney recited the indenture of the 17th of *June* 1780 ; and that the sum of £7900 was, some time after the execution of the indenture, paid by *John Whitmore* to the trustees, and by them invested upon a mortgage of certain estates, and was paid off and discharged by *John Keysall*, purchaser of the said estates, to the trustees, who thereupon, or soon afterwards, invested the same upon certain promissory notes drawn by or on the behalf of the United Company of Merchants trading to the *East Indies*, payable two years after the date thereof or thereabouts. which were received by *Nicholas Donnithorne*, on account of himself and his co-trustees, but who in breach of his said trust converted the said principal sum of money to his own use ; and *Thomas Griffith* and *William Symonds* have since obtained a joint and several bond from *Nicholas Donnithorne*, and *Isaac Donnithorne* his son, for securing the same : and that there was then due from the estate of *Nicholas Donnithorne* to *Griffith* and *Symonds*, as such trustees as aforesaid, the said principal sum of £7900 together with an arrear of interest for the same ; and *Nicholas Donnithorne* was at the time of his decease indebted to several other persons by specialty and simple contract to a very large amount, to the payment of a part of which debts his son *Isaac Donnithorne* was also liable, in consequence of his having joined in the securities for the same : and that by certain indentures of lease and release, and assignment, bearing date respectively on or about the                      and days of *January* last past, made, &c. (describing the deed of trust afterwards executed). all the real and personal estate of *Nicholas Donnithorne*, and also *Isaac Donnithorne*, therein described, were conveyed to *Walpole*, *Curtis*, and *Wood*, their executors, &c. upon trust by the several ways and means therein mentioned, to raise money for, and to apply the same in payment and discharge of the several specialty and simple contract debts of *Nicholas Donnithorne* and *Isaac Donnithorne*, jointly or separately, in the order and course therein mentioned : and that *Loveday Whitmore* had attained her age of twenty-one years, and thereby became intitled to a vested interest in the said sum of £7900 subject to the life interest of her father and mother therein ; wherefore *John Whitmore* and *Joanna* his wife, and *Loveday Whitmore* their daughter, were then the only persons beneficially interested in the trust money ; and inasmuch as the mode provided by the last recited indenture appeared to them that which was most eligible and would best conduce to the discharge of the several debts of *Nicholas Donnithorne* and *Isaac Donnithorne*, *John Whitmore* and *Johanna* his wife, and *Loveday Whitmore*, had therefore agreed to empower *Griffith* and *Symonds*, as such trustees as aforesaid, to concur with the other creditors of *Nicholas Donnithorne* in acceding to the deed of trust, and accepting the terms therein proposed : and it was witnessed, that for the reasons and considerations aforesaid, and for divers other reasons and considerations them thereunto moving ; *John Whitmore* and *Joanna* his wife, and *Loveday Whitmore*, authorized, empowered and directed

*Griffith and Symonds*, or the survivor of them, or the executors, &c., to sign, seal, and execute the indenture of release and assignment of the day of *January* last past, as creditors for the said sum of £7900 and all interest due for the same up to the date of the indenture, and thenceforth to accrue or become due in respect thereof, and from time to time to receive the proportionate dividend or share of the produce of the trust estates, when the same should, according to the stipulation and direction contained in the indenture, become due and payable, towards satisfaction of the principal money and interest; and *Whitmore* and his wife, and *Loveday Whitmore*, ratified and confirmed, and promised and agreed to ratify and confirm whatsoever *Griffith and Symonds*, and the survivor of them, &c., should lawfully do or cause to be done in the premises by virtue or in pursuance of the power.

(2) The doctrine of Lord *Northington*, though now clearly over-ruled, seems to have been authorized by some early decisions. "If a man be trusted with money as executor or otherwise for children's portions, though no interest be reserved, yet interests in some measure shall be paid, while it is in his hands, and if he let it out to such men as are trusted and esteemed by others to be men of worth and ability, if any loss happen, he shall not bear the loss thereof. *Per* Lord Keeper in *Canc.* 25 Jan. 1637, in *Sir Edward Hale's* and the *Lady Car's* case. MS.

(3) *Bradwell v. Catchpole.*  
Liability of co-trustee.

In this case the Defendant was a co-executor with *James Maykew* in trust, and co-devisee with him of certain lands, in trust, by sale to raise money to discharge a mortgage, and the lands mortgaged descended to the Plaintiff as heir. The mortgage term was assigned after to *Maykew*. *Catchpole* joined with *Maykew* in a conveyance of the lands devised to them to sell, and in a receipt for the purchase money, but never received one penny for it. *Maykew* had enough in his hands to discharge the mortgage, but, however, assigned it over for the principal term, without notice of the trust for clearing it, and that assignee assigned to another with notice. *Maykew* had appeared to the bill, but never answered, nor could be found to be served with process, which was carried on against him to a commission of rebellion; and it was said he was broke. He not being served to hear judgment, there could be no decree against him, but the process of contempt having been carried on to the end of the line (less would not have done), the other Defendant could not object for want of parties, for otherwise there might be a failure of justice. And now upon hearing the cause,

Lord Keeper decreed the Defendant *Catchpole* to make satisfaction for the breach of trust in his co-trustee, running away with the purchase money, though objected that he joined in the sale merely for conformity, and never intermeddled farther.

Sir *J. Jekyll* cited a late case at the Rolls, where one who was trustee for a woman and her children did, with the woman's consent, assign his trust to another who was guilty of a breach of trust, and the first trustee decreed to make satisfaction, because trustees cannot divest themselves of their trust at their pleasure. And another before Lord *Somers*, where one trustee received the whole trust-money, and both were charged.

Another part of the bill was against the assignee of the mortgage, to have the Plaintiff's inheritance discharged of it, *Maykew* having had sufficient in his hands to pay it off while the mortgage was in him, the mortgagor not having joined in an assignment from *Maykew* to *J. S.*, nor from *J. S.* to the Defendant; and it was insisted, and agreed to by *Vernon* of the other side, that if any person will take an assignment of a mortgage in which the mortgagor doth not join, he must at his peril inquire what is due upon it, and if all or part of the principal hath been before paid off by the mortgagor, or discharged by perception of profits, the assignee, though he comes in without notice, cannot set it up again against the mortgagor; and that for that reason, where the mortgagor doth not join in the assignment, it is the constant course to take a covenant from the mortgagee, who assigns, that the mortgage is in force, and unsatisfied, &c.; and that in this case *Maykew* having money enough in his hands to satisfy the mortgage, and which by the trust was to be applied to that purpose, it ought to be considered as applied, as against the mortgagee.

But *Vernon* insisted that an assignee was not obliged to take notice of such a

collateral satisfaction ; and there having been some length of time, and several assignments,

Lord Keeper would not look upon the mortgage as satisfied ; though it was objected that though the first under *Maykeu* came in without notice, yet his assignee came in with notice.

But *Vernon* replied, that if you would affect a purchaser at third or fourth hand with notice, you must affect every one under whom he claims, and it is not sufficient to prove notice in him only, or in the second or third ; for if it were, a purchaser without notice, might be brought into an impossibility of selling, by giving notice to those who intended to purchase of him. [From Mr. *Cox's* notes.—The date of this case is not stated ; but the names of the counsel ascertain the period within which it must have occurred.] [Sir *J. Jekyll* became Master of the Rolls in 1817.]

*Elizabeth Ryder v. Edward Bickerton. In Chancery. 9th Dec. 1743.*

[S. C. 1 Eden, 149 (n.). See *Hughes v. Wells*, 1852, 9 Hare, 773 ; *Sawyer v. Sawyer*, 1885, 28 Ch. D. 604.]

Trustee charged with breach of trust, for not putting out money at interest, nor on the best security, according to the trust in a deed. Money lent on a promissory note is not put out on a security. Trustee not protected by acquiescence of the *cestui que trust*, not duly informed.

The bill was brought to have a satisfaction for £800 which had been deposited in the Defendant's hands, as a trustee, to be laid out on the best security that could be got, and which the Defendant had lent to one Mr. *Ryder*, the Plaintiff's uncle, who afterwards became bankrupt, on his promissory note.

*Lord Chancellor* [Hardwicke]. If this Defendant has acted fairly, it is a hard case, but the rules of this court must be observed ; and it is better that one man should suffer an inconvenience, than that the general rule should be broken.

Two questions ; first, whether Defendant has been guilty of a breach of trust ; Second, whether there is any thing on his part to excuse that breach of trust ; or to indemnify him as to the plaintiff or her son ?

As to the first, it is now plain, that he is guilty of a breach of trust ; and a breach of trust may arise not only from a fraud in the trustee, but from his gross negligence ; in both which cases he is liable to make satisfaction in this court.

Here has been the grossest negligence. £800 out on a mortgage, which this trustee was to receive, and place out at interest on the best security that could be got for the same, with the approbation of the husband, wife, and survivor ; afterwards there is a clause in the articles that defendant should not be liable to any bad debts, arising from any insufficient security that should be so taken, nor for more than should come to his hands.

It is plain that £800 came to his hands ; so that the next question is, whether he has pursued the trust ? It is so far from that, that he has neither placed it out on security, nor at interest, but has laid it out on a bare promissory note, payable on demand, value received, without any interest. So there appears a direct breach of trust in two respects ; first, it was to have produced interest during the life of the husband and wife ; and in the next place, it was to have been on the best security that could be.

A promissory note is evidence of a debt ; but it cannot be considered as a security for money ; for it should have been on some such security as binds land, or something, to be answerable for it.

Next as to the approbation of the husband or wife ; but I shall lay no weight on this, as to the breach of trust, for their power of approbation or consent was only to collect what kind of security, and if this had been a security, their consent might have been sufficient to have indemnified him.

Another consideration is, as to part of the £800 there is a clause in the articles, that if the husband should have a mind to make use of any of the money in trade, and should procure his wife's consent, the trustee should be indemnified for paying it to him.

There was a deed prepared, in pursuance of this power, for £300, but never executed, nor was any part of the money paid, so that is entirely out of the case, as to the breach of trust.



This trustee has taken upon him to act in the trust, and has received the money. It is said it will be a very hard case on trustees. As to that, there would be some weight in it, if trustees were forced to apply to this court in the case of small sums. But that can hold only where there are but small deviations in the act of the trustees from their powers ; and that is not this case ; so that, supposing a breach of trust,

The next consideration is, whether the trustee may be excused from making a satisfaction to the Plaintiffs or the infants ?

As to the infants, there is no pretence to say that the defendant shall be excused ; for after the marriage it was not in the power of the husband or wife to do any thing to prejudice them.

So all that remains is, whether the Plaintiff has done any thing to defend the trustee against being liable to make satisfaction to her during her life ? And as to that, I am of opinion she has done nothing.

The power of the wife must arise out of the articles, for after the marriage she had no power to prejudice herself. The power is that she and her husband must give their consent to the placing out the money on security ; Therefore she could not give her consent to the placing out the money on no security at all.

There is another point, where it is said that there may be a case in which a married woman may not have power to act within the terms of a trust created before marriage, and yet if she draw in a trustee to do any thing against her benefit, she being so concerned, shall not afterwards be admitted to take advantage of it against the trustee ; which I believe is so : but in all these cases it must be where the persons so to be affected might have been fully informed of the state of the case. So that the question is, whether the Plaintiff appears to have been fully informed of the state of the case ?

There is no evidence before me of any transaction that she was privy to, antecedent to the lending of the money. I am speaking as to her being fully informed. All the evidence arises after the money was lent. The evidence arising out of the recital of the deed of *March* 1737, amounts to nothing ; for it is a false recital ; reciting that the money had been paid by the mortgagees, and placed out on a security ; and next *Crompton* swears that she said, as the money was placed out at interest in her uncle's hands, she would be content to lose it. This was a kind declaration ; but the question is, whether it shews that she was acquainted with the transaction ? It was further proved that she said the money would be getting something for her and her children ; whence it appears she mistook the matter, as the note did not carry interest. Another declaration of hers was, that she was to have 5 *per cent.* for it ; but it was plain it would not bring her any thing, for no interest could be recovered but from the time of making the demand.

So that it appears she was imposed on, thinking it was placed out at interest on security.

When the Defendant's part of the case comes to be considered, I am far from charging him with a fraud ; but it would be dangerous, in general, that a trustee should be excused for placing out money in the hands of persons with whom he has great dealings in trade, where that same money may possibly come round to his own hands, to pay his own debt, in method of negociation. I do not impute this to the Defendant ; but in general it might be a dangerous thing : therefore I cannot by any means allow his excuse.

Decree the Defendant to make satisfaction for the principal sum of £800 and interest, after the rate of 4 *per cent.*, from the death of the Plaintiff's husband.

I cannot, for the sake of the precedent, make any other decree in this case.

There was evidence that Mr. *Ryder*, into whose hands the money was placed, was at that time in very good circumstances, to the appearance of the world ; that the Defendant was but in slender circumstances, and that the Plaintiff and her husband were glad to have it in Mr. *Ryder*'s hands, thinking it a better security ; and it further appeared that the Plaintiff and her husband were needy, and wanted it to be at interest, and that the Defendant had endeavoured to lay it out in a purchase of lands, but the Plaintiff's husband did not like the purchase.

Reg. Lib. B. 1743, fol. 154. From Mr. *Short*.—Lord Colchester's MSS.

*Adye v. Feuillateau. In Chancery. 1st May 1783. (2 Cox, 24.)*

An executor lending money of his testator, upon bond, shall be personally answerable, if the security prove defective, though his testator was in the habit of lending money on such security; and shall not be indemnified from the profits made by other transactions of the same nature.

Exception to the Master's report, that the sum of £1000, which had been lent by the executor, on bond, out of the assets in his hands, and the security for which had failed, had not been allowed him by the Master in his accounts.

Testator died in the island of *St. Christopher*, where he left a very large personal estate, consisting of money lent on mortgages, and on bonds, leaving Plaintiffs, the infants, his residuary legatees.

It had been usual with the testator to lend very large sums of money on personal securities in the island, and the Defendant, the executor, who resided at *St. Christopher's*, continued the money upon the same securities, and as he received in the same, lent it again upon bonds, at *£8 per cent.*, the lawful interest of the island; he by this means benefited the estate about 4 or £5000. The £1000 in question was lent by the executor to a person of whose solvency no doubt could be entertained at the time; afterwards, however, he failed.

The executor's conduct had been exceedingly honourable in every respect, and all the parties in the cause, who were adults, consented to his being discharged in his account of this £1000; and the children and residuary legatees of the testator, who were infants, did not oppose it.

*Hardinge* and *Graham* argued for the exception, that an executor might be considered in two capacities, 1st. merely as an executor paying debts and distributing the assets; and, 2dly, as having money standing in his name for a considerable time to satisfy legacies that do not immediately arise, in which capacity he may more properly be considered as a trustee than as an executor; that when acting in the former capacity, the executor was entitled, for his own use, to any temporary profits which might be made of the money in his hands, and therefore was accountable for any loss which might happen. This is the opinion of Lord *Hardwicke*, in *Adams v. Gale*, 2 Atk. 106, whose words are: "An executor may make use of money which is perpetually coming in by assets of the testator, and turn it to his own advantage; and it is not improper for an executor to do it upon his own account, where he is a respectable man and ready to answer legacies and debts when called upon." And the same doctrine was laid down in *Bramfiel v. Wytherley*, *Prec. Chan.* 505, where it is said that if the executor is solvent, he shall have the profits made of the money to his benefit, because he ran the risk; *secus* of an executor insolvent at the time, because he runs no risk. When acting in the second capacity, the executor is to be considered as a trustee, and as such is entitled to the favour of the court, where the strict rule of law would be against him; in this capacity he is entitled to no profits made of the assets, and therefore ought not to be personally liable for the loss. If a trustee (and the executor *quoad hoc* is a trustee) keeps the trust property as he would keep his own, or as the court has evidence the person for whom he is trustee would have kept it, he shall be indemnified. *Morley v. Morley*, 2 *Chan. Ca.* 2; *Jones v. Lewis*, 2 *Ves. Sen.* 240. In the present case the executor not only employed the money as he would have employed it had it been his own, but he employed it in a manner the most beneficial that was possible for the residuary legatees, the infants, and by which he has gained for them a very considerable sum. He was obliged to lend the money upon personal security, or he must have transmitted it to *England*, where it would have produced much less, upon any securities, because the island afforded no other securities but personal ones; the executor, too, in this case, employed the money in the very same way in which the testator had himself employed it, and as he certainly would have employed it, had he been living. In *Prec. Chan.* 49, *Gibbs v. Herring*, testator employed a person to place out money for him at interest, and died, leaving a sum in his hands to be so laid out; the executor desires him to place it out at interest; he does, and the security fails; the executor was held to be liable. *Harden v. Parsons*, before Lord *Northington* (cited from a MS. note of Mr. *Stainsley*. 1 *Eden*, 145; *Vide* 3 *Swans.* 62, 63), was a case in point. There the executor lent money upon the note of a man of whose

solvency there was not at the time the least reason to doubt ; afterwards he failed, and Lord *Northington* held that the executor should not be liable, and said it was sufficient if he dealt with the property as he did with his own ; but that if there had been *crassa negligentia*, that indeed would have been different, and would have amounted to a breach of trust ; and the other cases cited were *Churchill v. Hobson*, 1 P. W. 241 ; *Salk.* 218, and *Cox v. D'Aranda*, *Vin. Abr.*

*Lord Loughborough.* It is quite a settled point that an infant's money cannot be laid out on personal security (*Terry v. Terry*, *Gillb. Eq. Rep.* 10) ; and the Court will never give their sanction to that when done, which at the time they would not have suffered to have been done. In some of the reports a confused notion prevails that an executor or trustee is not answerable for the loss, where he would be answerable for the profits, but I take that to be quite erroneous, and that it has been long established in this court, that in these cases every thing shall be taken against the executor ; if any profits are made, he must account for them ; if any loss happens, he must bear it ; and it does not alter the case that the executor has improved the estate by lending money on personal security ; for the Court will not consider the whole account of his dealings together, but must consider every single transaction by itself. The executor has behaved very honourably ; and I do not doubt that when the infants come of age, they will think themselves bound in honour to make up this loss to him, but the Court cannot do it. The distinction taken *Prec. Chan.* 505, is a very absurd one, and I thought had been long exploded. The exception must be over-ruled.

*Hardinge.* Does your Lordship decide upon the ground of its being infants' money ?

*Lord Loughborough.* Upon the ground of its being trust money. The circumstance of their being infants only affects the case, in as much as it is impossible there can be any circumstances of conduct in them which can authorize the executor, as there might have been had they been adults.

*Hotham, B.* Another reason why the Court always disapproves of lending money on personal security is, that it is a species of gaming, by which great interest is gained, and which the Court will not encourage.

The exception over-ruled.

*From Mr. Romilly. Lord Colchester's MSS.*

#### CRAWSHAY v. COLLINS. July 13, 16, 1818.

[For other proceedings see 15 Ves. 218 ; 1 Swans. 40 ; 1 Wils. Ch. 31 : 1 Jac. & W. 267 ; 2 Russ. 325. See now Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 5, 6.]

Arbitrators under an order of reference in a cause, having declined to proceed, the suit may be prosecuted as if no reference had been made.

By an order of 1st of *March* 1817, on consent, all matters in difference between the parties were referred to the award of three arbitrators, and it was ordered that no bill should be filed, nor any action commenced by either of the parties against the other touching any of the matters referred, except for the purpose of enforcing, if necessary, the award to be made ; and any of the parties were to be at liberty to apply to the Court as they should be advised.

The arbitrators having declined proceeding, and the Court having refused to order them to proceed (1 *Swans.* 40), the [91] Plaintiff on the 4th of *May* 1818, obtained a reference to the Master to take certain accounts, and on the 30th of *June*, an order on the Defendant *Collins*, to produce before the Master all books, &c., in his possession relating to the accounts. *Collins* now moved to discharge the latter order with costs.

The *Solicitor General* [Sir Robert Gifford] and Mr. *Beames*, for the motion.

The order of reference is a virtual dismissal of the bill ; although the arbitrators decline to make an award, the cause is no longer in court. The terms of the reference are absolute, not in the usual form, conditional on the event of an award made. The concluding reservation of liberty to apply, is a clause of course, and may refer to applications for compelling the arbitrators to proceed, or for enforcing their award. *Woodbridge v. Hilton* (1 *Bro. C. C.* 398 ; 2 *Dick.* 640), *Dick v. Milligan* (4 *Bro.*

*C. C.* 117, 536 ; 2 *Ves. Jun.* 23), *Price v. Williams* (3 *Bro. C. C.* 163 ; 1 *Ves. Jun.* 365).

It is true, that after the first order of reference was suffered to expire, a second order of reference was made, with the consent of the Defendant *Collins* ; but after Court had transferred its jurisdiction to the arbitrators, no consent could restore it. *Pownall v. King* (6 *Ves.* 10). Had the reference not failed, it is not pretended that the parties could have proceeded here ; the forum of the question was changed.

Sir Samuel Romilly, Mr. Hart, and Mr. James Stephen, against the motion.

[92] The dicta cited in support of this novel motion, from cases in which an award was actually made, have no application to a case in which the reference to arbitration has become ineffectual. The Court divests itself of jurisdiction only when the question can be decided by the arbitrators. The reservation of liberty to apply supposes a cause depending.

The Lord Chancellor [Eldon]. I take it to be undeniable, notwithstanding what was said in *Dick v. Milligan*, that according to all the old cases, an award was subject to exceptions : the new cases have restored the subject to a rule of common sense, that if on a reference of all matters in dispute the arbitrators proceed, there is an end of the matter : but the question is, whether, if the arbitrators do not proceed, if, for example, one dies, the cause is so out of court, that the parties cannot apply to prosecute it ? I always understood that the reserved liberty to apply extended both ways ; authorizing, if an award was made, proceedings on the award ; and if the arbitrators did not proceed, an application as if the reference had not been made.

July 16. The Lord Chancellor. The motion must be refused, and the cause will proceed as if no reference had been made.

His Lordship doth not think fit to make any order upon the motion, but doth order, " that the said Defendant do pay the costs of this application." Reg. Lib. A. 1817, fol. 1464.

[93] ROBERT MAYNE, *Plaintiff* ; WILLIAM HAWKEY, and JAMES WATT, *Defendants*.  
July 14, August 7, 1818.

A clerk in court and solicitor refusing to continue the conduct of a cause until his fees are paid, ordered to produce an office copy of the bill to be marked.

A motion was made on behalf of the Defendant *Watt*, that Mr. *J. Radcliffe*, one of the sworn clerks, might be ordered forthwith either to produce to the six-clerk the office-copy of the bill alleged by him to have been made in *Easter* term 1816, in order that the same might be marked, or that he might be ordered, forthwith to deliver up to the said six-clerk the original record of the amended bill filed in this cause ; and that Mr. *J. G. S.* might be at liberty to act as the clerk in court for *Watt*, in the future conduct of the cause, and to file his further answer to the exceptions, and also to the amended bill.

The affidavit of *Watt* stated, that having no personal interest in the cause, and being a party merely as the agent or consignee of *Hawkey*, he had, at *Hawkey's* request, allowed his answer to be prepared, and his defence to be conducted, by *J. R.*, the friend and solicitor of *Hawkey*, under an assurance that he should not be responsible for any expense incurred ; that those terms were understood by *J. R.*, who admitted that he was employed by *Hawkey* alone, and that *Watt* was not responsible to him ; that in *May*, *J. R.* informed *Watt*, that in consequence of the death of *Hawkey*, he could not continue so to conduct *Watt's* defence, but that *Watt* must supply money for carrying on the suit ; that *Watt* having then employed his own solicitor *R. G. B.*, *J. R.* refused to part with any papers, or give any information until his bill was paid ; and in *June* delivered a bill amounting to £73.

[94] The affidavit of *R. G. B.*, filed in support of the motion, stated, that having been employed by the Defendant *Watt* to put in his answer to the exceptions allowed to his former answer, and also his answer to the amended bill, the deponent applied to *J. R.* for the requisite information, who declined to give any information, or to part with any papers, unless he was paid his bill of costs for what he had before done ; that an attachment having issued against *Watt* for not putting in his answer,

the deponent prevailed upon the Plaintiff's solicitor to allow time for the answer to be prepared, and to furnish the deponent with a copy of the amended bill, and of the exceptions; that he afterwards prepared the further answer of *Watt*, which was sworn on the 22d of *May* last, and also paid the costs of the attachment and of the exceptions, to the Plaintiff's clerk in court; that some considerable time after the answer was sworn, he was informed by the agent for Mr. *J. G. S.*, the Deponent's clerk in court, that the six-clerk had refused to file the same, because the office-copy of the amended bill had not been marked or paid for, although in the bill of costs lately delivered to *Watt* by *J. R.* the sum of £7, 19s. 10d. was charged for an office copy of the amended bill in *Easter* term 1816; that he afterwards attended with the agent of Mr. *J. G. S.*, at *J. R.*'s seat in the Six-Clerks' office, and requested *J. R.* to get the office-copy (which he alleged had been made) marked by the six-clerk, in order that the answer might be filed; and the deponent subsequently offered to pay for the office-copy, if *J. R.* would produce and get the same marked, which he positively refused to do; that deponent had been informed by the agent of Mr. *J. G. S.*, which information he believed to be true, that *J. R.* detained the original record of the amended bill, alleging that he had a lien thereon for the amount of a bill of costs which he claimed to be due to him from *Watt*.

[95] Sir *Samuel Romilly*, for the motion.

Before a Defendant is allowed to file an answer, he must take an office-copy of the bill; and the six-clerk has no means of knowing whether the copy produced has been taken, except by the mark.

Mr. *Hart*, against the motion.

August 7. The Lord Chancellor [Eldon]. My opinion is, that Mr. *J. Radcliffe* must do what this motion requires. If a clerk in court, or solicitor, having engaged in the conduct of a cause, thinks proper afterwards to refuse to proceed without payment, he cannot stop the cause; he may reasonably decline to act without payment, and if the client omits to pay, he cannot be compelled to part with papers; but he must not delay the progress of the suit. The refusal of the solicitor or clerk in court to proceed authorises the client to employ another solicitor or clerk in court; and though the former solicitor or clerk in court cannot be compelled to part with papers, he must produce them for all purposes in the cause. (See *Commerell v. Poynton*, 1 Swans. 1.)

"His Lordship doth order, That *J. R.*, one of the sworn clerks of this court, do forthwith produce to the six-clerk the office-copy of the bill all geded by him to have been made in this cause in *Easter* term 1816, in order that the same may be marked; and it is ordered that *J. G. S.* be at liberty to act as the clerk in court for the Defendant *J. Watt*, in the future conduct of this [96] cause, and to file his farther answer to the exceptions allowed in this cause, and also to the said amended bill."

*Reg. Lib. B.* 1817, fol. 1556.(1)

(1) On inquiry at the office of the six Clerks, the editor has been favoured with the following information of the course of proceeding. An office-copy of the bill being taken by the Defendant's clerk in court, is produced to the Defendant's six-clerk, for the purpose of receiving his signature, and being then marked with the official stamp, becomes an authority for the clerk in court taking the copy. to file the answer of the Defendant for whom the copy was taken. (*Orders in Chancery*, ed. *Beames*, 186. *Attorney-General v. Milward*, 1 Cox. 437.) A peer defendant being served with a copy of the bill, is allowed to file an answer without taking another copy.

The following note of a case (shortly reported, 2 *Anst.* 489), on the jurisdiction of courts over their officers, is extracted from Lord *Colchester's MSS.*

*Exchequer. Trinity Term 1794.* Power of the Court of Exchequer to remove from the Remembrancer's office clerks who have not served a clerkship.

In the matter of *Windus* and *Rich*, side clerks in the King's Remembrancer's office, *Richards* moved, on behalf of Messrs. *Windus* and *Rich*, that the name of *John George Donne* might be erased from the roll kept in the office, whereby the seniority of the clerks in court is ascertained.

This motion was supported by affidavits, that *John George Donne* was articled to *David Burton Fowler, Esq.*, prior to *May 1787*, one of the sworn clerks in the said office, but had never attended there till 23d *May 1794*, although his name

had been entered upon the roll at the time of his being articled, and still remained there; that *Windus* was articled to another of the sworn clerks in *May* 1787, and *Rich* to another in *November* 1787, from which respective times they had regularly attended and served; that the said *J. G. Donne* [97] was, during the whole, or the greatest part of the said time, at school, and at the time of his name being entered on the roll, was only of the age of nine years, being an age much earlier than usual for bringing clerks into the office.

Besides the impropriety of such clerkship being allowed to stand good, it was insisted also that such a priority in the roll, might and would probably prejudice *Windus* and *Rich* in the office at some future period.

*Abbot*, contra, shewed for cause, that by other affidavits it appeared, that *Windus* and *Rich* knew, during the whole time, that the name of *Donne* stood before theirs, although they forbore for seven years to complain of it; that at any time, if required, *Donne* was ready and would have left school to give personal service in the office; that during the whole time he transcribed the king's process (which is part of the articled clerks' duty), by an avowed agent in the office, with the express knowledge and acquiescence of *Windus* and *Rich*, and that the said *David Burton Fowler* had dispensed with his service for the purpose of promoting his education; and that no rule or precedent to the contrary was known or ever intimated to *David Burton Fowler* or *Donne*.

Two precedents were cited in the course of the argument of names being erased from the roll; one of Mr. *Ord*, whose name had been postponed for non-attendance, by the authority of the Deputy Remembrancer, and without controversy; and another of Mr. *Wood*, whose name had been erased, he having left the office for many years, and returned to it at a great interval of time.

The Court was clearly of opinion, first, that it had jurisdiction to interfere in regulating the duties and conduct of all these clerks, although appointed by the King's Remembrancer, and promoted at his discretion; secondly, that no articled clerk should have his name on the roll who did not *bona fide* serve under his indentures.

And, accordingly, the Court ordered the name of *J. G. Donne* (not to be postponed, but) to be wholly erased from the rolls. See *Dorrington's case*, *Hardr.* 130. and the memorandum relative to the offices of chief prothonotary of the Common Pleas, and coroner and attorney of the King's Bench. *Dyer*, 150 b.

[98] *Ex parte BIRCH* in the Matter of *ADDY*, a Lunatic. *July* 23, 1818.

Sales of copyhold estates of a lunatic are not authorised by stat. 43 G. 3, c. 75.

This petition prayed a sale of some copyhold lands the property of the lunatic, under the statute 43 Geo. 3, c. 75.

Mr. *Barber*, in support of the petition, insisted, that though freehold and leasehold estates only are mentioned in the clause authorising a sale, yet the subsequent express authority to make surrender of the copyhold estates of lunatics, denotes the intention of the legislature to include them.

The *Lord Chancellor* [Eldon]. The power of sale is confined in terms to freehold and leasehold estates; copyholds are not mentioned as subjects of sale. I have no authority to make such an order.

Petition refused.(1)

(1) The stat. 59 Geo. 3, c. 80, s. 2, extends the power of sale to estates held by ancient demesne or copy of court roll.

*HOPKINSON v. LEACH.* *July* 29, 1818.

The Master's certificate in support of a motion for an absolute order for production of books, &c., or commitment, must bear date on the day of the motion.

A motion was made, that the Defendants might, within four days, deposit in the Master's office all books, &c., in their custody or power relative to the accounts directed to be taken; or in default, that the serjeant-at-arms might apprehend them.

[99] Mr. *Heald*, in support of the motion, relied on the Master's certificate, that the Defendant had not produced the books at the time fixed by a former order.

The Lord Chancellor inquired the date of the certificate; and being informed that it bore date on the 22d *July*, refused the order; observing that a certificate to support a motion for commitment must bear date on the day of the motion; otherwise *non constat*, that the party has not, since the certificate and before the motion, obeyed, and protected himself from the order. (So *Carleton v. Smith*, 14 *Ves.* 180.)

NEWMARCH v. BRANDLING. *July* 20, 21, 23, 30, 1818.

The lessees of a colliery having agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, and the owner of the first colliery, having granted to the second lessees the same right of way during a term of years, and afterwards by assignment from the first lessees become possessed of the first colliery, and the right of way, an injunction was granted to restrain him from removing the materials, and destroying the way.

In *September* 1809, certain collieries at *Dunnington*, *East and West Brunton*, *Fawdon*, *Wideopen*, *Morley Hill*, and *Wheelslade*, in the county of *Northumberland*, were demised for twenty-one years to *Richard Carrington* and others, who, in *February* 1810, assigned their interest therein to *John de Ponthieu*.

The premises called *Fawdon*, were situate about five miles and a half from the river *Tyne*; the intermediate grounds proceeding in a direction from *Fawdon* to the river, were respectively called *Cozlodge*, *Gosforth*, *Long Benton*, *Benton*, and *Walls-end*; and before the date of the assignment, *William Chapman* and his partners, [100] carrying on the business of coal workers under the firm of the owners or lessees of *Kenton* and *Cozlodge* collieries, had sunk a coal pit, called the *Jubilee* pit, in the *Cozlodge* grounds, at the distance of about 350 yards from the *Fawdon* grounds, in a direction towards the *Tyne*, and by virtue of *way-leaves*, or leases, from the owners of the intermediate grounds before mentioned, had constructed a waggon-way from the *Jubilee* pit to the *Tyne*.

By an indenture of the 30th of *April* 1811, between *J. Brandling*, owner of *Cozlodge*, *Gosforth*, and *Long Benton* grounds, and *de Ponthieu*, reciting that *Brandling* was seised and possessed of divers lands, situate at *Cozlodge*, *Gosforth*, and *Long Benton*, and that the lessees and owners of *Kenton* and *Cozlodge* collieries were then in the occupation of a certain waggon-way over part of the lands, as lessees under him, *Brandling* for himself, his heirs, executors, and administrators, covenanted with *de Ponthieu*, his executors, administrators, and assigns, that it should be lawful for *de Ponthieu*, his executors, &c., at any time within twenty-one years from the 22d of *November* then last, to make and place a waggon-way and side-way from the lands and grounds of *Fawdon* through the grounds of *Cozlodge*, to communicate with the waggon-way of the lessees and owners of *Kenton* and *Cozlodge* collieries at or near the *Jubilee* pit, according to a line laid down in a plan indorsed on the indenture, and by no other line, for the purpose of conveying the coals to be won and wrought out of the grounds of *Fawdon*, and out of a specified part of the grounds of *West Brunton*, and also of conveying timber, iron, &c., and all other things, to and from the colliery at *Fawdon*; and that it should be lawful for *de Ponthieu*, his executors, &c., during the term of twenty-one years, to have full and free liberty of ingress, egress, regress, [101] way-leave, and passage, along the waggon-way of the lessees or owners of *Kenton* and *Cozlodge* collieries, through the grounds of *Brandling* at *Cozlodge*, *Gosforth*, and *Long Benton*, for the purpose of leading and conveying all coal to be wrought and won out of the grounds of *Fawdon* and out of the specified grounds of *West Brunton*, and all timber, iron, &c., and all other things necessary for carrying on the collieries; and also that it should be lawful for *de Ponthieu*, his executors, &c., during the term of twenty-one years, to make and lay a waggon-way and side-way from the grounds of *Fawdon* through the grounds of *Cozlodge*, and there to communicate with the first-mentioned waggon-way, according to the line also laid down upon a plan indorsed on the indenture, for the purpose of conveying the coal to be won and wrought out of the grounds of *East Brunton*, *Dunnington*, and *Morley Hill*, *West Wideopen*, and a specified part of *West Brunton*, and also for the purpose of conveying timber, iron, &c., to and from the last-mentioned collieries;

and that it should be lawful for *de Ponthieu*, his executors, &c., during the term of twenty-one years, to have full and free liberty of ingress, &c., along the waggon-way intended to be laid as aforesaid, and also along the present waggon-way of the owners or lessees of *Kenton* and *Cozlodge* collieries, through the said grounds of *Brandling*, at *Cozlodge*, *Gosforth*, and *Long Benton*, for the purpose of leading and conveying the coal to be wrought and won out of the grounds at *East Brunton*, *Dunnington*, *Morley Hill*, *West Wideopen*, and the specified part of *West Brunton*, and also all timber, iron, &c., and all other things necessary for carrying on the collieries.

The indenture contained a covenant by *de Ponthieu* to pay a fixed rent for the several way-leaves, and a further contingent rent, proportioned to the quantity of [102] coal conveyed. And it was agreed, that in case *de Ponthieu*, his executors, &c., should be desirous to quit the way-leaves at the end of any one year of the term of twenty-one years, and should give to *Brandling*, his heirs or assigns, twelve months previous notice in writing, he or they should be at liberty to quit the waggon-ways at the expiration of such notice; from which time the respective rents, and the term of twenty-one years should cease, on the ground over which the same passed being restored to a proper state of cultivation: and it was agreed, that a regular lease should be entered into of the way leaves, in which should be inserted all covenants, clauses, and agreements in the indenture contained, and all other usual covenants and agreements contained in colliery way-leave leases, and thereby not provided, for, which were consistent with the terms and stipulations therein contained.

By an indenture of the 10th of *July* 1811, *Job Bulman* granted to *de Ponthieu*, his executors, &c., for twenty-one years from the 1st of *May* then last, right of passage and way-leave along the waggon-way and side-way laid by the owners or lessees of *Kenton* and *Cozlodge* collieries, upon the grounds of *Bulman*, within the townships and precincts of *Cozlodge*, for the purpose of conveying coal and other things to the *Tyne* from the premises comprised in the indenture of *September* 1809; and also power, in case the owners and lessees of *Kenton* and *Cozlodge* collieries should determine their interest in the way, to lay another waggon and side-way on the same scite.

By an indenture of the 15th of *July* 1811, *William Brown* made a like grant to *de Ponthieu* of a right of way-leave along the way enjoyed by the owners and lessees of *Kenton* and *Cozlodge* collieries, through his lands [103] in the townships of *Long Benton* and *Little Benton*, for twenty-one years from the 12th of *May* last.

By two other indentures of the 22d of *June* 1811, and the 28th of *September* 1812, *C. W. Brigge* and the Dean and Chapter of *Durham* respectively granted to *de Ponthieu* a way-leave, and power to make and use a waggon-way, &c., from the premises comprised in the indenture of *September* 1809, to the *Tyne*, through their respective grounds in *Long Benton* and *Wallsend*, for twenty-one years.

In *June* 1811, Messrs. *Knowsley, Tindell*, and Co., who had become the owners or lessees of *Kenton* and *Cozlodge* collieries, agreed to grant to *de Ponthieu* way-leave over the waggon-way made by *W. Chapman* and his partners, from the *Jubilee* pit to the *Tyne*, at a rent ascertained by award; but no regular grant was executed.

*De Ponthieu* having opened a coal-pit, called the *New Winning* pit, in the *Fawdon* grounds, placed a new waggon-way over the *Fawdon* and *Cozlodge* grounds, to communicate with the *Kenton* and *Cozlodge* waggon-way near the *Jubilee* pit, and also over part of the *Wallsend* grounds to the *Tyne*, and thus became possessed of a waggon-way from the *New Winning* pit to the *Tyne*, and continued to work coal, and use the way, until his death in *April* 1813.

In *May* 1814, the personal representatives of *de Ponthieu* sold his interest in the collieries to *John Newmarch* for £45,000.

In *March* 1817, Messrs. *Knowsley, Tindell*, and Co. assigned their interest in the *Kenton* and *Cozlodge* collieries, including the materials of the waggon-way constructed by *W. Chapman* and his partners, to *Brandling*; and on the 5th of *November* 1817, *Brandling* sent a written notice to *Newmarch*, that the owners of the *Cozlodge* colliery had agreed for a new waggon-way, and as soon as the new line was prepared, intended removing the materials from the old waggon-road.

The bill, filed by *Newmarch* and his partners, and the personal representatives of *de Ponthieu*, against *Brandling* and his partners, insisted that *de Ponthieu* and the Plaintiff having paid the reserved rent, and performed the covenants contained



in the indenture of the 30th of April 1811, and *Brandling* having granted or agreed to grant to *de Ponthieu*, his executors, &c., way-leave and passage along the *Kenton* and *Cozlodge* waggon-way, through his grounds at *Cozlodge*, *Gosforth*, and *Long Benton*, for the term of twenty-one years, and having afterwards become the sole owner, and being then one of the owners, of the waggon-way, was not either by himself or in concert with the other Defendants, entitled during the continuance of the term to destroy or take away the materials of the waggon-way upon his grounds, and thereby deprive the Plaintiffs, as the executors and assigns of *de Ponthieu*, of the benefit of the agreements contained in the indenture of the 30th April 1811.

The bill stated, that the Plaintiffs on receiving the notice, took measures for making a new waggon-way from the *Fawdon* grounds to the *Tyne*, in a direction different from that of the *Kenton* and *Cozlodge* waggon-way; and on the 22d of November 1817, gave notice to *Brandling*, that they intended to quit on the 22d of November 1818, the waggon-way and way-leave agreed to be granted to them over the grounds of *Brandling*; but insisted, that until the determination of the term of years by that notice, they were entitled to the benefit of [105] the agreement; the Plaintiffs not having any outlet for the coal obtained by them from the *Fawdon* colliery, except the way granted to them, until the new way was completed, which could not be effected before November 1818.

In reply to a pretence that *Brandling* only granted to *de Ponthieu* way-leave and passage along the *Kenton* and *Cozlodge* waggon-way for so long time as the owners or lessees of the *Kenton* and *Cozlodge* colliery should not be minded to remove the same, or the materials thereof, the bill charged, that by virtue of some agreement subsisting between *Brandling* and the owners or lessees of the *Kenton* and *Cozlodge* colliery, *Brandling* was empowered to sign the indenture of the 30th of April 1811, and had sufficient authority to grant to *de Ponthieu*, his executors, &c., such way-leave and right of passage along the waggon-way, as by the indenture is agreed to be granted during the term of twenty-one years.

The bill, also charging, that under the circumstances, the Plaintiffs were entitled to way-leave and passage along the *Kenton* and *Cozlodge* waggon-way, as tenants from year to year, that is to say, from the 31st December in each year to the 31st December in the following year, and that the Defendants were not entitled to determine such tenancy, or to deprive the Plaintiffs of the use of the waggon-way any otherwise than as before mentioned; prayed, that the Plaintiffs might be declared entitled to the benefit of the several agreements contained in the indenture of the 30th April 1811, and of the agreement between *Knowsley*, *Tindell*, and Co. and *de Ponthieu*, until the 22d of November 1818, the Plaintiffs offering to perform the agreement on their parts until such time; and that in the mean time the Defendants [106] might be restrained by injunction from conveying away or removing the materials of the *Kenton* and *Cozlodge* waggon-way, and from destroying or injuring the same, so as to deprive the Plaintiffs of the use thereof.

The allegations of the bill being supported by affidavit, the Plaintiffs moved for an injunction. The affidavits filed in opposition to the motion, stated, that in cases where owners or lessees of collieries had made and laid, under a grant or licence from the owners of the soil for that purpose, a waggon-way, for the purpose of leading the coal of their collieries, and the owners or lessees of any other colliery were desirous of using such way for the conveyance of coal, an application was made by the latter to the former for permission so to do; and it was the usage and practice to grant such permission, on the person to whom the same was granted paying a certain sum, or an awarded sum per ton per mile for the coal led over such waggon-way; and that such permission was always understood (unless it should be otherwise stipulated, of which stipulation the deponents recollected no instance) to be optional as to its duration on both sides; and that while the persons obtaining such permission were at liberty at any time to discontinue the use of the way, and in consequence to cease to pay or make any compensation, the persons granting the permission were also at liberty to withdraw such permission, and to prevent the leading coal over the way laid by and belonging to them at their pleasure, and without giving any notice of their intention. The affidavits farther stated, that the notice of November 1817, was sent as matter of courtesy only, and not under a notion that the Defendants were bound to give notice of their intention to remove their waggon-way.

[107] Sir Samuel Romilly and Mr. Bickersteth, in support of the motion. Mr. Bell against the motion.

The Lord Chancellor [Eldon]. An agreement by the lessees of the *Kenton* and *Coxlodge* collieries, to allow to the occupiers of the collieries of the Plaintiffs the use of the waggon-ways enjoyed by them, would be effectual so far only as their interest extended, but could not amount to an absolute grant without the concurrence of all the owners; for the right which they possessed was a licence to carry their own coal, not that of others. Such an agreement, I think, might be determined at any time, on the option of either party. But the Defendant *Brandling* then executes the deed of April 1811, a most improvident deed, granting a licence to use this identical way. Suppose that *Brandling* had not come into possession of the *Kenton* and *Coxlodge* collieries, and that after that agreement the lessees of those collieries had removed the materials of the waggon-way, I think that they were at liberty so to act. But *Brandling* afterwards becomes owner in possession of the soil, and the question is, whether a court of equity will permit him to defeat his own covenant? The deed is improvident on the part of *de Ponthieu* also, who covenants absolutely for payment of rent, though the lessees were entitled to remove the materials. Had they exercised their power of removal, no complaint could have been made against *Brandling*; but the question is, whether, if he grants a right of way for a term of years, and afterwards acquires a power to render that grant effectual, he or those claiming under him can be permitted to defeat it?

[108] July 30. The Lord Chancellor. The claim of the Plaintiffs to the interposition of this Court is rested on two grounds. First, that the owners of the *Fawden* colliery are to be considered as tenants in common with the owners of the *Kenton* and *Coxlodge* collieries, of the way-leaves in question, subject to determination on six months' notice. On examination of the different instruments, it appears to me that they could not establish any equity on that ground.

But there is another ground on which they are entitled to say that the materials of this waggon-way shall not be removed before the 22d of November; an equity arising on the deed by which *Brandling* demised a right of passage along this identical way. By that instrument, *Brandling* having power to grant a right of passage to be exercised not only on any waggon-way which might be laid across that property, but on that identical waggon-way, covenanted that *de Ponthieu*, and those representing him, should have a right of passage over that identical way; and it appears to me, that neither he nor those claiming under him, can be competent to interrupt that way in contradiction to his own deed; as against him and others, the Plaintiffs have an equity to say, you shall not defeat this grant by the premature removal of the materials, and deprive us of that identical way to which this deed entitles us.

I am of opinion, that the Plaintiffs are entitled to an injunction against the removal of the materials before the 22d of November. (1)

(1)

— v. White.

Specific performance of an agreement become useless to the Defendant, refused.

The bill was for a specific performance of an agreement by which the Defendant was to take a lease of a way-leave over the Plaintiff's close, at the yearly rent of £10, for [109] the use of a colliery which the Defendant intended to take; and was likewise to employ the Plaintiff's son in the colliery during the term, and allow him £20 *per annum* during the first seven years, and £30 the second: at the close of the articles the Defendant obliged himself to the performance under a penalty. After the execution of them, some other colliers took a lease of other lands, which, as well as the Plaintiff's, lay between the colliery and the river, and so rendered the Plaintiff's way-leave useless to the Defendant; and the Defendant could not obtain a lease of the colliery, and the lease that he was to take being for the use of the colliery, though there was no fraud proved in the Plaintiff hindering the Defendant from taking the other way-leaves or the colliery.

Yet my Lord would not decree a specific performance, but directed only a *quantum damnificavit* by the Defendant's not taking the lease; and that part that related to the employing the son he totally rejected, there being no colliery to employ him in.—Lord Colchester's MSS. in a collection entitled as containing cases from *Easter* 1706 to *Michaelmas* 1713.

WHITE v. The Bishop of PETERBOROUGH. July 20, Aug. 18, [1818].

[For subsequent proceedings, see Jac. 402].

A third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed at the instance of the second incumbrancer.

The bill stated, that the Defendant *John Ambrose*, being rector of the parish of *Blisworth*, in the diocese of *Peterborough*, in 1805, agreed with the Plaintiff for the sale to him of an annuity of £100 during the life of *Ambrose*, secured on the rectory, at the price of £700; and by indenture of the 29th of August 1805, *Ambrose* granted to the Plaintiff an annuity of £100 charged upon the rectory. (1) parsonage-house, &c., during the life of [110] *Ambrose*, with covenants for permitting entry and distress on the rectory, in case the annuity should be in arrear; and demised the rectory to *W. Ross* for ninety-nine years, if *Ambrose* should so long live, in trust, in case the annuity should be in arrear, out of the tithes and profits of the rectory, or by sale or mortgage, to raise such sums as should be sufficient to satisfy the arrears; and after reciting an indenture of the 27th of May 1805, whereby *Ambrose* granted to *Joseph Jacob* an annuity of £110 charged upon the rectory, and secured by a demise of the rectory for sixty years, and appointed *Matthias Deane* receiver of the tithes and profits of the rectory, in trust, to secure the annuity, *Ambrose* confirmed the appointment of *Deane* as receiver, and *Deane* agreed to apply the surplus of the tithes and profits of the rectory, after satisfaction of the annuity of £110 and certain other deductions in payment of the Plaintiff's annuity.

The bill further stated, that a memorial of the annuity was enrolled, and that the annuity had remained unpaid since the 29th of May 1810; that *Deane* died without having acted as receiver; that in February 1814, *Ambrose* took the benefit of the stat. 54 G. 3, c. 28, for the relief of certain insolvent debtors, and the Plaintiff had been appointed assignee of his estate and [111] effects, of which an assignment had been made; that by reason of prior incumbrances affecting the rectory, and in particular of an outstanding term created by the indenture of the 27th of May 1805, and then vested in the Defendant, *Robert Coddington*, the Plaintiff was unable to proceed at law to enforce his remedies against the rectory; and that the Defendant, *Stephen Eaton*, was in possession of the rectory under a sequestration granted to him by the Bishop of *Peterborough*.

The bill proceeded to state an assignment of *Jacob's* annuity to *Robert Coddington* in July 1807, and subsequent grants of annuities by *Ambrose*; and particularly a pretence of the Defendants, *Stephen Eaton*, and *William Johnson*, that by an indenture of the 27th of July 1809, *Ambrose*, in consideration of £3000, granted an annuity of £417, during his life, to *Eaton*, and demised the rectory for 99 years to *Johnson*, in trust, to secure the payment; and a pretence of the Defendant, *Augustus Manning*, that *Ambrose* was indebted to him in the sum of £4807 upon a judgment; and charged that the sums of £3000 and £4807, were never paid to *Ambrose*, and that the grant of the annuity and the judgment were merely colourable transactions to enable *Ambrose* to retain possession of the rectory, and to exclude the Plaintiff and other creditors, and that with that view *Eaton* and *Manning*, on the 26th of June, and the 14th of November 1811, respectively, procured sequestrations of the rectory to be granted to them by the Bishop of *Peterborough*; and by virtue of such sequestrations, they, or one of them, had entered into possession of the rectory, and had received the tithes and profits to a considerable amount; and though they had notice of the Plaintiff's annuity as a charge upon the rectory, had advanced various sums to *Ambrose* out of their receipts.

The bill prayed an account of the arrears of the [112] Plaintiff's annuity, and that the future payments might be secured out of the tithes and profits of the rectory; a reference to the Master to take an account of the incumbrances affecting the rectory, and to ascertain their priorities, and what was due upon them respectively; an account of all sums received by the Defendants, *Eaton* and *Manning*, or either of them, &c., from the tithes and profits of the rectory, and application of the amount, after deducting the sums expended by them in the salaries of curates and all other just allowances, in payment of what was due to the Plaintiff, and the other creditors of *Ambrose*, according to their priorities; and if it should appear that *Eaton* and *Manning*, or either of them, had advanced any sum to *Ambrose*

out of the tithes, &c., after notice of the Plaintiff's annuity, that they might be charged therewith; and that the Plaintiff might be let into possession of the rectory, or that a receiver might be appointed with the usual powers; and an injunction to the Bishop of *Peterborough* from granting, and to the other Defendants from taking out or proceeding in, any sequestrations against the rectory, or collecting or receiving the tithes or profits thereof.

July 30. The allegations of the bill having been supported by affidavit, on this day a motion was made on behalf of the Plaintiff, for a receiver, and an injunction.

Mr. *Hart* and Mr. *Seton*, in support of the motion, referred to *Errington v. Howard* (Amb. 485), and *Silver v. the Bishop of Norwich*. (2)

[113] Sir *Samuel Romilly* and Mr. *Barber* against the motion.

[114] The Lord Chancellor [Eldon]. I remember, that in the case of *Silver v. the Bishop of Norwich*, I had occasion to consider the authorities relative to this question; but my present recollection is not sufficiently precise to enable me to pronounce judgment.

[116] Aug. 18. The Lord Chancellor [Eldon]. Where a creditor of a clergyman seeks to obtain payment of his debt by judgment and sequestration, he is, [117] in the contemplation of this Court, in the same state as any other creditor who has taken out execution; and, a [118] creditor, having taken out execution, cannot hold property against an estate created prior to his debt. If, by *elegit*, one creditor is in possession of one moiety, and another creditor of another moiety, that is good against the debtor; but if there is an antecedent estate, by virtue of which an ejectment may be brought, it does not appear that against that estate the creditors can hold. Here the Plaintiff could not succeed in an ejectment, because there is a prior estate which may be set up against him; but though a second incumbrancer, yet being prior to the creditor who has taken out sequestration, it appears to me that he is entitled to a receiver.

18th August 1818. "This Court doth order, that the Defendants be restrained from collecting or receiving the tithes, issues, and profits of the rectories, in the pleadings mentioned; and it is ordered, that it be referred to Mr. *Courtenay*, one. &c., to appoint a proper person to collect, get in, and receive the said tithes, issues, and profits, &c.; and it is ordered, that the said Master do take an account of the incumbrances affecting the said rectories, and ascertain their respective priorities; and it is ordered, that the receiver do, out of what he shall so receive, pay and keep down what is or may become due and payable for, or in respect of such incumbrances, according to their respective priorities; and he is to be allowed what he shall pay in respect thereof, in passing his accounts before the said Master, and for [119] the better taking the said accounts, &c."—Reg. Lib. B. 1817, fol. 1629.(3)

(1) The stat. 13 *Eliz. c. 20*, declaring void "all chargings of benefices with cure, with any pension or with any profit out of the same to be yielded or taken, other than rents reserved upon leases to be made according to the meaning of the act," together with the "explanations, additions, and alterations thereof, made by several statutes in the 14, 18, and 43" of *Elizabeth*, was repealed by stat. 43 *Geo. 3. c. 84, s. 10*; but by stat. 57 *Geo. 3, c. 99, s. 1*, so much of the acts of *Elizabeth*, "as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices," and also the statute of 43 *Geo. 3, c. 84*, are repealed. It seems therefore that so much of the stat. 13 *Eliz. c. 20*, as relates to the charging of benefices, and the provisions in stat. 14 *Eliz. c. 11, s. 15*, concerning bonds, contracts, promises, and covenants, for permitting any person to enjoy any benefice with cure, or to take the profits thereof, remain in force.

(2) *Silver v. The Bishop of Norwich. Aug. 1816.*

A receiver appointed of the profits of a rectory under sequestration, and an injunction granted against enforcing sequestrations.

The bill stated, that previous to December 1809, *Augustus Beevor*, one of the defendants, being possessed of certain rectories, and a vicarage in the diocese of *Norwich*, contracted with the Plaintiff *Silver*, for an annuity for his life, to be charged on the rectories and vicarage; and accordingly, by indenture dated

December 2, 1809, *Augustus Beevor* bargained and sold to *Silver* an annuity of £343 during the life of *Augustus Beevor*, charged upon the rectories and vicarage; and the indenture contained a covenant on the part of *Beevor*, in case the annuity should be in arrear, to permit distress and entry by *Silver*; and *Beevor* demised to the Plaintiff *Sparkes*, the rectories and vicarage for 99 years, if *Augustus Beevor* should so long live, in trust, in case the annuity should be in arrear, by demise, sale, or mortgage, to raise the arrears.

The bill stated a similar indenture for securing an annuity of £300 to the Plaintiff *Rolleston*. Both annuities were secured by warrant of attorney, and both were in arrear; and, on the 15th May 1812, *Silver* and *Rolleston* (having severally entered up judgments, &c.) obtained sequestration against the rectories and vicarage.

On the 12th November 1812, *James Beevor* procured sequestration to be actually granted to him by the Bishop of *Norwich*, and had ever since been, and then was, in the receipt of the profits under it.

In October 1811, *Augustus Beevor* took the benefit of an insolvent debtor's act, under which *Silver* was appointed his assignee.

The bill charged, that the debt upon which *James Beevor* had obtained sequestration was collusive; that he was a trustee for *Augustus Beevor*, with notice; and fraud, &c.; and, after stating the claims of several other Defendants, who had sequestrations against the livings, and annuities charged on them, which they pretended were prior, and charging that they were not; the bill prayed an account of the arrears of the annuities; that the arrears and future payments might be paid out of the profits of the living; that the sequestrations of *James Beevor*, and those of the other Defendants, might be declared fraudulent, and an account be taken of what *James Beevor* and the Bishop had received under them, to be paid over for the benefit of the parties interested therein; a reference to ascertain the priorities of the annuities; that *Silver* might be let into possession; a receiver, and an injunction.

After the answers had been filed, the Plaintiffs moved for a receiver of the rents and profits of the rectories and vicarage; and an injunction to restrain the Bishop of *Norwich* and *James Beevor* from collecting the rents, &c., and to restrain other Defendants from putting in force the sequestrations which they had obtained.

Mr. Hart and Mr. Selon in support of the motion.

Sir Samuel Romilly and Mr. Barber opposed the motion, on the ground that the Court had no jurisdiction to interfere with a possession under a sequestration by appointing a receiver.

The Lord Chancellor [Eldon].

The legal estate is not in the sequestrator. The trustee of the Plaintiff, under the demise of the term by which the annuity is secured, might bring ejectment, and in that recover the glebe and the tithes. It is said the legal estate is in one *Scott*, under a demise of a prior date, to secure a previous annuity, and that *Scott* will not consent to the receiver. But, I apprehend, the Court will not allow a prior incumbrancer to object to the Court's appointing a receiver by any thing short of a personal assertion of his legal right, and a taking possession himself.

In the course of the long vacation of 1816, the following written judgment was sent to the parties.

The Lord Chancellor [Eldon]. I should have sent this case to town sooner, if, upon reading the pleadings attentively, I had not found more difficulty than what occurred to me upon the mention of the case in Court.

The objection to *Silver's* annuity, founded in what is stated (in the answer) as to the memorial (that it had not been duly enrolled), makes it necessary, on this motion for a receiver, to consider the case as founded only in the claim of *Rolleston* for his annuity. With respect to any claim which *Rolleston* can have under his sequestration of the 15th May 1812, the pleadings deny that sequestration. (Note: It was said to be invalid as not having been duly published. *Legassicke v. The Bishop of Exeter*, 1 *Crompton*, 359; see *Tidd's Practice*, 1004, n.)

I cannot, in the question about appointing a receiver, now enter into the consideration what may be fit to be done if he obtains a valid sequestration hereafter. If he has now no valid sequestration, I do not see what right he has to an account now under a sequestration, even if he should have that right when he has obtained a valid sequestration.

But perhaps this case will be found not to depend upon the rights connected with sequestration, or sequestrations, merely. *Rolleston's* annuity is secured by a term of ninety-nine years, created in *December* 1809, and he seems, by the persons in whom that term is vested, to have a right to proceed by law to take possession against all subsequent judgment creditors, having obtained sequestration; and therefore against *James Beevor's* judgment, unless there are prior outstanding legal estates, that would bar his title in ejectment. If he has such a right, and can proceed at law, he is not entitled to have a receiver in equity. The bill has indeed stated as pretences, that there are prior annuities of 1805 and 1807, without stating, whether the grants are of such a nature as would bar the Plaintiff's proceeding in ejectment under the demise, for it does not state these prior grants with much particularity as to the effect of them; but whatever they are, the bill, instead of admitting their existence, and stating that existence to be a bar to the Plaintiff's proceeding at law, expressly charges that there are no such annuities, and that the suggestion that there are such is mere pretence. The answer indeed of *Augustus Beevor* or *James Beevor*, after asserting that *James's* judgment is not colourable or in trust, represents his judgment for £10,000 to be for securing £1388 debt, and what he pays as surety for *Scott's* annuity, which is prior to the Plaintiff's, and for various sums which *James* had paid for *Augustus*.

But this part of the answer does not so state the securities for *Scott's* annuity, as to enable any judgment to be framed, whether there is an estate created for securing *Scott's* annuity, such as would defeat the proceedings in ejectment, under the ninety-nine years' term, created by the demise in the deed of *December* 1809; and if that proceeding can be sustained, and it does not appear upon these pleadings that it cannot be sustained, I apprehend a receiver cannot be appointed. It is also true that it does not appear one way or the other by the answers, whether *James Beevor* has a right to make use of his judgment as against the Plaintiff *Rolleston* and his demise for ninety-nine years, with respect to the sums which he has paid for *Augustus Beevor* beyond his payment of *Scott's* annuity. But *James* has sworn to a large sum of money being yet due to him, and I apprehend the Plaintiff cannot be entitled to a receiver, unless he can show by the record, that if he is entitled as a prior judgment creditor having a right to a subsequent valid sequestration (the present sequestration of *Rolleston* being denied to be valid) the demand is satisfied in respect of which *James Beevor* is entitled to make use of his sequestration, or unless he can show from the record, that whatever be the claim of *James Beevor*, satisfied or unsatisfied, the Plaintiff has a right to the possession, by virtue of his demise for ninety-nine years prior to *James Beevor's* title, but that by virtue of some prior legal estate, which would prevent his availing himself of the ninety-nine years' term, he cannot make use of it at law, and therefore is obliged to come into equity; and it seems to me that upon the present state of the record it cannot be shown that this is sufficiently manifest for the purpose of this motion. I am therefore upon the whole afraid that the case, as it stands upon the record, does not admit enough for the appointment of a receiver, and that more admissions must be obtained by compelling further answer. I have, however, stated the grounds upon which I think I cannot grant the motion, that either party may offer to me their observations upon what I have stated; being apprehensive that the justice of the case is more with the Plaintiff as to having a receiver appointed, than it perhaps can be upon the state of the present record. From Mr. *Merivale's* MSS.

A receiver was afterwards appointed.

His Lordship doth order, that it be referred to Sir *John Simeon*, baronet, one. &c., to appoint a proper person to be receiver of the rents, tithes, issues, and profits of the rectories and vicarage in the pleadings of this cause mentioned, and to allow him a reasonable salary for his care and pains therein, such person so to be appointed first giving security, &c.; and the tenants of the said estates are to attorn and pay their respective rents in arrear, and growing rents, to such receiver, who is to be at liberty to let and set the said estates from time to time, with the approbation of the said Master, as there shall be occasion; and it is ordered, that the said Master do inquire what annuities and incumbrances there are affecting the said estates, and he is to state their priorities; and it is ordered, that the person, so to be appointed receiver, do keep down the said annuities and the interest of the said in-

cumbrances, according to their priorities ; and it is ordered, that he do pay the balance that shall be reported due from him, from time to time, into the bank, &c. ; and in the meantime it is ordered, that the Defendants, the Bishop of *Norwich* and *James Beevor*, be restrained, by the injunction of this Court, from commencing or prosecuting any proceedings in respect of the matters in the bill mentioned ; and it is ordered, that the Defendants *Miles Beevor*, *William Unthank*, and *Mary Beevor*, be restrained from putting in force the sequestration obtained by them in the pleadings of this cause mentioned, until the farther order of this Court.—Reg. Lib. B. 1815, fol. 1733–1735.

(3) See concerning sequestration of ecclesiastical property, *Cuddington v. Withy*, 2 Swans. 174, with the references ; to which may be added *Berwick v. Swanton*, Bunb. 192, n. ; 1 Wood, 295 ; 2 Gwill. 537. *The Bishop of Norwich v. Buckler*, 2 Gwill. 610. *The Bishop of London v. Nicholls*, Bunb. 141 ; 2 Gwill. 648, and *Hubbard v. Beckford*, 1 Haggard, 307.

“ *Pasch. 10 Ann. B. R. Coventry's Case*.—The bishop grants a sequestration upon a *feri facias*, against a clergyman ; and returns that he had granted such sequestration, but that A. and B., tenants of the land, refused to pay the rent according to it : upon a motion for an attachment against A. and B., it was objected, that there was no affidavit that A. and B. refused to pay ; but the Court held the return of the bishop, who, in this case, is in nature of the sheriff, sufficient.”—From *Sir Clement Wearg's MSS.*

MUNYARD v. NEW. *Rolls. July 21, 1818 ; March 17, 1819.*

Construction of an obscure will—executors not beneficially entitled.

The will of *James Daniel*, dated in April 1812, was in the following words : “ Whereas my good and faithful servant, *Ann Glayshier*, has been kind, and done a mother's part towards my daughter from her cradle, and I putting great confidence in her future care and attention to and for my daughter's happiness, and for those reasons I do order and direct, that all the rents and profits arising from all and every part of my estates or effects shall be paid into the hands of my faithful friend *Ann Glayshier*, together with all the interest of any money in the public funds, and that her receipt shall be a full discharge for all monies received by her ; and I order and direct, that she may recover and receive all money that may be owing to me, and that it may be paid into her hands ; and after paying my just debts, [120] and funeral expenses, the money to be applied as follows : First, I give and bequeath unto my faithful *Ann Glayshier* the sum of £200 *per annum* for and during her natural life, together with the use of all my household furniture, for her use, not subject to the debts or controul of any future husband ; and I do order and direct, that the interest of all the other monies arising from my estate and effects shall be applied as my executors shall direct, for the comfort of my daughter, as may be thought proper, subject to the direction and advice of my faithful friend *Ann Glayshier*, and that no part of the money shall be subject to the debts or controul of my daughter's present or any future husband ; and I do order and direct, that, in case my son-in-law, *Joseph Munyard*, treats my daughter with kindness, and permits her, and that she does stay as long as she pleases with any of her friends or relations, and that in case my daughter shall, from any cause or infirmity of mind, or illness, be put under the care of her friends, and that it shall be the wish of my daughter to remain with her friends, that her husband shall not take her away, or compel her to live with him, in case she does not like it, and that her husband, *Joseph Munyard*, signs a deed drawn up for that purpose, and that my daughter is not compelled to live with his mother, or any other part of his family ; and on my daughter's husband complying with these terms, then, and in that case, after the decease of my daughter and *Ann Glayshier*, the whole of all my houses and lands shall go to my daughter's husband, *Joseph Munyard*, his son, *Joseph Daniel Munyard* ; and, after his son's decease, to be subject to the will of my son-in-law, *Joseph Munyard*, his heirs or assigns for ever ; and in case my daughter's husband does not comply with these terms, then, and in that case, I leave it to the full power of my executors to dispose of all my pro-

perty to and [121] amongst my own relations as they think proper, after the decease of my daughter ; and should I leave any money in the public funds, then I order and direct, that one half shall go and be subject to the same conditions, to the use and benefit the same as the other property for the benefit of my daughter, and, after her decease, to go to *Joseph Munyard* and his son ; the other half of the funded property to be disposed of by my executors as they may judge right ; in case of the decease of my son-in-law, *Joseph Munyard*, then I do order and direct the whole of my property besides *Ann Glayshier's* part, shall go and be applied for the whole benefit and support of my daughter, *Sarah Ann Munyard*, and her son."

The testator appointed *Ann Glayshier*, *George New*, and *Charlotte Nash*, his executors and executrix.

On the 27th of *August* 1812, the testator executed a codicil ; which, after referring to his will, as in the possession of *F. J. Rowbotham*, proceeded thus : "Whereas in and by my said will, I have given and devised my real and personal property, and to the persons, and in the manner therein expressed, the whole particulars of which I do not recollect, and I have therein nominated and appointed *George New*, with other persons, as trustees and executors ; now, I do, by this codicil, which I direct to be added to and taken as part of my said will, nominate and appoint my said friend *Francis Jonathan Rowbotham* to be a trustee and executor of my said will, jointly with and in addition to the said *George New*, and the other persons therein named ; and in case of any inaccuracy or insufficiency as to the disposition of all or any part of my real or personal property, I do hereby give, devise, direct, limit, and appoint, all my real and personal, of every description, in *Great Britain*, or elsewhere belonging to me, or over which I [122] have any power of appointment or disposition, unto the said *F. J. Rowbotham*, jointly with the said *George New* and the other persons therein named as trustees or executors in my said will, and to their heirs, executors, administrators, and assigns, upon trust for the several persons, and to be disposed of in the manner expressed concerning the same, in and by my said will, which I do hereby ratify and confirm, in all respects not hereby varied or altered."

The testator died on the 29th of *August* 1812, possessed of some leasehold and copyhold estates and money in the funds.

The bill filed by *Sarah Ann Munyard*, his only child, stated that *George New* and *Ann Glayshier* proved the will, and that the latter had retained to her use the testator's household furniture, without having signed an inventory.

The bill charged, that the general devise and bequest to all the executors in trust, contained in the codicil, revoked the special direction in the will, with regard to the receipt of *Ann Glayshier* alone ; and, that by the true construction of the whole of the will and codicil together, the executors took the whole of the property not specifically bequeathed in trust for the Plaintiff for her life, or during her coverture, with a future contingent benefit to her, in case she should survive her husband ; and that although the executors and trustees might be empowered to exercise a discretion as to the mode of applying the same for the Plaintiff's comfort, still the whole income of the testator's property, after paying *Ann Glayshier's* annuity, must be so applied, or if not, that whatever the executors should not think proper to be applied for the Plaintiff's comfort and benefit during [123] her coverture, ought to be accounted for by them, and laid out as part of the testator's general estate, for the benefit of those entitled to the residue.

The bill prayed, that the trusts of the will might be carried into execution for the benefit of the Plaintiff and all persons interested ; the usual account of the testator's personal estate, and of his copyhold and leasehold estates ; and that it might be ascertained of what particulars the clear residue might consist ; and that the Plaintiff might be declared entitled to the whole interest or income of such residuary estate, to her separate use for her life, or during her coverture, with such future contingent interest absolutely as thereinbefore mentioned ; or that the right and interest of the Plaintiff, and the several parties might be ascertained and declared ; and that directions might be given for renewing any of the testator's copyhold and leasehold estates which might require renewal ; and to that end, if *George New* and *Ann Glayshier* should not be held to have in them, as acting executors, sufficient estate and interest in the copyhold estates, without the joining of the executors and trustees named in the will, then that such other executors and trustees might join, or assign and convey their interest therein respectively, to the acting trustees and



executors ; and that, if necessary, a receiver might be appointed of the copyhold estates, with the usual directions.

*Ann Glayshier*, by her answer, claimed the annuity of £200, and submitted whether she and the other executors were entitled, for their own benefit, to a moiety of the testator's property in the public funds ; and whether she was entitled to receive, during the life of the Plaintiff, the rents and profits of the testator's copyhold and leasehold estates, and the interest or annual produce of the clear residue of his personal estate other than his household furniture, and thereout to retain and [124] pay to herself the annuity of £200, and to apply the remainder according to the directions of the will ; or whether she was only entitled to be paid during her life the annuity of £200 ; and in that case, out of what fund.

The case, on farther directions, was argued by Mr. *Trower*, Mr. *G. Wilson*, Mr. *Hart*, and Mr. *Treslove*, for different Plaintiffs ; Mr. *Bell* and Mr. *Shadwell*, for the Defendant *New* ; Mr. *Wetherell* and Mr. *Roupel*, for *Rowbotham* ; and Mr. *Heald* and Mr. *Cooper*, for *Ann Glayshier*.

The following authorities were cited : *Bro. Abr. Devise* pl. 39. *Anon. Moor*, 57. *Robinson v. Dugate* (2 Vern. 181), *Hales v. Margerum* (3 Ves. 299), *Tomlinson v. Dighton* (1 P. W. 149), *Nannock v. Horton* (7 Ves. 391), *Maskelyne v. Maskelyne* (Amb. 750), *Timewell v. Perkins* (2 Atk. 102), *Goodtitle v. Otway* (2 Wils. 6), *Gibbs v. Ramsey* (2 Ves. & Bea. 294), *Paice v. The Archbishop of Canterbury* (14 Ves. 364).

The *Master of the Rolls* [Sir Wm. Grant]. In the construction of a will so strangely framed, considerable difficulties are inevitable. The principal question is, whether the testator did not intend to give one moiety of his funded property to his executors ? The subordinate question, who fill the character of executors—those only who have proved, or those also who have not proved, and in what proportions they take ?—will not arise till the previous question is decided.

It is fair to contemplate the situation of the testator and his family, as some guide to his intention. Having copyhold, leasehold, funded, and other personal property, [125] and only one child, a daughter, peculiarly requiring his protection, and marked out as the object of his care, and married to a husband with whom there had been disputes, and having one son of the marriage, without any misconduct on her part, and she still appearing to be the principal object of his bounty : to suppose that the testator meant to bestow one half of his property on strangers, not on any substituted object, having a prior claim, but merely to give it from his daughter and grandson, is a conclusion which the Court would not adopt, unless the words of the will peremptorily require it.

The will (which is written by his own hand) manifests an intention to embrace the whole of the testator's property, real and personal, expressly including interest arising from the funds, which is to be paid into the hands of *Ann Glayshier*, an object of his bounty, but principally with reference to the chief object of bounty, his daughter ; and, as a means of conducting it to her, she is to retain to herself £200 *per annum* for her life, not subject to the debts or controul of her husband ; and a question has arisen, whether the household furniture was given absolutely to her, or only the use of it during life ? I am of opinion, that it was the testator's intention to give to her the use for life only ; that gift is expressly connected with the sentence that gives to her an annuity for life : both the subjects thus united are evidently intended to be given for the same period. Pursuing the general question, all the interest of money in the funds, and all the rents of the lands are given to *Ann Glayshier*, subject to this annuity of £200 ; and the testator then directs, that the interest of all his other monies should be applied as his executors direct for the comfort of his daughter. This is a disposition of interest only, not of capital. The interest of every part of his property, after satisfying the annuity of £200, is devoted to [126] the comfort of his daughter ; but that clause, undoubtedly, extends to give to her the interest only, not the *corpus* of the estate. Then, leaving for a time the disposition in favour of his daughter, the testator proceeds to the case to which he had anxiously adverted, hoping to induce the husband to treat his daughter with kindness. The deed to which the will refers appears, by the Master's report, to have been prepared in 1810, though not executed till after the date of the will in 1812 ; but the testator by the will invites the husband to execute this deed, making the execution a condition of the benefits conferred on him, and thus imposing an obligation to treat his wife in the manner prescribed. In case of compliance with those terms, the real property,

but no part of the personalty, is devised, after the decease of the wife, to the husband and grandson, to be at the absolute disposal of the former, after the death of the latter. That is the first alternative, compliance.

The testator then adverts to the alternative of non-compliance. (See the clause, 3 Swans. 120.) The first observation on this clause relates to the words, "all my property"; terms large enough to comprehend every thing of which he was possessed; but the question is, whether he did not mean all his *said* property, all that which he had just given in the event of compliance, namely, houses and lands; designing, in case of a compliance, a gift to his son-in-law; in case of non-compliance, an absolute power of disposal by his executors among his family, after the decease of the daughter, who was to enjoy the rents of the land, and the interest of the funded property. Then, assuming that the testator is pursuing the same alternative, the event of non-compliance of the husband, having declared what was to become of the lands in that event, that they were to be distributed by his executors among [127] his relations, was the son-in-law to be left destitute? What was to become of the funded property? To that he next proceeds. The clause is, indeed, subject to considerable difficulty and confusion; the testator is entangled by a multiplicity of words, but the question is, whether the Court cannot discern his intention? Whether it is not apparent, that he is now making a disposition with regard to the funded property, in the event in which he had previously disposed of the landed property?

Designing his will to operate *in terrorem* on his son-in-law, if he did not treat his daughter according to the terms of the deed, the testator directs that he shall forfeit all the landed property, and that his executors shall dispose of it; and as to the funded property, instead of having the whole, the son-in-law and grandson shall have only a moiety. It might be reasonable that his grandchild, the son of his only daughter, and the father of that son, should not be totally destitute, but that a reduced provision should be made for them; the other moiety is left to the disposal of his executors. The same power that the testator thought fit in the first instance to give to his executors over the landed property, as a punishment for the non-compliance of the son, he here extends to the funded property.

The difficulty of this part of the case arises from his having embarrassed his meaning with the words, "subject to the same conditions, to the use and benefit as the other property for the benefit of my daughter"; words which certainly create a considerable obscurity; but the main object of this clause seems to be, not to make a new disposition in favour of the daughter, but to provide that one moiety of the funded property should belong to the son and grandson, and the other moiety be [128] at the disposal of his executors. This construction appears best to reconcile the whole will, and executes the testator's natural intention of providing for his daughter, and securing protection to her, with an eventual power to the executors in case of non-compliance; regulating the disposition of both species of property, after the death of the daughter. It would be most unnatural that the ill usage or neglect of the husband, which rendered her a more just object of attention, should deprive her of a provision during her life. The misconduct of the husband ought not, and could not be intended, to operate in abrogating the bounty bestowed on the daughter. The words here introduced, "given for the benefit of my daughter," are evidently terms of reference, not of a new bequest: for they cannot be understood as a bequest of capital: after the death of the daughter this was to go to the son and grandson, but would operate to give to the daughter the interest. When on one construction the effect of the second part of the will, relative to the same subject and the same object, would be to reduce the gift in the former part, contrary to every probability of intent, to the prejudice of the principal object of the testator's bounty, the Court must incline to a different construction.

The concluding clause, "the whole of my property," &c. (3 Swans. 121) may be fairly understood to express his intention, if the son-in-law was removed to give the whole to the daughter. Supposing that the son had died during the daughter's life, notwithstanding the intermediate clauses, under the last clause the daughter would take the whole. What then would have become of that which is supposed to be a substantive independent gift of one moiety to the executors? In the event of the [129] son's death in her life, the whole devolves to the daughter. That manifests the testator's intention, that his daughter should take the whole unless in certain events particularly mentioned.

The best construction, though not unattended with difficulties, is, that it was the testator's purpose to give the whole to his daughter for her life, to give the houses and lands to the husband, and to provide for an event not improbable, non-compliance with the terms of the deed. Nothing short of imperative words could compel the Court to declare that it was the intention of the testator to deprive his daughter of the funded property, for the benefit of his four executors, one of whom had been an object of his bounty to the extent of £200 *per annum*. The general and loose form of the gift to the executors, denotes a gift to strangers, only in the event of the misconduct of a prior legatee.

This construction renders it unnecessary to consider the subordinate questions.  
 "His Honour doth declare, that the Defendant, *Ann Glayshier*, is entitled to the use of the testator's furniture for life, and doth order that an inventory be made thereof, signed by her and the other Defendants, the executors; and it is ordered, that two parts be made thereof, and it is ordered, that one part be deposited with the Master; and his Honour doth declare, that she is also entitled to a life-annuity of £200 charged on the real and personal estate; and subject thereto, doth also declare, that the Plaintiff, *Sarah Ann Munyard*, is entitled for her separate use, to the interest and dividends of the testator's personal estate and funded property, and to the rents and profits of his real estate, for her life; and [130] doth declare, that the said Defendant, *Joseph Munyard*, having executed the deed, and in other respects conformed to the directions contained in the testator's will, has entitled himself to such eventual benefit in and out of the testator's estate, as in the testator's will mentioned; and upon the death of the Plaintiff, he, or any other person interested in the estate of the testator, are to be at liberty to make such application to the Court in regard thereto, as they shall be advised; and his Honour doth declare, that the Defendants, the executors of the testator, take no beneficial interest, as such executors, under the said testator's will." Reg. Lib. B. 1818, fol. 1256.

*Ex parte PRICKETT*, in the matter of the Duchess of NORFOLK, a lunatic.  
 July 25, 1818.

Apportionment of the costs of granting a lease of a lunatic's estate, between the estate and the lessee.

This petition, presented by one of the receivers appointed in the lunacy, prayed the confirmation of the Master's report, that it would be for the benefit of the estate of the lunatic that a lease should be granted to *E. Stone*, of two farms described, on the terms specified, and a reference to approve a lease, and taxation of the costs of the petitioner, and the next of kin, and committees of the estate of the lunatic, relating to the proposal for and granting the lease, to be paid by the petitioner, and allowed in passing his accounts.

Mr. *Norton*, for the petition; Mr. *Bell*, for the committee of the estate; Mr. *Wetherel*, for the next of kin.

The Lord Chancellor [Eldon]. The usage in lunacy is, that the committee pays the [131] expenses of the inquiry, and the lessee of the lease.—Take the order in those terms.(1)

The order directed the Master to tax the petitioner, and the committees of the lunatic's estate, and the next of kin of the lunatic, their costs and expenses incurred about the proposal for granting the lease, and of the ap-[132]-plication, and relating thereto; and those costs when taxed, were to be paid by the petitioner out of the rents and profits of the lunatic's estate, and allowed in passing his accounts; but the costs and expenses of the lease and counterpart were to be borne by the petitioner. (Note: It was understood that those costs should be paid by the lessee.)

(1) *Ex parte Jermyn. In Chancery. 24th May 1788.*

*Petition in Lunacy.* A lease renewed for the benefit of the lunatic's estate ought to be taken in the name of the lunatic if it were so at the time of the lunacy, but if originally in trust for the lunatic, then to the committee.

Upon reference to the Master to inquire whether it would be for the benefit of the lunatic's estate to renew a lease holden under a college, and the Master having

reported it to be beneficial to procure such renewal, the present petition prayed that the report might be confirmed, and that the committee might be at liberty to surrender the old lease, and that a new one might be granted by the college to the committee for the usual term.

The *Lord Chancellor* [Thurlow] had some doubt whether the new lease ought not to be in the name of the lunatic, and not of his committee; and asked whether this lease at the time of the lunacy was in the lunatic himself, or in any other person in trust for him? To which it was answered by the solicitor, that this was a very old lunacy, and that this lease had been from time to time renewed in the name of the committee, but whether the lease subsisting at the time of the lunacy was made to the lunatic himself, he was not able to inform the Court.

His Lordship said, if the lease was at the time of the lunacy made to some other person in trust for the lunatic, he should continue it so, as in that case he should not change the estate; but if the lease was in the lunatic himself, and only taken out of him by the act of the Court, the new lease ought to be made to the lunatic himself, and not to his committee. And his Lordship directed an inquiry as to this fact.—From Mr. *Cox's* Notes.

BLACKBURN v. JEPSON. April 1, 2, 7, 11, 1818; Feb. 11, March 11, 13, 15, 1823.

A modus of one penny in lieu of the tithes of hay of every inhabitant or occupier of a house, and having any land at, or belonging to, or used or enjoyed with any house, is invalid. The decree of the *Master of the Rolls* on the other moduses affirmed. A modus being clearly invalid as laid, the question of law is decided without directing an issue on the question of fact.

The decree pronounced at the hearing of this cause before the *Master of the Rolls* (17 Ves. 473), on the 3d of August 1810, dismissed the bill, so far as it sought an account of the tithes of wheat, rye, barley, oats, peas, and beans; and directed a reference to the Master to take an account of all the other titheable matters and things demanded by the bill, which the Defendants *Thomas Jepson, &c.*, had, since the 25th day of December 1804, had or taken upon or from off the several farms or lands occupied by them respectively, in the several townships in the pleadings mentioned (except gardens, orchards, eggs, geese, hay, colts, pigs, honey, wax, and wood burnt in their houses); and an account of all Easter offerings, oblations, obventions, mortuaries, and other dues and payments which had become due from the Defendants respectively, to the Plaintiff *William Joule*, since the said 25th day of December 1804; with the usual directions for taking the accounts.

The decree then ordered the Plaintiffs and the several [133] Defendants to proceed to a trial at law at the Spring assizes to be holden for the county of Lancaster, in the year 1812, upon the several following issues: 1. Whether by ancient custom, used and approved within the said parish of *Manchester*, from time whereof the memory of man is not to the contrary, hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester* aforesaid, that is to say, *Beswick, &c.*, and in all the other townships, precincts, or hamlets, in the said parish of *Manchester*, or any or either of them; and having any garden at or belonging to, or used and enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector or rectors for the time being of the said parish of *Manchester*, his or their lessee or lessees, farmer or farmers, for every such garden so occupied by every such person, the sum of one half-penny, for and in lieu and in full satisfaction of the tithes of all the titheable matters and things yearly arising, growing, renewing, and increasing, and had and taken in and from every such garden.

2. Whether by ancient custom, &c., hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant and occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester, &c.*, having any orchard at or belonging to, or used or enjoyed with any house, and situate in the several town-

ships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for every such orchard so occupied by every such person, the sum of one penny, for and in [134] lieu and in full satisfaction of the tithes of all the titheable matters and things yearly arising, growing, renewing, and increasing, and had and taken in and from every such orchard.

3. Whether by ancient custom, &c., hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester*, &c., to or for the use of the rector, &c., for all hens kept by any such person on such land, the sum of one half-penny, in lieu and full satisfaction of the tithes of the eggs or young respectively, of all such hens.

4. Whether by ancient custom, &c., hitherto there has been and now is due and payable at *Easter* in each year, or as soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, or hamlets, in the parish of *Manchester*, &c., and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for all geese kept by every such person on such land, the sum of twopence, in lieu and full satisfaction of the tithes of the eggs and young respectively, of all such geese.

5. Whether by ancient custom, &c., hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester*, &c., aforesaid, that is to say, *Beswick*, &c., and in all the other townships, precincts, or hamlets, in the [135] said parish of *Manchester*, &c. (save and except as to the tithes of hay of some parcels of land situate in the townships of *Manchester*, in the answer of the Defendants mentioned), or any or either of them, and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, and producing titheable matters and things to or for the use of the rector, &c., the sum of one penny, for and in lieu and in full satisfaction of the tithes of all hay of every such inhabitant or occupier having any such land as aforesaid, producing hay, whether such quantity be more or less.

6. Whether by ancient custom, &c., hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, or hamlets in the parish of *Manchester*, &c., and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for every colt fallen in such lands, the sum of four-pence, in lieu and in full satisfaction of the tithes of every such colt.

7. Whether by ancient custom, &c., hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets in the parish of *Manchester* aforesaid, and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for every farrow of pigs farrowed on such [136] land, the sum of three-pence, for and in lieu and in full satisfaction of the tithes of every such farrow of pigs.

And it was directed that the Defendants in this cause be Plaintiffs at law, and the Plaintiffs in this cause be Defendants at law, who were forthwith to name an attorney, accept a declaration, appear, and plead to issue; and it was referred to the Master to settle the issues in case the parties differed about the same. And it was ordered, that all deeds, books, papers, and writings in the custody or power of any of the parties, be produced and left with the Master upon oath, as the Master should direct; and that the depositions of such of the witnesses examined in this cause as should be dead or unable to travel at the time of the trial, be produced, and read in evidence at the trial of the issues (saving just exceptions); and it was ordered that all the leases, tithe-books, and other documents which were produced, and

given in evidence on the hearing of the cause, or before the commissioners named in the commission for the examination of witnesses, be also produced on the trial of the several issues at law. And his Honour reserved the consideration of the costs of the dismissal of the bill so far as it respects the demand of the tithes of corn and grain, and also of the rest of the costs of the suit, and of the trial of the issues, and of all further directions until after the Master should have made his report and the trial of the issues should have been had; and any of the parties were to be at liberty to apply to the Court as there shall be occasion.—Reg. Lib. A. 1809 fol. 1383-1387.

From this decree both the Plaintiffs and the Defendants appealed. (2 *Vat. Beam.* 359.) The Plaintiffs appealed from so [137] much of the decree as directed issues with respect to the tithe of hay, of gardens, of orchards, of hens, of geese, of colts, and of pigs; and as reserved the consideration of the costs of the dismissal of the bill, so far as it respected the demand of the tithes of corn and grain, and of the rest of the costs of the suit.

The Defendants appealed from so much of the decree as directed an account of the tithes of milk and calves, and agistment of cows not milked, and of the tithes of potatoes or other small prædial tithable matters; and insisted that issues ought to have been directed to try the moduses of 1½d. for each cow producing a calf within the year, in lieu of the tithes of the calf and milk of every such cow; and of 1d. for each cow called a farrow or barren cow, in lieu of the tithes of milk of such cow, if milked, and of the keep or feed of every such cow, if not milked; and of 1d. and 2d. for the small prædial tithes of lands cultivated by the plough, and called the plough and half plough.

The cause now coming to be heard on appeal, the Defendants objected a want of parties.

Sir *Samuel Romilly* for the Defendants. The bill is filed by the warden and all the fellows of *Christ College, Manchester*; since the hearing, two fellows have died, and two new fellows have been elected in their place; for the same reason which rendered it necessary to have all the original fellows parties, the new fellows must be parties: at present no one sustains their interest; the fellows being Plaintiffs in their individual characters, not as members of the corporation, the deceased are not represented by the survivors. Among [138] other reasons, the new fellows are necessary parties in respect to costs, which the Court has reserved. The corporation is not a party to the suit; and if the Defendants are eventually entitled to costs, they must be recovered by attachment against the individuals, not by sequestration against the corporation. The cause is entitled not the *Corporation of Manchester*, but *Blackburn* and others, against *Jepson*; and the petition of appeal is presented under that title in the names of three living persons and two dead.

Mr. *Bell* and Mr. *Agar* for the Plaintiffs.

It is not necessary that all the members of the corporation should be parties. The decree declares that the Plaintiff *Joule*, not the corporation, is entitled to the tithes.

The *Lord Chancellor*. The question must be decided after an examination of the form of the decree:—if the Plaintiffs sue as a corporation, there is no defect of parties; if they sue as individuals, the objection must prevail. If it was originally necessary to make the warden and fellows parties to this suit, or if, though not from necessity, they have been parties from the beginning, and there is, by the decree, a reservation of costs, the Defendants are clearly entitled to the same security for costs, which was tendered to them in the institution of the suit; and that, notwithstanding that the Plaintiff *Joule* alone is declared entitled to the tithes.

April 7. The *Lord Chancellor* [Eldon]. A very material fact is, that the Defendants, subse-[139]quently to the appeal presented by the Plaintiffs, themselves presented an appeal (2 *Ves. & Beam.* 359), entitled in the same manner, and petitioned that their appeal might be heard at the same time with the Plaintiffs'. Is not that a waiver of the objection for want of parties? Proceed with the appeal.

Sir *Samuel Romilly*. The Defendants' petition of appeal could not be otherwise entitled; they could not appeal in any other cause. If a suit has become defective by the death of parties, which renders necessary a bill of revivor or supplement, that objection cannot be waived.

The *Lord Chancellor*. Is not the fact of your petition evidence that you consider the information, however informal, as the information of the warden and fellows ? (1)

[140] The counsel then proceeding to argue the case on appeal, a question arose which side should begin ?

[141] The *Lord Chancellor*. The original appeal, and the cross-appeal together, bring the whole case before the Court ; and it cannot be right that the appeals should be heard as if they were [142] appeals in separate causes. Which side is entitled to begin, depends much on the question, Which has most to complain of in the decree from which they appeal ? [143] The rector complains that he has not received his tithe ; that the Defendants have insisted on moduses which are not valid, and have attempted to prove the fact of [144] modus, when the pleadings raise no question on which the proof can be admitted : on the other hand, the De-[145]-fendants have appealed on the question of agistment only. If the interest of the suitor, which must never be [146] sacrificed to the convenience of the Court, requires it, the appeals may be heard as appeals in distinct [147] causes ; otherwise, I think that the party whose appeal represents him to be most aggrieved by the decree should begin.

[148] It was agreed that the appeals should be heard together, and that the counsel for the Plaintiffs should begin.

[149] April 11, 14. Mr. Agar and Mr. Bell, for the Plaintiff, objected to the moduses as uncertain ; and subject to abuse.

[150] They cited *Took v. Ledgard* (1 *Keb.* 612, cit. 2 *Gwill.* 588), *Travis v. Oxton* (3 *Wood*, 523 ; 3 *Gwill.* 1066 ; 1 *Anstr.* 308, n., under the name of *Whitehead v. Travis*, 7 *Bro. P. C.* ed. Toml. 49), *Franklyn v. The Master, &c., of St. Cross* (*Bunb.* 78).

[151] Sir Samuel Romilly, Mr. Hart, and Mr. Winthrop, for the Defendants, cited *Bennett v. Read* (4 *Gwill.* 1272 ; 2 *Anstr.* 322, n.), *Leyson v. Parsons* (18 *Ves.* 173) (remarking that the statement of the modus [152] is not correct, and no entry of the decree can be found in the Registrar's book), *Thomson v. Holt* (2 *Gwill.* 671), *Phillips v. Symes* (*Bunb.* 171 ; 2 *Wood*, 228), *Manchester College v. Andrew* (2 *Wood*, 488), *Atkins v. Lord Willoughby de Brooke* (2 *Anstr.* 397 ; 4 *Gwill.* 1412), *Williamson v. Lord Lonsdale* (5 *Price*, 25), *Gills v. Horrez* (3 *Gwill.* 861), *Boscawen v. Roberts* (3 *Gwill.* 946 ; 3 *Wood*, 174), *Scott v. Fenwick* (3 *Gwill.* 1250), *Brincklow v. Edmunds* (*Bunb.* 307 ; 2 *Gwill.* 711), *Gardiner v. Cox* (2 *Wood*, 473), *Vernon v. Waller* (1 *Wood*, 300).

In the course of the argument, the following remarks were made by

The *Lord Chancellor*. In *Bennett v. Read* the modus was laid in persons resident and occupying, that is, inhabitants and occupiers ; here it is in the disjunctive, inhabitants or occupiers ; and for some purposes a person may be considered as occupier of a house which he does not inhabit. The doctrine of *Travis v. Oxton*, if different from that of *Bennett v. Read*, though the latter is the more recent decision, must prevail, since it has the authority of the House of Lords. I do not, however, consider the cases as contradictory. In the former case, I think that the intention of the House of Lords was to direct an issue on the question, not whether the modus was good, but whether that payment, whether good as a modus or bad, had been made in lieu of tithe of hay, in order to determine the first point in the case of a vicar—his title to satisfaction for tithe of hay ; and they then seem to have dealt with the case as if it had been admitted that the [153] payment was made in lieu of tithe of hay : and that amounting to proof of the vicar's title to satisfaction for tithe of hay, and the modus being bad, it followed that he was entitled to tithe of hay in kind. The decision in *Bennett v. Read* seems to have proceeded on the ground, that every inhabitant was bound to pay a satisfaction for tithe of hay.

It will be necessary to consider, also, the mode of combining the present fellows of the college ; and I apprehend that that must be done by a consent to be bound by the proceedings in this cause—a consent under the college seal, and by the individual new fellows ; and that agreement may be recited in the order now to be made.

Feb. 11, 1823. The *Lord Chancellor* [Eldon]. (*Ex relatione.*)

This was a suit instituted by the warden and fellows of *Manchester* college ; and the Defendants, after stating the particular premises which have been in their occupation and possession, insist that by ancient custom used and approved within the parish of *Manchester*, from time whereof the memory of man is not to the contrary

hitherto there hath been due and now is payable at *Easter* in each year, or as soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, or hamlets in the parish of *Manchester* (I take it for granted, but I wish to be informed whether I am correct, that in the record itself the expression is "inhabitant or occupier," and not "inhabitant occupier"; because a man may be an inhabitant occupier, but he may also be an occupier without being an inhabitant: an occupier of land need not be an inhabitant, nor need an inhabitant of a house be an occupier of land (*Note*: On examination of the record the expression was found to be, "inhabitant or occupier")),—and having any garden, orchard, or land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, and producing the several titheable matters or things next after mentioned respectively, or any of them, to or for the use of the rector or rectors for the time being of the said parish, his or their lessee, farmer or farmers, the several sums following. So that the description of persons entitled, if any persons are entitled to avail themselves of this modus, is an inhabitant or occupier of a house situated in some of these townships, having any garden, orchard, or land at or belonging to, or used or enjoyed with any house, and situate in these several townships, and producing the several titheable matters and things next after mentioned. The description is "inhabitant or occupier," in the alternative; but, whether he is inhabitant or occupier, he is to have a garden, orchard, or land: which word "land" will include any quantity of land; but it is to be at or belonging to, or used or enjoyed with the house, and situate in the several townships and precincts, &c. I do not find that in the subsequent part of the pleadings, the Defendants have inserted any averment that their land, gardens, or orchards were at or belonging to, or used or enjoyed with, their respective houses. I do not find any averment of the sort. Then they state, for every such garden so occupied by every such person, a sum of one halfpenny to be payable for and in lieu and full satisfaction of the tithes; and they go [155] through all the several moduses, every one of them affected by the description, such as is stated, of the persons who claim the benefit of them. Having so done, they insist they are intitled to the benefit of all these moduses, and a vast deal of evidence has been gone into. The principal and most material question I apprehend to be with respect to the tithes of hay: and they say, that such persons so described are liable to pay one penny for and in lieu and in full satisfaction of the tithes of all hay of every such inhabitant or occupier having any such land as aforesaid producing hay, whether such quantity was more or less, save and except as to some closes which are particularly described as excepted closes. The way they allege their right to pay this penny in lieu of the tithes of hay is obviously this, that they are to pay only a penny, whether they have a thousand acres, or whether they have only one acre; but with this qualification, that the land upon which the hay is to be produced is to be land used and enjoyed with the house; not stating whether the land of which they themselves are in possession is land used and enjoyed with the house, and much less, stating that it had been anciently used and enjoyed with the house.

His Lordship then read the judgment of the *Master of the Rolls* on the original hearing, and proceeded thus:

You observe that this direction, is, to try the fact before the law is ascertained; but if the modus is laid in such a way that it can have no validity in law, the question will be, whether the Court ought not in the first instance to decide against the modus, because it is not a legal modus, even if the fact would support a modus that was legal? The *Master of the Rolls* [156] states his opinion, that the modus for gardens and orchards is well laid, notwithstanding they are not represented to be ancient gardens and orchards; overruling the objection that the modus was laid to be in satisfaction of the tithes of all titheable matters and things yearly arising. There appears to me to be a stronger objection than that which he overrules, viz. that the Defendants claim this modus to be in satisfaction not only of the tithes that are mentioned, but of all other tithes, or some of them.

The *Lord Chancellor* then referred to *Leyson v. Parsons* (18 *Ves.* 173); to the judgment of the present *Master of the Rolls* in *Buske v. Lewis* (3 *Jac. & Walk.*), expressing doubt whether the *Master of the Rolls* had been correctly informed of the manner in which the modus in this case is laid, which differs materially from the modus in *Travis v. Oxton*); and to the judgment of the Chief Baron in *Williamson*



v. *Lord Lonsdale* ; and concluded by expressing his opinion, that the decision in the last case was ruled entirely by *Travis v. Oxtou* ; and that *Bennett v. Read*, if not distinguishable from *Travis v. Oxtou*, though later, cannot prevail against it, in opposition to the authority of the House of Lords.

March 11, 1823. The Lord Chancellor (*ex relatione*). I hold the hay modus bad, on principle, and on the authority of *Scott v. Fenwick*, *Travis v. Oxtou*, *Williamson v. Lord Lonsdale*, and *Buske v. Lewis* ; and I think the present case distinguishable from the case of *Bennett v. Read* in this respect, that if the owner there had parted with the land and retained the house, he was [157] liable to pay, which is not the case here. Whether that distinction is or is not solid and substantial, it is sufficient that the cases are distinguishable. This case must be decided upon different principles.

March 13. The Lord Chancellor (*ex relatione*).

I have examined all the moduses in this case, and I see no ground for varying the decree of the *Master of the Rolls*, except as to the hay modus. That modus is bad ; the remainder of the case has been properly disposed of.

March 15. Mr. Agar insisted, that the Plaintiff was intitled to both the deposits, and that the Defendants should be ordered to pay the costs of their appeal. He cited Lord *Loughborough's* order of the 7th of Feb. 1794. (*Orders in Chancery*, ed. *Beames*, 458.)

The Lord Chancellor (*ex relatione*). The decree will direct an account of the tithes for the time past, and the representatives of the late warden will receive what accrued during his life. On the question of costs, it is a very material fact that the tithes now claimed were never before paid ; all the predecessors of the Plaintiffs have been content with a sum now stated to be £15,000 a year, less than they claim. The omission of demand in all times past, encourages the honest belief that tithes are not due. It happens, I believe very often, the law being that mere non-payment of tithes is no defence against payment, that non-pay-[158]-ment takes place from year to year and century to century, till the evidence of the legal right of non-payment is lost. It must be also recollected, that the Plaintiffs have failed in every point of their appeal, except the article of hay.

On the question of the modus of hay, though I have little or no doubt that I am right, yet I cannot forget that Sir *William Grant* was of opinion, that the fact of the modus ought to be tried before its validity was decided. With all deference to that great judge (happy shall I be, if my memory is as much respected as his), it appeared to me, that to try the fact of the modus was to begin at the wrong point, if the law is that the facts when found will not constitute a valid modus. Whether the modus would be valid, is a question depending much on the authorities of *Travis v. Oxtou*, and *Bennett v. Read* ; cases in which, though I have satisfied my own mind that they are substantially different, yet Sir *William Grant* expressed himself unable to discover a precise distinction. (17 *Ves.* 476, and see 5 *Price*, 36.) On this modus, therefore, the Defendants had solid ground for resisting payment of the tithes.

I shall give no costs of the appeal ; the general costs of the cause are reserved, and the Plaintiffs are entitled to both deposits. If, before the answer was filed, I had read all the cases which have been cited, I think that I could have laid a better modus.(2)

(1) The following cases on objections for want of parties, are extracted from MSS. in the possession of the editor.

Anon. *In Chancery. Trin.* 16 *Geo.* 2, 1742.

Said per Lord *Hardwicke*, Chancellor, that where a bill is brought for a partition, a conveyance must be decreed, and therefore all parties necessary to make such conveyance must be made parties, and brought before the Court. Mr. *Coe's* MSS.

*Pierson v. Robinson*, executor of *Foster*. *In Chancery. Trin.* 21 & 22 *Geo.* 2, 1748. One of two part-owners of a ship, having assigned his share to the other, the former is a necessary party to a bill by a creditor of both against the representatives of the latter.

Upon an account made up between the Plaintiff, as captain of a ship, and *Foster* and *Barclay*, the two part-owners thereof, it was agreed that *Foster* and *Barclay* were

indebted to the captain in £60. and that the ship was liable thereto. *Foster* afterwards buys *Barclay's* share in the ship, and dies.

And a bill was now brought against the executor of *Foster* only, for a discovery of assets, and for a satisfaction thereof of the said debt; and the bill suggested the death of *Barclay* before *Foster*, but it was not proved that *Barclay* was dead, and the Defendant answered that he did not know whether he was or not.

The question was, whether this debt is recoverable against the executor of *Foster* only, or whether *Barclay* or his representative ought not to have been made parties? And it was argued by the Attorney-General for the Plaintiff, and by the Solicitor-General for the Defendant.

The Lord Chancellor [Hardwicke]. Considering this as a personal debt, whether *Barclay* is now living, or whether he died before *Foster* (though at law the demand survives), I am of opinion, that *Barclay* or his representative ought to be made parties, because these are proper parties in account, especially as between the part-owners themselves, and they may perhaps shew in the account a satisfaction of part of the debt. As to the ship itself, no remedy lies here *in rem*, the admiralty only having jurisdiction as against that; and there is no reason for charging the executor of *Foster* in respect of the value, because *non constat* what is become of the ship? Besides, this bill is not adapted to such a demand, it being only for satisfaction out of the assets. The Court, therefore, can only decree for a moiety, or order the cause to stand over, with liberty to add parties, and the Plaintiff to pay the costs of the day.

And the cause was adjourned for him to make his declaration. MSS.

*Saville v. Tancred. In Chancery. 21 & 22 Geo. 2, 1748.*

S. C. 1 Ves. Sen. 101. To a bill against a bailee, for re-delivery of jewels, persons entitled to a part of them are not necessary parties.

Bill for the delivery of a chest of plate and jewels, pawned originally in 1675. to Mr. *Saville* by one *Row*, and left by *Saville* in the custody of *Tancred*, with whom *Saville* lodged, and who always acted as his agent; and it appearing by the Defendant's answer, that in the chest there is a box of jewels, entitled, "a particular of jewels belonging to the Duke of *Devonshire*," and that this the Defendant informed the Plaintiff of before the bringing his bill, it was objected by Mr. *Brown* for the Defendant, that the representatives of the Duke (now deceased) ought to be made parties, that the Defendant may be safe in delivering up the jewels to the proper person.

But the Lord Chancellor [Hardwicke] clearly overruled the objection, because, as these goods appear to have been left with *Tancred* for safe custody only, he is obliged to restore them to the person depositing them, and the title of the Duke's representative (if any) will remain the same against the person to whom they are delivered. If *Tancred* was a pawnee only, he is compellable to deliver them up to the pawnor, not only here, but also in an action of trover or detinue.

Decreed, therefore (*inter alia*), that the chest and every thing in it be delivered to the Plaintiff, but without costs on either side, because the paper written as above, though it be no defence, yet is some excuse to the Defendant for refusing to deliver the jewels. MSS.

*Lawley v. Walden. Trin. 14 Geo. 2. [1741].*

When on a bill for an injunction in an ejectment at law against the Plaintiff's tenant, the tenant ought to be a party.

The bill was by the owner of lands, for an injunction to stay the Defendant's proceedings at law, upon an ejectment against the Plaintiff's tenant.

Demurrer, that the tenant was not made a party to the bill, and the demurrer allowed; but the Lord Chancellor said if the Plaintiff had been made a Defendant at law, as he might have been, he should not have thought it necessary to have made the tenant a party to his bill, notwithstanding his being a Co-defendant; but as he is the only Defendant at law, he must be a party here. Mr. *Coze's* MSS.

*East India Company v. Coles and Others. Lincoln's-Inn-Hall. 15th January 1783.*

Whether a demurrer for want of parties should be to the whole bill.—*Quære.*

The bill was brought by the East India Company for an injunction to restrain the Defendant, *Coles* (among others), from proceeding at law on a bond given to him by the Defendants, *Herbert, Coles, and Palmer*, in the name of the said Company. The bill stated several transactions by the Defendant, *Herbert*, in conjunction with and *Kirkham*, both since dead, acting together as servants of the said Company, on a particular expedition, and afterwards transactions by the said Defendant *Herbert*, acting with the Defendants, *Coles and Palmer*, in the same capacity, and required a discovery of all those transactions, and relief in respect of all of them, leaving a blank for the names of the representatives of ——— and *Kirkham*; and prayed the injunction on the ground that the bond was given to *Coles* for a private debt of *Herbert and Palmer*, and that they were indebted on other accounts to the Company in a larger sum than the amount of the bond. The Defendant, *Coles*, demurred to the whole of the bill for want of parties, for that it appeared by the bill that the representatives of ——— and *Kirkham* were necessary parties, and yet they were not before the Court.

When the demurrer came on to be argued, the counsel for the Defendant assigned *ore tenus*, as another cause of demurrer, that the bill was multifarious; and it was agreed to be regular in point of form, to assign such new cause without its being entered on the record (1 *Swans.* 288), and that it was not necessary to specify the parts of the bill in which it was multifarious. It was agreed on both sides that there were some parts of the bill to which a demurrer would hold for want of parties; but it was insisted by the counsel for the Plaintiff, that a decree might be made as to part of the transactions against *Herbert, Coles, and Palmer*, without involving the representatives of ——— and *Kirkham*; and that the demurrer would not hold as to those parts. It was insisted by the counsel for the Defendants, that the demurrer was good as to the whole, inasmuch as it sufficiently appeared by the bill, that the transactions involved ——— and *Kirkham*, and that the Plaintiffs thought so by requiring discovery and relief against the representatives, and leaving a blank for their names; or if a separate decree could be made against *Herbert, Coles, and Palmer*, then that the bill was multifarious. They also contended that there could not be a partial demurrer for want of parties, but that a demurrer of that nature must extend to the whole bill.

*January 16.* The Lord Chancellor [Thurlow] was inclined to think that there could not be a partial demurrer for want of parties, and that, therefore, a demurrer to the whole bill was proper, and had directed the register to allow the demurrer; but upon Mr. *Mitford's* mentioning some cases wherein such partial demurrers had been allowed, *Finch*, 113, *Atwood v. Hawkins*; *Finch* 4, *Astley v. Fountaine*, 2 *Cha. Cas.* 197, *Pressendens v. Decrees*; the Lord Chancellor ordered it to stand over to the next day of demurrers; but the Plaintiff's counsel thought it would answer better their client's purposes to amend their bill, and pay the costs of the demurrer. Mr. *Coze's* MSS.

*Delabere v. Norwood. At the Rolls. 22d June 1786.*

Annuity prior to a mortgage, need not be made parties to a suit by the mortgagee against the mortgagor for a sale, but the estate must be sold subject to the annuities.

This was a bill brought by a mortgagee against a mortgagor, praying a sale of the mortgaged estate. Two of the Defendants had annuities charged upon the estate, which were prior in point of date to the Plaintiff's mortgage.

The Master of the Rolls [Sir Lloyd Kenyon] said, that it was quite unnecessary to bring the annuitants before the Court, and, therefore, notwithstanding they appeared at the hearing, and consented to a sale of the estate, he dismissed the bill as to them, with costs, and said that the estate must be sold subject to their annuities. If the annuities had been subsequent to the mortgage in this case it might have been proper to have made the annuitants Defendants, because the Plaintiff then could have compelled them to join in a sale of the mortgaged estate; but even in that case they would not have been necessary parties.

*Selwyn and Mitford* for Plaintiff. *Brown* for Defendant.—From Mr. *Romilly's* Notes. Lord *Colchester's* MSS.

Routh v. Kinder and Others. *Rolls. February 14th, 1789.*

Parties to bill by creditors against trustees for sale.

Bill by A. on behalf of himself and other creditors, against B. and C., trustees of estates conveyed in trust to pay debts, for account of produce of sales and payment of their debts; B.'s representatives by their answer allege, that not only C. but also D. were trustees, and that D. acted in the trust, although they do not know whether he received any part of the produce. Defendant B. objected for want of parties.

*Kenyon, M. R.*, held D. to be an unnecessary party; and *Arden, M. R.*, in the same cause, held the same; and did not direct any inquiry before the Master upon this matter; *sed qu.*—for at the bar the general opinion was, that D.'s representative ought to have been parties; nor could one creditor suing waive on behalf of the absent parties, in joint interest with himself, the benefit or possible benefit of any part of the trust fund.—See *Cowslad v. Cely, Prec. in Cha.* 83; 1 *Eq. Ca. Ab.* 73. Lord *Colchester's MSS.*

Roveray and Another v. Grayson and Another. *In the Exchequer. Nov. 17th, 1790.*  
Injunction obtained by bail against a creditor after a verdict dissolved, the principal debtor, though a Defendant, not being within the jurisdiction.

This was a motion to dissolve an injunction on the coming in of the answer.

*Burton and Daniel* shewed cause.

The Plaintiffs were bail for one of the Defendants, sued at law by the Defendant *Grayson*, who, having got a verdict, was proceeding against them; and the bill set forth, that *Grayson* had pretended to have laid out various sums for the Defendant at law, *Kulnhaltz*, which in fact he had never paid; that goods had been remitted to him to be sold, which he had disposed of at an undervalue, collusively and that most of them had been bought in on his own account; and it prayed an account of all the mercantile transactions between *Grayson* and the Defendant at law, *Kulnhaltz*, and that what appeared to be due from *Grayson*, might be set off against the verdict obtained at law, and that the Defendant *Grayson* might be restrained from proceeding until the account was taken; also, that the goods remitted by the Defendant at law to *Grayson*, and in his hands, might be sold, and the produce applied in discharge of the debt.

*Eyre*, Chief Baron, in the outset, asked *Burton* how he could make out any right in the Plaintiffs to come here, without having the principal actually before the Court! He was a Defendant, but charged to be out of the jurisdiction of the Court. What relief can bail be entitled to? They have undertaken specially to produce the Defendant, or pay the debt.

*Burton* mentioned the case of co-obligors who were only sureties.

But per *Eyre*, Chief Baron,—Even they cannot call on the obligee, if the principal obligor is not brought before the Court. The Defendant at law must be made an effective party, either as Co-Plaintiff or as Defendant actually before the Court and appearing. For here must be a double account, you must at least have all the necessary parties here. If you had your account, it could not bind the Defendant at law. He might come in afterwards, and call upon the creditors to account upon the same grounds. If, indeed, you could fix collusion between the principal creditor it might be otherwise; but standing as it does, nakedly, I do not see how you can proceed. And so the order must be absolute for dissolving the injunction.

Nov. 23, 1790. This being mentioned again to-day,

*Burton and Daniel* attempted to shew that there were facts to fix a strong suspicion of collusion on the Defendants. And the latter cited 1 *Vern.* 87, *Israel v. Narbourn*, to shew that the Court would give time to add parties, and grant an injunction in the mean time.

*Eyre*, Chief Baron, expressed his surprise at this being mentioned again; and said, he thought the Court had, when the matter came on last, expressed their opinion as to a total want of equity in the Plaintiffs, standing in the situation in which they stood at present. To grant an injunction in this case would be to put bail in a better situation than their principal could be in; for had the principal lain by and suffered judgment to go against him at law, the Court would never have granted him an injunction on his coming here in that stage of the business. And as to the present

Plaintiffs, they are not at all damnified until they have paid the money—very different is the case of *Vernon*, for there the bail were principal (it being a bond to the sheriff), here they are only concerned collaterally.—Injunction dissolved.—Lord Colchester's MSS.

*Angerstein v. Clarke. In Chancery. Nov. 13th 1790.*

S. C. 2 Dick. 738 [1 Ves. Jun. 250].—To a bill against an obligor in a joint and several bond, an insolvent co-obligor need not be a party.

Objection for want of parties, because all the obligors in a bond were not before the Court.

It was stated in the bill, and admitted by the answer, that one obligor was out of the jurisdiction, and another was insolvent.

In *Madocks v. Jackson*, 3 Atk. 406, Lord Hardwicke says, that in equity all the obligors in a bond must be parties; but Lord King held otherwise in *Collins v. Griffith*, 2 P. W. 313.

Lord Chancellor [Thurlow]. If you will sue in equity upon a joint and several bond, you must make all the obligors parties, to avoid circuitry of suit; but if one of the persons living (which is a stronger case than that of a dead person) be admitted to be insolvent, surely it ought to be an answer to an objection for want of parties.

I almost incline to say, that even in the case of a living party upon an admission of his being insolvent, he need not be brought before the Court; because if that fact be agreed upon, there can be no danger of circuitry of suit where there can be no objection to contribute to the demand.

The Chancellor recognized the case of *Madocks v. Jackson*, and seemed inclined to overrule the objection; but it appearing that a mortgage had been made as a collateral security, and that some of the parties to it, who had been in possession of the mortgaged estate, were not before the Court, it stood over on that account.

See Sir Daniel O'Carroll's case, Amb. 61.—Lord Colchester's MSS. (See *Cockburn v. Thompson*, 16 Ves. 326. *Haywood v. Ovey*, 6 Madd. 113.)

*Attorney-General v. Gaunt. In Chancery. Nov. 26th, 1790.*

The heir of a private founder, who has appointed no visitor, must be made a party to an information for regulating a charity; but the Court, in favour of charities, will direct an inquiry for the heir.

This was an information at the relation of the inhabitants of a parish in *Staffordshire*, to have a school-master dismissed for improper demeanour, and to have the charity regulated.

*Richard Cross* of *Bagginton*, in the county of *Stafford*, by will in 1699, devised lands to A., then minister of *Yoxall*, in the county of *Stafford*, and his successors for the time being, and to B., then minister of *Harmstall Ridware*, in the same county, and his successors for the time being, in trust out of the rents and profits to erect a free school-house in *K. J. Bromley*, in the county of *Stafford*, provided the lord of the manor should grant a convenient piece of ground for that purpose; and that when the school-house was erected, they should apply the rents and profits for the maintenance of a school-master to teach poor children.

*Lloyd*, for the information, cited 1 Ves. Sen. 72, *Attorney-General v. Smart*, to show that in the case of a private charity the Court will not dismiss the information for want of form, but regulate the charity as well as it can. The heir of the founder was wanting in the case of *Newport* school, yet the Court directed an inquiry for the heir, and did not order the cause to stand over for making him a party.

So here the devise is to A. and B. and their successors, ministers of two parishes, to employ rents for maintenance of a school-master, but no power to appoint one; and the rule is, that when the king founds, his successors are visitors. 2 P. W. 325, *Eden v. Foster*. But if a private man founds, his heir is visitor, unless the founder makes another man and his heirs visitors. 3 P. W. 145, *Attorney-General v. Rigby*.

The heir of the grantor, therefore, shall nominate, and not the grantee's heir.

Therefore here these ministers had no authority, and the Court must find the heir who had authority to appoint a school-master; and the legal estate descended to the heir at law of this testator, the clergymen having no estate beyond their

own lives by this will. 2 P. W. 125, *Attorney-General v. Ruper*. The clergymen being only corporations for taking as parsons, and not generally for other purposes; the rents and profits, therefore, belong to the heir, in trust for the school.

*Milford*, for the Defendant *Gaunt*, contended that the testator having devised to the rector of *Y*. and his successors for the time being, in trust to pay, the estate is vested in these successive rectors; and they are the persons to regulate the charity, though accountable to the Court. The rector is not only a corporation to take lands for the benefit of his church, but also for charitable purposes. *Duke's Char. Uses*, 139. So in other cases, as *Fulwood's case*, 4 Co. 64. The Chamberlain of *London* may take, &c.; and therefore this estate vested in the two rectors, as tenants in common; and they were to nominate, because they being to pay, and no other person having power to nominate, unless they nominate, there is no one to whom payment can be made. The heir of the donor ought not to have nomination; but if a necessary party, and not before the Court, yet the Court will not direct any inquiry *ex necessitate*. For in 1 Ves. Sen. 80, *Attorney-General v. Wycliffe*, Lord *Hardwicke* refused it, the information not appearing to him to be proper. 2 Ves. Sen. 327, *Attorney-General v. Middleton*.

The *Solicitor-General* [Macdonald], in reply, cited 3 Atk. 198, *Attorney-General v. Price*, to show that Latin and Greek are not the charity intended to be dispensed in these schools to poor children, and therefore this charity wanted regulation.

The *Lord Chancellor* [Thurlow].

The heir at law should have been a party; but I will not dismiss this information if I can get the heir before the Master by inquiry.

Let the Master receive a scheme for the school, according to the nature and circumstances of the place where it is to be kept.—Lord *Colchester's MSS.*

*Stokes v. Clendon. At the Rolls. 3d December 1790.*

To a bill of foreclosure against the principal mortgagor, the mortgagor of another estate, as a collateral security, is a necessary party.

The case was of a principal mortgagor, and another mortgagor of an estate as a collateral security.

His Honor [Sir Richard P. Arden] determined, that a bill of foreclosure against the principal only could not be sustained, without making the other mortgagor a party; because the other mortgagor has a right to redeem and be present at the account, to prevent the burthen ultimately falling on his own estate, or at least falling upon it to a larger amount than the first estate might be sufficient to satisfy.

Ordered to stand over for want of parties.—Lord *Colchester's MSS.*

Shepherd and Others on behalf of themselves and Others, creditors of John Roberts, Sen., and John Roberts, Jun., *Plaintiffs*; Gwinnet, Roberts, Sen. and Jun., Thomas Richardson, and Matthew Paul, *Defendants. In Chancery. March 12th, 1791.*

Judgment creditor prior to a mortgage, need not make the subsequent mortgagee party in order to postpone him.

Bill filed by Plaintiffs, who were creditors of the two *Roberts*, who, in November 1779, assigned certain premises to *Gwinnet*, in trust for all their creditors, and also entered into a joint bond and warrant of attorney to him, upon which judgment was immediately entered up.

*Roberts* had, prior to entering up the judgment, made a mortgage of his estate to *Richardson*, and at a date subsequent to the judgment, made a second mortgage to *Paul*.

The bill was filed praying, that *Gwinnet* might be decreed to account for what he had received under the deed of trust, and that Plaintiffs might be at liberty to redeem *Richardson*, and that *Paul's* mortgage might be postponed to the judgment.

Lord *Chancellor* [Thurlow] dismissed the bill with costs against *Paul*, as an unnecessary party, the judgment having a legal priority; and he decreed *Gwinnet* to account, and to put the judgment in force as far as it was available at law.—Lord *Colchester's MSS.*

(2) The Bishop of Hereford v. Cowper. *In the Exchequer. Pasch. 5 Geo. 2, [1732].*

Modus allowed.—Reported on another point, *Bunb.* 293.

The Plaintiff, as rector of *Whitechurch*, brought his bill for tithe hay and potatoes in kind, and for the agistment of barren cattle. Against the claim of tithe hay, a modus was pleaded in bar, viz. that within the parish of *Whitechurch* there were several townships, and that the occupiers of each township, time out of mind, had paid certain sums of money in lieu of tithe hay, which sums were collected by the respective constables, and then the whole, which amounted to 15s. 4½d., was by some of them paid over to the rectors as a modus for the whole parish, *Eyre, Seryt., pro quer.* objected to the modus, that as it was laid that the occupiers of each township have paid the certain sums, if any occupier of land in a township has not paid his share towards making up the sum belonging to that township, it will be a variance; and it appears that several of the lands have never been rated. Besides, to make any modus good, it is necessary to show how the rector may recover the satisfaction; for, he thought, the rector could have no remedy against a division or township.

*Reynolds*, Chief Baron, observed, that, according to this modus, the rector was only concerned with each ville in general, and in the same manner must have his remedy against each; which *Carter B.* said was no more than what was done every day in case of chief rents: but afterwards, it appeared by the proofs that it was usual for the rectors to deliver schedules to each constable to collect by; and by some of them it appeared how much each inhabitant ought, and was used to pay, towards the sum. On this the Chief Baron observed, that in such case the rector's remedy seemed to be against each particular landholder, for his share.—Ordered to stand over till next term, the Baron going to the House of Lords.

Note: None of the Plaintiff's proof was read, and but about half of the Defendant's.

*Trin. 6 Geo. 2, [1733].* The proofs in the cause being read, and observations made thereon by the counsel, *Reynolds*, Chief Baron, said, wherever a fact is litigated, and the law resulting from it is dubious, we will always have the fact determined before we judge of the law arising from it. This modus seems to extend no further than the townships, and the rest to be an historical account how it is raised, and that the several proportions have been collected among the occupiers. There is no reason why this modus, as alleged, should not be good, for it has all the requisites of a good modus. This must be the case where there is a modus for a great quantity of land, which after is disposed of into different hands; though the remedy becomes more intricate, yet the rectors must have it against all those who have the land.

But several facts appearing doubtful to the Court, the principal of which was, whether all occupiers of the lands in each township had contributed to the sum to be raised by the respective townships, an issue at law was directed to try the modus.—*Per tot. Curiam.*

*N.B.*—Mr. *Bunbury* said, when this matter was before the Court several years ago, it was adjudged against the Defendants, because the modus was laid to be payable by the owners and occupiers, which was held to be uncertain, because an owner is very different from an occupier.—Sir *Clement Wearg's MSS.*

*Cart v. Hodgkin and Others. In Chancery. May 20, 21 Geo. 2, 1748.*

Modus of 5s. payable annually out of every yard land, is valid.—Representatives of a rector not permitted to enforce payment of tithes which the rector never demanded.

Bill by the administrator *de bonis non* of *William Cart*, late rector of *Stony Stanton*, in com. *Leicester*, for an account and satisfaction of tithe hay, and the small tithes of the said rectory, due to him from 1722, when *Cart* first became rector, to 1735, when he died. The Defendants in their answer, as to the small tithes, set out, "that there is a modus or composition of 5s., which, from time out of mind, has been paid out of every yard land in the said parish of *S.* in lieu of tithes, and that it ought to be received yearly and every year as a modus"; and further alleged, that *Cart*, the rector, received it for one year from the Defendants, "the occupiers of some of the yard lands, and the other occupiers and farmers of the said other yard lands"; and that *Dr. Geary*, his predecessor, received it "from the occupiers and farmers of the said yard lands."

It was objected by Mr. *Wilbraham* and others, to this modus, 1. That though it be not now necessary (as it was formerly) to lay a modus as payable on such a particular day, yet it must be laid to be paid annually (in which case it will be understood to be payable on the first day of the year), and this is not alleged in the present case. 2. It is not stated by whom the modus ought to be paid, which should be shewn, that the person may be known against whom the action must be brought. A modus (generally) is payable by the occupier, but not always; for sometimes it is paid by the lord (*Cro. El.* 599), and sometimes by the occupier only of part. 3. This is stated to be a modus or composition (in the disjunctive), which is very inaccurate, these being of a different nature; for a composition is fluctuating, but a modus not so. And in the late case of *Hardcastle and Slater*, where a modus was laid to be paid by the owners and occupiers, it was held ill, these being different (According to the printed reports of this case, 3 *Atk.* 245, *Amb.* 41, 2 *Gwill.* 784, the modus was allowed.)

On the other side, it was argued by Mr. *Murray* (Solicitor-General), that there is a great difference between bringing bills for establishing a modus, and where a bill is brought for subtraction of tithes and a modus is set up by way of defence: in this last case, though it be set out informally, yet if it appears sufficiently in evidence, this will bar the Plaintiff; and it has been lately held, that in a bill for tithes, if it appears by the Plaintiff's own evidence that there is a modus, he cannot have a decree. Now here, it must be admitted, the modus is inaccurately stated; but yet it sufficiently appears, taking the whole together, that this is a modus, and that it is payable yearly by the occupiers and farmers. And Mr. Solicitor said, that where a modus was laid to be payable by "the owners and occupiers" it had been lately held sufficient; which the Court seemed to admit.

The Lord Chancellor [*Hardwicke*]. There are cases (perhaps) in another court, where moduses have been overturned for niceties; but the question here is, whether it be laid sufficiently in substance? As to the difference mentioned at the bar, between bills brought for a modus, and the setting them up by way of defence, in both cases the modus must be laid with sufficient certainty, otherwise the Court will not enter into proof; and this is the rule both of this Court and the Exchequer. Indeed, where the Plaintiff sues for tithes, and shews, in his own proof, there has been a modus, this will bar him; though (perhaps) it would not be sufficient, if proved by the Defendant. There have been cases of this nature; and on the same foundation, it has been held by Lord Chief Justice *Holt*, that where in ejectment the Plaintiff proves a deed he shall be nonsuited, though such proof by the Defendant is not sufficient; and there are many other cases of this kind. Now, in the present case, I am of opinion, that the modus is stated to a common intent, and therefore to a sufficient certainty. There is no ground for the objection, that here is no time of payment alleged. It would be attended with great inconvenience to make it necessary to show a particular day on which a modus is payable. If it was alleged to be payable yearly, this anciently was held sufficient, and so it is at this day. Here, after stating the modus, it is said that it ought to be received yearly, and every year, as a modus; which is all one in substance, as if it had been alleged in the beginning to be paid yearly. This is sufficient, though it be somewhat inaccurate, but the same exactness is not required in answers in this Court and in the Exchequer as in pleading. As to the 3d objection, it is shown in the subsequent parts of the answer, that *Cart* and *Geary* have accepted the modus from the occupiers and farmers, which must be admitted to be the same persons, and therefore this exception is not material. And as to the last, a modus, or composition payable from time immemorial, must mean the same thing.

The objections, being all overruled, the Defendants proceeded to their proofs. And the deposition of one *Norton*, a parishioner of *Stoney Stanton*, was produced to prove the modus for the yard-land; and it was urged for the Defendants, that as it does not appear the whole parish is divided into yard-lands, a parishioner may well be admitted to prove it, unless it be shown, on the other side, that he has a yard-land.

But by Lord Chancellor; his deposition cannot be read, because this modus may possibly be in satisfaction of all the lesser tithes of the parish; and he said he had a note of a case where it was determined by all the Judges in *England*, in the time of *Ld. Chief Just. Parker*, that where a modus is in question, no inhabitant



of the parish can be examined generally, unless he be a lodger, or one receiving alms of the parish, but he must not be a person who can claim any thing under the custom.

It appeared by the evidence produced, that as to the tithe hay, the parsons of the parish had for a long time enjoyed several pieces of land in lieu thereof, and it was not proved that Mr. *Cart* ever demanded such tithe. It also appeared, that great part of the lands in the parish which was formerly grass, was now turned into clover. As to the modus of 5s. there was variety of proof.

The *Lord Chancellor* [Hardwicke] said, that there was no ground for the bill so far as it relates to the tithe pay, as it appears that the rectors have enjoyed land in lieu thereof. And it makes no difference that the lands in the parish are turned to clover, for it has been determined, that where there is a modus, or real composition, for the tithe of hay, and the ground is broke up and turned into a new culture (as clover, &c.), yet the modus or composition remains the same; each side being to take its chance, as it sometimes may be for the benefit of the parson and sometimes of the farmer; and the contrary would occasion much uncertainty. It is also very material that this bill is brought after a very great length of time, and after an acquiescence by the incumbent, during his whole life. It would be of great inconvenience to suffer personal representatives to bring bills for such tithes as the rector himself never demanded; I never remember such a case, and will not make a precedent. This is a circumstance of great weight. This part of the bill, therefore, ought to be dismissed with costs. The modus of 5s. must be sent to trial, on account of the variety of the proofs; and it is proper to reserve the consideration of costs, as to this part of the bill, till the issue be tried; and he decreed accordingly.—MSS.

[159] BURROUGHS v. OAKLEY. *March 1, 1819.*

A purchaser was held entitled to an investigation of the vendor's title, notwithstanding possession taken, acts of ownership incident to possession, and preparation of a conveyance.

The bill stated, that in 1812, the Plaintiff being seised in fee-simple of certain lands situate in the parish of *Offley*, and also under an act of parliament for [160]-enclosing lands in the parish, and a deed of exchange made in pursuance of the directions of the act, seised in fee-simple of certain allotments or enclosures of common field in [161] the parish, offered the premises for sale by public auction, on the 12th of *June* 1812, under conditions that the purchaser should pay a deposit of 20 per cent. and [162] sign an agreement for payment of the remainder of the purchase-money on or before the 31st day of *August* 1812, on having a good title; and that if any delay should [163] arise in completing the purchase beyond that time, the purchaser should pay interest at 5 per cent. on the remainder of the purchase money, from that day; that [164] the Defendant became the purchaser of lot 2, consisting of a wood called *Stubbock's Wood*, with an allotment of arable land, and an enclosure, at the price of £1800, and of lot 3, consisting of an allotment of arable land, and two small enclosures, at the price of £430; and paid a deposit, and signed an agreement to complete the purchase according to the conditions of sale; that shortly after the date of the agreement, an abstract of the Plaintiff's title was sent to the solicitor of the Defendant, who objected that the Plaintiff had no right to dispose of the allotments till an award had been executed by the [165] commissioners, but no other objection was suggested, and the commissioners had long since executed their award, from which no appeal had been made.

The bill prayed specific performance of the agreement.

The Defendant, by his answer, insisted that he was not bound to pay the residue of the purchase money, inasmuch as divers objections existed to the Plaintiff's title to the premises, which, as the Defendant was advised, rendered the Plaintiff incompetent to make a good title, and to execute a proper conveyance; and among other things, that it did not appear that the award had been long since executed, no copy or extract thereof having ever been furnished to the Defendant or his solicitor, although applications had been made for that purpose; and that if the award had been in fact executed by the commissioners, yet it had not been inrolled in pursuance of the act 41 *Geo. 3, c. 109.*

The answer also stated other objections to the title, under certain deeds of exchange; and submitted to perform the agreement on having a good title.

The bill was afterwards amended by the insertion of allegations, that the Defendant took possession of the premises in August 1812, and had since cut three falls of underwood; that after the receipt of the abstract by the Defendant's solicitor, a correspondence ensued between the solicitors of both parties, and in November 1814, the Defendant's solicitor transmitted to the solicitors of the Plaintiff, a draft of a conveyance of the premises, approved on the part of the Defendant; and that the cutting underwood, and other acts of [166] ownership, amounted to an acceptance of the Plaintiff's title.

At the hearing the counsel for the Defendant, objected to the production of the letters of his solicitor, offered on the part of the Plaintiff, as evidence that the Defendant had accepted the title. It was insisted that, in order to be distinctly put in issue, they should have been set forth at length in the bill, as in *The Margravine of Anspach v. Noel* (1 Madd. 310); and it was said that in *Selby v. Selby* (3 Mer. 2), Sir William Grant refused to receive in evidence letters not charged in the bill.

The Master of the Rolls over-ruled the objection.

Copies of letters written by the solicitors of the Plaintiff to the solicitor of the Defendant, were offered in evidence, but rejected by the court, notice not having been given to produce the originals.

Mr. Trower, Mr. Shadwell, and Mr. Swanston, for the Plaintiff. By taking possession, and exercising acts of ownership, the Defendant has accepted the estate, and is no longer entitled to an inquiry whether the Plaintiff can make a good title. *Fleetwood v. Green* (15 Ves. 594), *The Margravine of Anspach v. Noel* (1 Madd. 310), *Fordyce v. Ford* (4 Bro. C. C. 495). The conclusion from the correspondence is, that the Defendant had waived that inquiry. The Lord Chancellor ordered the Defendant to pay the purchase money into court. (*Burroughs v. Oakley*, 1 Mer. 52, 376, n.)

[167] Mr. Hart, Mr. Sugden, and Mr. Rose, for the Defendant. Possession was taken under the contract, with the assent of the Plaintiff: the acts of ownership alleged, consist only of three falls of underwood in a due course of husbandry. Nothing less than unequivocal acts of ownership, as in the cases cited, or want of good faith, will deprive a purchaser of his right to an investigation of the title. Payment of money into court was consequent on taking possession. *Jenkins v. Hiles* (6 Ves. 646), *Fildes v. Hooker* (2 Mer. 424), *Dixon v. Asley* (1 Mer. 133).

The Master of the Rolls [Sir Wm. Grant]. This case is attended by some circumstances, which distinguish it from any other that has ever come before the Court. The bill, as originally filed, was a common bill for specific performance. At that period, though recently after the correspondence on which the principal stress has now been laid, it did not occur to those who framed the pleadings to represent the Plaintiff's as one of the excepted cases, in which the vendor is released from the obligation of proving his title; an ordinary equity which the Court is particularly careful to enforce, on the plain principle that a plaintiff seeking to compel a purchaser to accept an estate, is bound to submit his title to such a scrutiny as satisfies the court, that the defendant may safely part with his money. The order of the Lord Chancellor in this case, for payment of the purchase money into court, was undoubtedly not intended to preclude the investigation of title; it was at that time stated, that the investigation was proceeding, and nothing was suggested to exempt this suit from the ordinary [168] course. The Plaintiff then amended his bill, alleging circumstances now insisted on, possession taken, acts of ownership by felling underwood, and a correspondence, but not seeming to state that correspondence as proof that the title had been waived.

In proceeding to consider the effect of the evidence, a court of equity called on to enforce specific performance of an agreement for the conveyance of an estate to one party, and payment of the purchase money to the other, must feel anxiety to protect the purchaser, and give to him reasonable security for his title; not compelling him to take a title without knowing whether it is good or bad. The vendor, if his title is good, suffers only the temporary inconvenience of delay; but the vendee, if it is bad, may sustain a severe loss. The inclination of the Court therefore is in favour of the vendee; and a vendor claiming to be excepted from

the general rule, is required clearly to establish a case of exception. What circumstances has this Plaintiff proved to warrant the Court in considering the present as an excepted case?

The decisions in *Fleetwood v. Green*, and the other cases cited, are founded not so much in a rule of equity, limiting a time within which objections must be taken, and visiting delay with punishment, as on a conclusion of fact, the Court being satisfied that the purchaser intended to waive, and has actually waived, his right of examining the title. When the Court is convinced that that is the just conclusion from the facts of the case, then, and then only, is it authorized in denying to the purchaser his ordinary equitable right. The question therefore is one of fact; what is sufficient to authorize that denial?

[169] Possession taken by the Defendant, has been properly insisted on as a very important fact; and, undoubtedly, it becomes a purchaser to be careful in what circumstances he takes possession; but whatever weight may belong to that fact in ordinary cases as evidence of waiver of title, in this case certainly no such inference can be deduced.

Possession was taken of part of the lands at *Michaelmas* 1812, and of the remainder at the end of that year under a contract which is silent on the subject of possession, and under which possession so taken is premature; the vendee being bound to pay interest on the purchase money from the 31st of *August* 1812; a provision which seems to denote that the parties contemplated delay. Two lots of recently inclosed land are sold for considerable sums, and it being an express term of the contract that the purchase money should not be paid without a good title shown, and possible that delay might occur, in *August* 1812, possession is taken; in what circumstances, the Court is not apprized; but it must be presumed to have been taken with the concurrence of the vendor; there is no proof that it was contrary to his wishes, or accompanied by an obligation on the vendee to waive any right. That the vendee did not, by taking possession waive the investigation of the title, is clear; more than a year after that event the parties were negotiating on the subject of title; what revived the investigation if then waived? In 1813 an abstract, and a farther abstract were delivered, for what purpose if the question of title had been abandoned? It must be concluded therefore, that possession was prematurely taken with the consent of both parties, but without an intention of waving the investigation of the title.

[170] The same principle applies to the acts of ownership; for what could be the purpose or advantage of taking possession, except to act as owner? The evidence on the part of the Defendant seems not to have carried the case farther than the evidence on the part of the Plaintiff; the act insisted on is cutting underwood. Had I known the nature of the evidence offered by the Defendant, namely, evidence of the judicious exercise of acts of ownership, I should have doubted whether it was admissible; but as an explanation of the acts insisted on by the Plaintiff, I thought that I ought not to reject it. Whether included or excluded, the acts of the Defendant seem no more than the proper acts of a person entrusted with possession, bound to take care of the estate, and not to leave the crops uncut and waste; acts of preservation, not of destruction. The conclusion depends on that distinction. A fall of underwood which must be cut by the person in possession at the regular season, is no more than gathering a crop of corn or hay. In the absence of proof that the fall was improper or contrary to custom, it is only an annual crop which a tenant for life would enjoy as one of the ordinary fruits incident to the possession, and of which it could not be intended that the party in possession was not to have the benefit. The delivery of a farther abstract after a fall of underwood, is quite inconsistent with the supposition, that by that act the purchaser had made the estate his own, and precluded himself from an examination of the title.

The case finally resolves itself into the correspondence; the strongest of all the facts alleged, because it is open to the observation, that the parties are engaged in an act, which, in the ordinary course of business, is posterior to the investigation of title. It is not till after the title has been examined, that a draft of the conveyance comes to be prepared. The preparation of the conveyance in this case is an important fact, as amounting to evidence that the parties had arrived at a stage of proceeding subsequent to the question of title, and must be supposed, therefore, to have removed or abandoned all objections. But I cannot satisfy

myself that that fact alone, in the circumstances of this case, is sufficient to exclude the common equity. The Plaintiff had given no strong proof of desire of despatch; for entering into the contract in *June* 1812, he has not delivered a farther abstract till *November* 1813, and that imperfect and insufficient. If the difficulties attending the title had been removed, what occasioned the delay? The business proceeds slowly in 1814, without any urgency on the part of the vendor, to determine whether the purchaser meant to proceed with the examination of the title, or was satisfied.

The difficulty in this case, which distinguishes it from every other, is, that after possession taken, and acts of ownership, the investigation of title proceeds, and the question is, whether the delay in the investigation affords proof that it was abandoned? In the many instances that have occurred of culpable delay, perhaps for the purpose of retaining the purchase money, delay has not precluded an examination of the title. That conclusion requires not mere delay, but delay accompanied by acts which afford evidence of an intention to wave the examination. So much stress cannot be laid on a correspondence, in which we have only the letters on one side, letters of a country attorney, without knowing the answers, as to satisfy the Court that the Defendant intended to wave the question of title. They contain no express, nor am I convinced that they amount to an implied waver. (*Note: The Master of the Rolls*, here read and commented on the letters.)

[172] In the *Margravine of Anspach v. Noel* (1 *Madd.* 310), the acts of the Defendant amounted to evidence of waver, because they were such as without waver, would not have been performed. The solicitation of time for payment of the purchase money was an extremely strong act of that nature; the solicitation, as an indulgence, of delay, which if the question of title remained open, was matter of right. That application, together with acts of ownership, warranted the conclusion that the purchaser had waved the examination of title.

In *Fleetwood v. Green* (13 *Ves.* 594), after a lapse of three or four years, no objection had been taken. Neither of those cases is parallel to the present. Here an objection had been taken, such as caused considerable delay in the delivery of the abstract; and the discussion of the title follows the acts, which are the strongest evidence of waver. The Court would not, under all the circumstances, be warranted in adopting so strong a measure as to deprive the Defendant of the common equity of an investigation of title. The money being in court, that investigation cannot be proposed for delay.

"His Honour doth order that it be referred to Mr. Cox, one, &c., to inquire whether the Plaintiff can make a good title to the said estate agreed to be sold to the Defendant; and in case the said Master shall be of opinion that the Plaintiff can make a good title, it is ordered that he do inquire when it appeared by the abstracts delivered by the Plaintiff that he could make a good title, and at what time; and for the better discovery," &c. Reg. Lib. A. 1818, fol. 941.

[173] PALMER v. VAUGHAN. July 29, 1818.

The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed, pending the question of the validity of the assignment.

Vaughan, clerk of the peace of the city of Westminster, assigned certain estates and the profits of the office of clerk of the peace, to trustees upon trust to pay his debts. The bill having been filed to compel the execution of the trusts of the assignment; the Plaintiff now moved for the appointment of a receiver.

Mr. Hart and Mr. Simpkinson for the motion—stated, that Vaughan had forbidden the trustees to make farther payments.

Mr. Shadwell against the motion. The Defendant will not oppose the appointment of a receiver of the rents of the estates, but submits the question, whether the profits of the office of clerk of the peace (which do not exceed £160 *per annum*) are assignable? The assignment is void, by the statute of 5 & 6 *Ed.* 6, c. 16. prohibiting the sale of offices which "shall in anywise touch or concern the administration or execution of justice"; and by the principle of the decisions against the alienation of the half-pay of military officers. (*Davis v. The Duke of Marlborough*, 1 *Swans.* 74.)

Mr. *Hart* in reply. The cases cited are not applicable to an office which may be executed by deputy ; but a doubt on the validity of the assignment is a sufficient reason for securing the property until a decision ; as in *Sir Watkin Lewes v. Smith*. If the Defendant consents that the deputy shall pay the fees into court, verifying the amount by oath, the Plaintiff will not press for a receiver.

The Lord Chancellor [Eldon]. Take the order for a receiver, substituting, if the parties agree in the arrangement, payment into court of [174] the fees by the deputy ; without prejudice to the question whether the profits are assignable ? (1)

(1) *Wheeler v. Trotter*. In *Cur. Canc. Trin.* 10 Geo. 2, [1737].

Bill for specific performance of an agreement to grant a deputation of the office of register of a consistory court.—What charge of misbehaviour is sufficient to introduce evidence of particular acts.

The defendant, *Trotter*, being entitled, by patent from the bishop of *Durham*, to the office of register of the Consistory Court of *Durham*, with all fees, &c., for his life, to be exercised by himself or his sufficient deputy, did by deed-poll, dated 30th August 1731, appoint the Plaintiff to be his deputy for three years, in case both the parties should so long live ; but by articles of agreement, dated 6th Sept. 1731, the fees of office were ascertained, and the method and times of accounting prescribed ; and it was also agreed that the Plaintiff should have one-third of the profits for the trouble of executing the office. The Plaintiff took possession of the office immediately, by virtue of the deputation, and afterwards the parties came to a new agreement in writing, dated 6th December 1731, reciting the former deputation for three years, and thereby the Defendant granted, promised, and agreed, that the Plaintiff should have a further deputation for four years, so soon as the three years should be expired ; and the Plaintiff likewise agreed to accept the deputation, and to execute the office upon the same terms that were expressed in the articles, dated 6th September 1731. The three years being expired, this bill was brought to have a specified performance of the agreement with regard to the four years, to commence after the three years.

For the Plaintiff it was argued, that the consideration of this agreement was just, and not in the least affected by the 5 & 6 Ed. 6, c. 16, and that the deputation was not to be for such a time as that it could go to any one else besides the Plaintiff, for it was to end with the life of either of the parties. The difference was taken to be, where the deputy is to pay a sum in gross, and where out of the profits of the office ; for in the former case it is in the nature of a sale, because in all events the deputy is [175] bound to pay it. *Godolphin v. Tudor*, 3 Keb. 717 ; 2 Salk. 468 ; and there can be no inconvenience to the public by making a deputation for four years, for he must have it under the same terms with regard to any misbehaviour in the office, as if he was only a deputy at will. *Sutton*, Marshall of the King's Bench neglected to attend his office for two terms together, so the Court appointed another ; and it was there held a lease of the office might be good. Then it was insisted, that as the principal might dispose of the profits of his office, or make a grant of them for the satisfaction of debts, so far as his right in the office itself extends, and as there could be no inconvenience to the public, in this case the Plaintiff was entitled to a specific performance of the agreement ; and the case of *Sir Henry Slingsby* (3 Swans. 178), warden of the Mint was cited, where it was argued, that he could not be turned out of his office without an inquisition found against him ; but my Lord Chancellor *Finch* held, that the king was not obliged to accept of his service, but might direct the duty to be done by another, though he could not deprive him of the salary ; whence it was inferred, that in this case, though the Defendant might in strictness of law refuse to make the Plaintiff his deputy, or might revoke it at any time, considering it as a bare power only, yet that he could not defeat the Plaintiff of the interest or profit he was to have from the place. *Co. Litt.* 233 a, b.

For the Defendant it was said, that every deputy is, from the nature of the thing, removeable, *Hob.* 13 ; and the reason why the office of undersheriff is revocable, is for the public interest, and for the indemnity of the sheriff, which are both applicable to the present case, therefore the Court ought not to interpose, but leave the Plaintiff to his remedy at law if he had any. Then it was urged, that though the

Court might in this case decree a specific performance of the agreement, yet that upon considering the whole together, the Plaintiff was not entitled to the aid and assistance of this Court, because the Plaintiff had not accounted for divers fees which he had received by virtue of the deputation, and that he had taken several fees which were not due or expressed in the list of fees [176] annexed to the agreement, dated 6th September 1731, and had concealed several instruments and writings belonging to the office, and so he had forfeited all the equity he might otherwise have had.

The Defendant being about to read his proofs as to those misbehaviours, &c., alleged in such general terms by his answer, it was objected on the part of the Plaintiff, that the charges were too general, and that the Plaintiff could not tell what proof to make against them, unless he must examine to every particular fee he had received during the time of his executing the office, and also as to every instrument that hath come to his hands, which would be unreasonable and expensive; therefore the Defendant should have pointed the particular facts in his answer, whereby the Plaintiff might be enabled to know how to clear himself by his proof. 2 *Dane*. 244. A. leases to B. for years, B. covenants to leave the premises in repair; Breach may be assigned that he did not leave in repair: but if the Defendant pleads he did leave them in repair, the Plaintiff by his replication must shew particularly what part was out of repair, that the Defendant may give a particular answer to it, *Hancock v. Field*, *Cro. Jac.* 171; and it was said the reason would hold equally strong in equity as in law; and that though an indictment for barratry might be general, yet the prosecutor is always obliged to give a list upon oath to the Defendant of the particular matters that are intended to be proved against him, *Hark. P. C.* 2 B. 227. For the Defendant it was said, if this exception should prevail, whenever a Defendant alleged fraud in his answer, or that any person was *non compos*, he could be admitted to prove no other facts but what were particularly set forth in the answer, because it may there with equal reason be objected, that the Plaintiff would not know what to controvert, or what proof to make. And the case of *Sidney v. Sidney*, 3 P. W. 269, was mentioned, where a bill was filed for a specific performance of marriage articles, and the Defendant in his answer, declared his wife had greatly misbehaved herself towards him; at the hearing of the cause, the Defendant would have proved, that the Plaintiff had been guilty of adultery, but he was not admitted to make that proof, there being a great variety of misbehaviour that a wife may be guilty of towards her husband, and so the charge was too general; but it was then [177] agreed, if it had been said generally, that she had been guilty of adultery, he might have been permitted to prove any particular acts of adultery, though not alleged in the answer.

*Talbot*, Lord Chancellor. The question is, whether these matters are sufficiently put in issue or not; for it is certain they might have been more precisely so, by enumerating the particular facts; yet as they are not intended to charge the Plaintiff with any particular sums received more than are accounted for, but to show a general misbehaviour of the Plaintiff in this office, so that a Court of equity should not help him, I think for this purpose they are sufficiently put in issue. Here the Defendant does not rest in saying the Plaintiff has broken the articles generally, but says under such and such a head, which are general heads on which the Defendant intends to rest his case. In the case of *Sidney v. Sidney*, the words were so uncertain, that it was impossible to imagine what kind of misbehaviours they might be, and there the Court would not let him prove adultery, because it was not rightly put in issue; but if it had been said she had been guilty of adultery, then she would have had a sufficient opportunity of defending herself, even as to particular adulteries. In criminal matters, it is not only necessary that the nature should be set out, but generally that the single fact should be specified, by which the party may be enabled to defend himself in a matter which is final against him. But here, if the Plaintiff thinks he can give further light in the affair, or the Court has any doubts about it, there may be directions given for a further inquiry.

Then the Defendant began to read his proofs, but the Chancellor proposing that a Master should examine whether the Plaintiff had accounted for all the fees he had received, &c., the parties agreed to it. At last the whole dispute was referred to arbitrators.

This cause came before the Chancellor by way of appeal from the Rolls, where

it was determined, that the allegations in the Defendant's answer were too general to put the particular misbehaviours in issue; and also, that this was in its own nature a case improper for the court to decree a specific performance, because the law has allowed every principal a power to revoke his deputation at any time.—*Sir Clement Wearg's MSS.*

[178] The following note of *Slingsby's* case, cited in the preceding, is extracted from *Lord Nottingham's MSS.*

*Slingsby's Case. July 18, 32 Car. 2, 1680.*

Prerogative of the king by letters patent, to suspend a public officer, though the office is granted for life. After suspension the officer is entitled to receive the salary, but not to exercise the functions, of the office.

Mr. *Slingsby*, the Master of the Mint, had been examined before the Lords Commissioners of the Treasury touching several misdemeanors, and upon their report, and hearing of him at council table, was ordered to be suspended from his place, and the patent of suspension coming to be sealed, he put in a caveat, and insisted by his counsel, that he had in no sort misdeemeaned himself, nor could be removed from his freehold without an inquisition, finding a forfeiture, or a *scire facias*; nor could he be suspended, his salary arising by the profits, and he having also casual profits that arise by the exercise of his place, as 18*d.* for every pound weight of silver that is coined, and 7*s.* for every pound weight of gold, besides houses and other privileges; and cited 1 *Inst.* 233 *a, b*, 18 *E. 4, 9, Bro. Grants*, 103.

To which it was answered, that it was fit to distinguish in this case, between that which was truly and properly Mr. *Slingsby's* office as Master of the Mint, and that which was a collateral contract by indenture between him and the king. To his office, strictly and properly, there belonged nothing but a mere salary, which must and ought to be continued to him notwithstanding his suspension, but his service in that office the king was not obliged to use unless he pleased; and *ergo*, might well enough discharge him the exercise of it, paying him his salary; for herein the king did no more than any common person might do. The profits and perquisites which he claims at 18*d.* and 7*s.* in the pound, arise only by the contract between him and the king, upon which contract he is found to be greatly indebted to the moneyers and others, and this contract is not for life; or if it were, the king is not obliged to continue in that contract, and trust with the further receipt of money, him who is already found so faulty; and whereof the consequence begins already to appear, so far that the mint is like to stand still; and as to the patent of his office, directions are given for a *scire facias*.

I said the first part of the debate, whether Mr. *Slingsby* have deserved to be suspended, is not at all before me; but the latter point, whether he may be suspended, though [179] he deserve it neversomuch, is that which I am to consider; and yet the very debate of the first point supposes and admits the latter: and I observed, that since his Majesty's happy restoration, there were several precedents of officers for life, who had been suspended. The Earl of *Newport* was suspended from being Master of the Ordnance, and the exercise of that place granted to Sir *William Compton*; the Earl of *Anglesey* was suspended from being Treasurer of the Navy, and the exercise of that place granted unto Sir *Thomas Osborn*, and Sir *Thomas Littleton*; and to the first patent the Earl of *Clarendon* put the seal, to the second the Lord *Bridgman*. Since these, there was likewise a suspension of the Lord *Onger* from being Vice-treasurer of *Ireland*, and the exercise of that employment is now in the Lord *Ranelagh*; and this patent of suspension was sealed by the Earl of *Shaftsbury*. So that Mr. *Slingsby* must have more favour than these other lords have had, and I must be wiser than all my predecessors, if I refuse to seal this patent of suspension, which the council table have ordered to pass; nor do I do this because I am so required, but because I think the law allows it; for it is expressly within the difference of all the books, it being an office without any profits but the mere salary, which must be continued; and it were strange to deny the king that liberty which every subject hath, to refuse the service of any man whom he doth not like. For in a stronger case than this, viz. in the case of an office of inheritance, the case of the constable of *England*, it hath been resolved by all the judges of *England*, that the king may refuse the service of the officer; and yet there are profits incident to that office, as the books say, 6 *H. 8, Keilw.*

171; 11 *El. Dyer*, 285; and in *Mark Steward's* case, who was serjeant-at-arms during life, and had a licence from the queen, by parole, to absent himself, the chief reason why that licence was held to be good was, as the book says, because it was in a manner a refusal of his services for the time, and it is in the pleasure of the queen, whether she will accept his service or no, *Co. l. 9, 99 a, quod nota*, for there are fees and profits which arise by the exercise of that office. And now if Mr. *Slingsby* be still resolved to dispute, and neither these precedents, nor yet a former precedent in King *James's* time, where a [180] predecessor of his own, who was likewise master of the Mint, and was suspended by order of council, can satisfy him, I know no better way for the king to assert his power of suspending, and to try his right so to do, than by sealing this patent, and leaving Mr. *Slingsby* to his remedy at law. Lord *Nottingham's* MSS.

Younger v. Welham. Trinity 1711.

Where an office of justice or profit is in trust, the acts of a majority of the *cestui que trusts* may bind the rest.

There being four *cestui que trusts* of the office of the register of the Prerogative Court; the trustees covenanted not to appoint any under officer, &c., without the direction of the *cestui que trusts*; but afterwards the defendant *Norris* was made assistant without the privity of three of the *cestui que trusts*, but with the consent of the fourth.

*Norris* was enjoined not to act any longer; but as he came in without notice of the covenant, he was to have his costs against the Plaintiff, and the Plaintiff to have them over against *Welham* who put *Norris* in.

*Peer Williams*, said the four *cestui que trusts* made but one assignee of the office, and that therefore they ought all to agree in nominating, or else nobody could be nominated; and the rather because the place was within the statute, and therefore could not be sold, or the nomination any profit; but in cases of profit, he allowed a majority should bind.

Lord Keeper [Sir Simon Harcourt]. Shall three lose their right because a fourth will not agree? A majority is sufficient.—From Mr. *Cox's* notes.—Lord *Colchester's* MSS.

[181] *In re the Coroner of SALOP.* April 25, 1818.

Order that a writ should be issued for the election of an additional coroner for the county of *Salop.* Proceedings on the death of a coroner, for the election of a successor.

*Edward Seager*, one of the coroners for the county of *Salop*, having died, a petition was presented by some freeholders of that county, praying an order to the cursitor to issue a writ for the election of a coroner in his place, and also of an additional coroner for *Hales Owen*. The allegations of the petition appear in the orders annexed.

Sir *Samuel Romilly* in support of the petition. The statute *Westm. 1, c. 10*, requires that "sufficient men" shall be chosen coroners, but no statute [182] limits their number. In 1787 Lord *Thurlow*, on an application from the freeholders of *Staffordshire*, there being then only two coroners for that county, ordered writs for the election of two additional coroners.

The Lord Chancellor [Eldon]. The usual course is (I know not that it is necessary) to issue the writ for election of a coroner, on a representation made by the magistrates at the quarter sessions.

The following orders were made.

Tuesday the 26th day of *May*, in the 58th year of the reign of His Majesty King *George the Third*, and in the year of our Lord 1818.

Upon reading the petition of several of the freeholders of the county of *Salop*, praying my order that the cursitor for the said county do make and issue forth His Majesty's writ *de Coronatore Eligendo*, for the election of a new coroner, in the room and stead of *Edmund Seager*, late of *Cleobury Mortimer*, in the said county of *Salop*, gentleman, deceased, one of the coroners for the said county; an affidavit of *Joseph Milnes Bloxham*, of the borough of *Hales Owen*, in the said county, surgeon, of the



death of the said *Edmund Seager*, and an undertaking of *George Hinchcliffe*, of *Hales Owen* aforesaid, gentleman, one of the attornies of His Majesty's Courts of King's Bench and Common Pleas at *Westminster* (filed with the receiver of the fines), that six days' notice of the time and place to be appointed for the said election, shall be publicly given in all the market towns of the said county of *Salop*, before the day of the execution of the said writ; let the cursitor for the county of *Salop* make and issue forth His Majesty's [183] writ *de Coronatore Eligendo*, for the election of a new coroner in the room of the said *Edmund Seager*, deceased.—ELDON, C.

Tuesday, the 26th day of *May*, &c.

Whereas several of the freeholders of the county of *Salop*, on behalf of themselves and other freeholders of the said county, have presented their petition to me, stating, among other things, that within the said county there is a certain insulated part, situate within the parish of *Hales Owen*, which contains many thousands of inhabitants and considerable collieries and ironworks, in which are frequent accidents, which said parish of *Hales Owen* is about twenty miles distant from any other part of the said county, and that the attendance of a coroner who has usually resided in such other part of the said county, and at a place thirty-five miles distant from *Hales Owen*, has been attended with very great inconvenience, trouble, and expense; that there have hitherto been only four coroners acting in the said county, but that were a fifth appointed to act within such insulated part, it would be a considerable saving to the county in general, and to the parish of *Hales Owen* in particular, in the expenses attendant thereon, and that the business would be more speedily and effectually done; that in case the appointment of the fifth coroner should be approved of, and a writ should issue for such election, they were of opinion that the residence of such fifth coroner should be in the said parish of *Hales Owen*; and that the business of the county, independent of that part of it which lies within the parish of *Hales Owen*, is fully as much as four coroners can possibly attend to: Now therefore, on reading the said petition, the approbation of the justices signified at the general quarter sessions of the peace held for the [184] said county, of such application for appointing a coroner for *Hales Owen*, and an undertaking of *John Philpot*, of the Inner Temple, gentleman, one of the attornies of His Majesty's Court of King's Bench at *Westminster* (filed with the receiver of the fines), that due notice shall be publicly given in all the market towns within the said county of *Salop*, of the time and place to be appointed for the execution of His Majesty's writ *de Coronatore Eligendo*, for the choosing a new coroner for *Hales Owen* in the said county, six days at least before the execution of the same; let the cursitor for the said county of *Salop* make and issue forth His Majesty's writ *de Coronatore Eligendo*, for choosing a coroner for the parish of *Hales Owen*, within the said county of *Salop*.—ELDON, C. (*Anon.* 3 *Atk.* 184; 58 *Geo.* 3, c. 95.)

The ATTORNEY-GENERAL v. the MAYOR, &c., of FOWEY. *May* 21, 23, 1818.

Defendants after two orders for time, having filed an answer which was found in part illegible, a motion that it might be taken off the file, resisted on an affidavit that it was legible when sworn, was refused.

In this case, after two orders for time, an answer had been filed by the defendants, but on attempting to take a copy, it was found in various parts illegible. The plaintiff now moved that the answer might be taken off the file.

Sir *Samuel Romilly* for the motion.

An illegible answer, of which no copy can be taken, is in effect no answer. The only question is, whether the defendants are not under the necessity of obtaining a third order for time. They cannot be in a better situation than if no answer had been filed.

[185] Mr. *Hart* against the motion. The defendants are willing to pay the costs of filing a new answer; but they deprecate an order by the terms of which they consent that the serjeant at arms shall go against them. (*Orders in Chancery*, ed. *Beames*, 455.) The affidavit of their solicitor proves that the answer must have become illegible since it was sworn.

Sir *Samuel Romilly* in reply. The solicitor states only that he examined the

answer before it was sworn by one of the defendants in *London*, not after its return from *Cornwall*.

The *Lord Chancellor* [Eldon]. If the answer was filed in a legible state, no blame attaches to the defendants. I find on inspection, that all the schedules, and nine-tenths of the body of the answer, are legible. An affidavit must be filed, describing the state of the parts now illegible, when last sworn.

May 25. An affidavit having been filed, stating that the answer was legible when sworn, the *Lord Chancellor* refused the motion.

[186] ROBERT, Earl of BUCKINGHAMSHIRE (since deceased), ALBINIA, Countess Dowager of BUCKINGHAMSHIRE, JOHN SULLIVAN, ALBINIA JANE HOBART, HENRIETTA HOBART, CHARLES JOHN HOBART, AUGUSTUS EDWARD HOBART, and CATHARINE VERE LOUISA HOBART, *Plaintiffs*, and GEORGE ROBERT HOBART, now Earl of BUCKINGHAMSHIRE, *Defendant*. June 27, 29, 1818.

[Distinguished, *Grice v. Shaw*, 1852, 10 Hare, 80.]

A charge not extinguished for the benefit of the estate, though satisfied by the tenant in tail, with the intention of extinguishing it, under the erroneous supposition that he was tenant in fee simple.

The Master's report in this cause, dated the 1st of April 1815, stated that Sir *Cecil Wray*, by his will dated the 21st of January 1735, devised his seat at *Branston*, with all his fee-simple estate there, and all his messuages in *Heighington*, &c., in that county, to the heirs of his own body begotten or to be begotten, with remainder to Mrs. *Ann Casey*, his natural and reputed daughter, for life, without impeachment of waste, remainder to *John Selwyn* and *Thomas Farrington*, trustees, to support contingent remainders, remainder to *Selwyn* and *Farrington*, their executors, &c., for the term of 500 years, upon trust, to raise £6000 for the younger child or children of *Ann Casey*, beside an eldest son, equally at the age of twenty-one years or day of marriage, remainder to the first and other sons of *Ann Casey*, in tail general, with remainder to her first and other daughters in tail general, with divers ulterior remainders; that Sir *Cecil Wray* died in 1736 without lawful issue, whereupon *Ann Casey* entered into possession of the devised estates, and afterwards intermarried with Lord *Vere Bertie*; that by an indenture dated the 14th of May 1757, being the settlement, or articles providing for a settlement, on the marriage of *Albinia* [187] *Bertie*, the eldest daughter of *Ann Casey*, with the Honourable *George Hobart*, afterwards Earl of *Buckinghamshire*, between *George Hobart* of the 1st part; Lord *Vere Bertie* and *Ann Lady Bertie* his wife, and *Albinia Bertie*, then an infant of the age of eighteen years, of the 2d part; *Edward Woodcock* the elder and *Edward Woodcock* the younger of the 3d part; *Elizabeth*, then Countess Dowager of *Bucks*, of the 4th part; Lord *Robert Bertie* and *John Bristow*, of the 5th part; and *John*, Earl of *Buckinghamshire*, and *Robert Weston* of the 6th part; reciting that Lord *Vere Bertie* and Lady *Ann* his wife had issue *Albinia Bertie* and *Louisa Bertie*, and no other issue, Lord *Vere Bertie* and Lady *Ann* and *Albinia Bertie* covenanted with *Edward Woodcock* the elder and *Edward Woodcock* the younger, that in case the marriage should take effect, and *Albinia Bertie* should attain the age of twenty-one years, they would within six months after that time convey the mansion-house of *Branston*, and all other estates in the county of *Lincoln* devised by the will of Sir *Cecil Wray*, to the use of Lord *Vere Bertie* and *Ann Lady Bertie* and the survivor for life, remainder to the use of trustees to preserve contingent remainders, remainder to the use of the first and every other son and sons of *Ann Lady Bertie* in tail male, remainder to *George Hobart* for life without impeachment of waste, remainder to preserve contingent remainders, remainder to the use of *Albinia Bertie* for life, remainder to preserve contingent remainders, remainder to the use of two or more trustees to be named, their executors, &c., for 600 years, upon trust, in aid of a term of 500 years thereinbefore agreed to be limited in other estates devised by the will of Sir *Richard Ellys* in favor of *George Hobart*, for raising £10,000 for the younger children of *George Hobart* and *Albinia Bertie*, remainder to the use of the second, third, and every the son of *George Hobart* on the body of the said [188] *Albinia Bertie* lawfully to be begotten (other than such son as should be heir male of the

body of *George Hobart* for the time being) in tail male, with divers remainders, and the ultimate remainder to the use of Lord *Robert Bertie* and his heirs.

The master also found that no settlement was made of the estates devised by Sir *Cecil Wray*, during the lives of Lord *Vere Bertie* and Ann Lady *Bertie*, but that after her death (she having survived her husband) in 1778, by indentures of lease and release, bearing date the 23rd and 24th days of April 1779, and made between *George Hobart* and *Albinia* his wife of the first part, *Elborough Woodcock* of the second part, *Thomas Barnard* of the third part, Lord *Robert Bertie* and *Edward Woodcock* of the fourth part, and *Henry Hobart* of the fifth part, and by a recovery suffered in pursuance thereof, the estates devised by the will of Sir *Cecil Wray*, were settled to the use of *George Hobart* for life, remainder to the use of Lord *Robert Bertie* and *Edward Woodcock*, to preserve contingent remainders, remainder to the use of *Albinia* the wife of *George Hobart*, for life, with the like limitation to the same trustees to preserve contingent remainders, with remainder to the use of *Henry Hobart* and *Elborough Woodcock*, their executors, &c., for 600 years, as auxiliary to, and for raising such sum or sums as they should think proper towards payment of the said sum of £10,000 intended to be provided by the trusts of the term of 500 years, limited in the estates of Sir *Cecil Wray*, by the articles of the 14th of May 1757, for the portions of the younger children of *George Hobart* and *Albinia* his wife, remainder to the use of the second, third, and every other the son of *George Hobart*, on the body of *Albinia* his wife begotten (except such as should be heir male of the body of *George Hobart* for the time being), with [189] divers remainders over; the uses and trusts so limited and declared being conformable to the covenants in the indenture of the 14th of May 1757, except as to the interests directed in favor of Lord *Vere Bertie* and Ann Lady *Bertie*, and her issue male; Lord *Vere Bertie* and Lady Ann being then dead without issue male.

The master also found that Lord *Vere Bertie* had, with the fortune of his wife, Lady Ann, purchased other estates in *Branston*, which were known by the description of the purchased or partition estates, to which during his life it was conceived that he had, under the purchase, become entitled for an absolute and disposable interest; and that by the indenture of the 14th of May 1757, the same had been demised by him to John then Earl of *Buckinghamshire*, and *Robert Weston* for 400 years, for securing additional portions to the younger children of *George Hobart* and *Albinia*, to the amount of £7000, but that upon the death of Lord *Vere Bertie*, it was discovered that the purchased estates or the beneficial interest therein, according to the purport of a bond or agreement, which had been entered into by him upon his marriage with Ann Lady *Bertie*, respecting the investment of her fortune in land, would upon her death become vested in her two daughters *Albinia Hobart* and Ann *Louisa*, as tenants in common in tail general; and accordingly upon the decease of Ann Lady *Bertie*, by indentures of lease and release, bearing date the 31st of May, and 1st of June 1780, the release being made between *George Hobart* and *Albinia* his wife of the first part, *Augustine Greenland* of the second part, *Elborough Woodcock* of the third part, John Earl of *Buckinghamshire* and *Robert Weston* of the fourth part, and *Brownlow Duke of Ancaster and Kesteven* of the fifth part, and a recovery in pursuance thereof, the undivided moiety of *Albinia Hobart*, in the purchased [190] estates, was settled to the use of John Earl of *Buckinghamshire* and *Robert Weston*, their executors, &c., for 600 years, upon the same trusts for raising £7000 for the additional portions of the younger children of *George Hobart* and *Albinia* his wife, as were declared by the indenture of the 14th of May 1757, with respect to the term of 400 years; and it was agreed that the term of 600 years should not affect the term of 400 years, but should be considered to be only in aid thereof, and subject to the term, the moiety was limited to the use of the Duke of *Ancaster* and Lord *Robert Bertie* (the executors of Lord *Vere Bertie*), their executors, &c., for 1000 years, upon trust by mortgage or sale to raise £4200, and £4000, due from *George Hobart* to the estate of Lord *Vere Bertie* and Ann Lady *Bertie*, and subject thereto, to the use of *Elborough Woodcock*, in trust for *George Hobart* and his heirs.

The master farther found that in 1781 a partition of the purchased estates was effected by certain indentures bearing date the 13th and 14th of September 1781, and certain fines levied in pursuance thereof, and *Albinia Hobart's* divided moiety thereof was settled to the uses declared of her undivided moiety, by the indenture

of the 1st of *June* 1780 ; that *George Hobart* and *Albinia* his wife had issue. *George Vere Hobart* their second son, who by virtue of the indenture of the 14th of *May* 1757, and the settlement in pursuance thereof by the indentures of the 23d and 24th days of *April* 1779, and the recovery then suffered, became entitled to the estates devised by the will of Sir *Cecil Wray* (called the *Wray* estates), as tenant in tail in remainder expectant upon the several deceases of *George Hobart* and *Albinia* his wife ; that by virtue of an indenture of bargain and sale duly enrolled, bearing date the 13th of *June* 1787, and made between *George Hobart* and *Albinia* [191] his wife of the first part, *George Vere Hobart* of the second part, *Elborough Woodcock* of the third part, and *Thomas Woodcock* of the fourth part, and of a recovery in pursuance thereof, the *Wray* estates were settled to the use of such person or persons and for such estate as *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, should, by any deed executed in the presence of two witnesses and enrolled in Chancery, appoint, and in default, to the use of such person, &c., as the estates then stood conveyed by the indenture of the 24th of *April* 1779 ; that by an indenture of appointment bearing date the 9th of *February* 1790, made between *George Hobart* and *Albinia* his wife, and *George Vere Hobart* of the one part, and *Elborough Woodcock* of the other part, duly executed by them in the presence of two witnesses, but not enrolled in Chancery, the *Wray* estates were appointed to the use of *Elborough Woodcock* his heirs and assigns, upon such trusts as *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, should by any deeds executed in the presence of two witnesses appoint : that by indentures of lease and release and appointment, bearing date the 9th and 10th days of *February* 1790, the release and appointment being made between *George Hobart* and *Albinia* his wife, and *Elborough Woodcock* of the first part, *George Vere Hobart* of the second part, *Charles Stuart* and *Ann Louisa* his wife, and *John Earl of Bute* and *Thomas Coutts* (trustees named in the marriage settlement of *Stuart* and his wife), of the third part, *Brownlow Duke of Ancaster* of the fourth part, *William Birch* and *Elborough Woodcock* of the fifth part, and *C. G. Hudson* of the sixth part, reciting that the indenture of the 9th of *February* had been enrolled in Chancery, and that in 1786, *George Hobart*, together with *Robert Hobart* his eldest son, executed mortgages of certain manors, &c., formerly the estate of Sir *Richard Ellys*, for securing [192] several sums, amounting in the whole to £50,000, the manors, &c., being also subject to an annuity of £500, granted by *George Hobart* and *Albinia* his wife, during their lives and the life of the survivor, and that at the time of making the mortgages, it was intended to re-purchase the annuity, and £3500, part of £50,000, were deposited in the hands of *Birch* for that purpose : and in the mean time to indemnify the mortgagees and *Albinia Hobart*, in case she should happen to survive her husband, against the annuity, and subject to such indemnity in trust for *George Hobart* his executors, &c. ; and farther reciting that it having been found impracticable to repurchase the annuity, the £3500 had been laid out in India bonds, and that *George Hobart* being desirous of paying off £4200, part of the £8200, due to the Duke of *Ancaster*, as surviving executor of Lord *Vere Bertie* and *Ann Lady Bertie*, and to borrow £300, *Birch* had agreed to advance the £3500, and *C. G. Hudson* had agreed to advance £1000, to make up the £4500 : and that *George Vere Hobart* had agreed to join with *George Hobart* and *Albinia* his wife, in appointing the *Wray* estates comprised in the indentures of 13th *June* 1787, and 9th *February* 1790, as a farther security for the £4500, upon condition that the equity of redemption of the premises thereafter granted, should be limited to *George Vere Hobart* in fee, subject to the estate for life of *George Hobart* ; the several parts of the estates purchased by Lord *Vere Bertie*, and allotted in severalty to *George Hobart* and *Albinia* his wife, were released and assured to the use of *William Birch* and *Elborough Woodcock*, their heirs and assigns, subject to the terms of 400 years and 600 years, and to the sum of £7000, to be raised under the trusts of those terms, and subject to the term of 1000 years, and to the sum of £4000 remaining to be raised under the trusts of that term, and subject to a proviso [193] that upon payment by *George Hobart* and *George Vere Hobart* or either of them, or the heirs or assigns of *George Vere Hobart*, to *Birch* and *Elborough Woodcock*, their executors, &c., upon the trusts thereafter mentioned, of the £3500, and to *Hudson* his executors, &c., of £1000, the premises should be reconveyed to *George Hobart* for life, and after his decease to the use of *George Vere Hobart* in fee ; and for better securing the repayment of the £3500 and £1000, *Elborough Woodcock*, *George Hobart*.

and *Albinia* his wife, and *George Vere Hobart*, conveyed the *Wray* estates to *Birch* and *Woodcock* in fee, subject to a proviso, that on payment of the £3500 and £1000, the last-mentioned premises should be reconveyed to the use of such person, &c., as *George Hobart* and *Albinia* his wife, and *George Vere Hobart* should by deed attested by two witnesses appoint, and in default of appointment, to the use of *George Hobart* for life, remainder to the use of *Albinia Hobart* for life, remainder to the use of *George Vere Hobart* in fee; and the indenture contained covenants by *George Hobart* and *George Vere Hobart*, for payment of the £3500 and £1000.

The Master farther found, that by a deed-poll, under the hands and seals of *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, dated the 5th of January 1791, and attested by two witnesses, reciting that the *Wray* estates, subject to the payment of £6000 to *Ann Louisa* the wife of *Charles Stuart*, and to the last mortgage, were settled to the uses declared in the last indenture, and that *George Hobart* was about to borrow £14,463 3 per cent. bank annuities then standing in the names of *John Earl of Buckinghamshire* and *Robert Weston* as trustees, to pay the interest to *George Hobart* for his life, and after his decease in trust as to the capital, for the younger children of *George Hobart* [194] by *Albinia* his wife, except *George Vere Hobart*, the same having been purchased with the £10,000 provided for the portions of the younger children; and the produce of the bank annuities, which was computed at £11,560, was to be applied in payment of £4250 remaining due from *George Hobart* to the trustees for *Sir Charles Stuart*, and then of £6000 to *Ann Louisa Stuart*, and the residue to *George Hobart*; it was agreed between *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, that the £11,560, or such sum as should arise by the sale of £14,463 3 per cent. bank annuities, should be secured, £6000 primarily on the *Wray* estates, and collaterally upon that part of the estates purchased by *Lord Vere Bertie*, which had been limited in severalty to *George Hobart* and *Albinia* his wife, and the remaining £5560, primarily upon the purchased, and collaterally upon the *Wray* estates.—That by another deed dated the 16th of August 1791, under the hands of *George Hobart* and *Albinia* his wife, and attested by two witnesses, reciting that a security was prepared and would be speedily executed to *John Earl of Buckinghamshire* and *Robert Weston*, for the money to arise from the £14,463, 7s. stock, in which to avoid objections on the part of the trustees, the whole was secured as well on the purchased as on the *Wray* estates, it was declared, that as between the parties to the deed and their son *George Vere Hobart*, the security was to be considered as given conformably to the agreement for charging £6000 primarily on the *Wray* estates, and collaterally only on the purchased estates, and the residue primarily on the purchased, and collaterally on the *Wray* estates; that by indentures of lease and release and appointment bearing date the 16th and 17th of August 1791, the release and appointment being made between *George Hobart* and *Albinia* his wife, of the first part; *George Vere Hobart* of the second part; *Charles Stuart* and *Ann Louisa* his [195] wife, and *John Earl of Bute* and *Thomas Coutts* of the third part; *Brownlow Duke of Ancaster* and *Kesteven* of the fourth part; *W. Birch* and *Elborough Woodcock* of the 5th part; *C. G. Hudson* of the sixth part; *John Earl of Buckinghamshire* and *R. Weston* of the seventh part; and *Conrade Coulthurst* of the eighth part; in consideration of £4000, part of £12,710 (the value of the £14,463, 7s. stock), paid to the Duke of *Ancaster*, in satisfaction of that sum remaining due to him under the trusts of the term of 1000 years, and in consideration of £6000, other part of the £12,710, to *John Earl of Bute* and *Thomas Coutts* paid in satisfaction of the £6000 provided by the will of *Sir Cecil Wray* for the portion of *Ann Louisa Stuart*, as the only younger child of *Ann Lady Bertie*, and all interest thereon, and in consideration of the remaining £2710 paid to *George Hobart* and *George Vere Hobart*; *George Hobart* and *George Vere Hobart* conveyed to *John Earl of Buckinghamshire* and *R. Weston* in fee, the part of the purchased estates allotted in severalty to *George Hobart* and *Albinia* his wife, subject to the terms of 400 years and 600 years, to the £7000 to be raised under the trusts thereof, and also subject to a proviso, upon payment of the £12,710 and interest, for reconveyance to *George Hobart* for life, remainder to *George Vere Hobart* in fee, subject to the terms of 400 years and 600 years, and the sum of £7000: and for farther securing the repayment of the £12,710, *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, appointed to the Earl of *Buckinghamshire* and *R. Weston*, in fee, all the *Wray* estates, subject to a proviso, upon repayment, for reconveyance to such persons

as *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, by any deeds attested by two witnesses, should appoint, and for want of appointment to *George Hobart* for life, remainder to *Albinia Hobart* for life, remainder to the use of *George* [196] *Vere Hobart* in fee; and the indenture contained covenants by *George Hobart* and *George Vere Hobart* for payment of the £12,710.

The Master then found that *George Vere Hobart* being thus entitled in fee simple to the equity of redemption of the purchased estates, subject to the life estate of his father *George*, and also believing himself to be in like manner entitled in fee simple to the equity of redemption of the *Wray* estates, subject to the life estates of his father and mother, by his will dated the 12th of *June* 1802, devised his reversionary interest in the *Branston* estate to his wife *Janet M'Leod Hobart* for her life, if she should so long continue unmarried, remainder to *Robert Earl of Buckinghamshire*, then *Robert Lord Hobart* and *John Sullivan* in fee, on trust to sell (with an option of purchasing to his eldest son living at the death of his wife), and stand possessed of the purchase-money upon trust for all his children living at his death, except an eldest or only son, equally, with benefit of survivorship in the event of the death of any sons under 21, or any daughters under that age and unmarried; that *George Vere Hobart* soon afterwards died, leaving his wife (who shortly died) and *George Robert Hobart* his eldest son and heir, and five younger children.

The Master farther found that *George* late *Earl of Buckinghamshire* having died, leaving *Albinia* Countess Dowager of *Buckinghamshire*, and *George Robert Hobart* having attained 21, and having declined to purchase, *Robert Earl of Buckinghamshire* and *John Sullivan* contracted to sell the estates; and on investigating the title of the testator *George Vere Hobart*, it being discovered that the indenture of appointment of the 9th of *February* 1790, had not been enrolled in the Court of [197] *Chancery*, the present suit was instituted in order to have that effect supplied; that in the mean time it was agreed between *Robert Earl of Buckinghamshire* and *John Sullivan*, and *George Robert Hobart*, upon whom, in case of failure of the appointment of the 9th of *February* 1790, the remainder in tail in the *Wray* estates, after the life estate of *Albinia* Countess Dowager of *Buckinghamshire*, descended, that *George Robert Hobart* should concur with them and the Countess *Albinia* in making a good title to the purchasers, without prejudice to his rights as to the purchase-money of the *Wray* estates, in case the defect of enrolment should not be supplied; and accordingly by an indenture of the 19th of *November* 1810, and certain recoveries suffered in pursuance thereof, the *Wray* estates were settled to the use of such persons as the Countess *Albinia* and *George Robert Hobart* should by deed appoint, and in default of appointment to the use of the Countess for life, by way of restoration and confirmation of her estate for life therein, remainder to the use of *George Robert Hobart* in fee; and the Countess and *George Robert Hobart* had concurred in executing the contracts for the sale of the *Wray* estates, and *Robert Earl of Buckinghamshire* and *John Sullivan* had executed the contracts for the sale of the purchased estates, and out of the purchase-money had paid the £12,710 to the executor of the late *John Earl of Buckinghamshire*, the surviving trustee, and the sums of £3500 and £1000 to the parties entitled, and having kept separate accounts of the application of the purchase-moneys, had charged the *Wray* estates with £6000, part of the £12,710.

The Master also found that the £12,710 arose from an investment in stock of the £10,000 raised out of the estates of Sir *R. Ellys*, and received by *John Earl of Buckinghamshire* and *Robert Weston* as trustees for the [198] younger children of *George Hobart* and *Albinia* his wife; and that the sum of £6000 was paid out of the £12,710 in satisfaction and discharge of the £6000 provided by the will of Sir *Cecil Wray*, and a receipt for the same was endorsed on the release of the 17th of *August* 1791, but he did not find that the same or any of the securities for the same were then any otherwise released, or that the said charge on the *Wray* estates, or the securities for the same, were extinguished, released, assigned, or otherwise dealt with, except as aforesaid, and except that after the contracts of sale, the term of 500 years was assigned, and that the Countess *Albinia*, after the decease of *George* last *Earl of Buckinghamshire*, paid the interest of the £12,710 as tenant for life in possession of the *Wray* estates; and by an indenture dated the 16th of *January* 1811, the trustee of the term of 500 years assigned it, subject to the mortgages of the 9th and 10th of *February* 1790, and 16th and 17th of *August* 1791, in trust for the

Countess *Albinia*, *George Robert Hobart*, *Robert Earl of Buckinghamshire*, and *John Sullivan*, their heirs, &c., in trust to attend the inheritance.

The Plaintiffs insisted that the £6000 having been originally charged on the *Wray* estates, they ought still to be considered as charged therewith, saving the effect of the sale and conveyance to the purchasers, and that sum ought to be paid out of the money arising from the sale of the *Wray* estates in exoneration of the purchased estates.

The cause now came on for further directions.

*Mr. Bell*, and *Mr. Wetherel*, for the Plaintiffs, cited *Jones v. Morgan* (1 Bro. C. C. 206).

[199] *Sir Samuel Romilly*, and *Mr. Benyon*, for the Defendants. All the parties intended to extinguish the charge, and it is in fact extinguished. The transaction was certainly founded in mistake; *George Vere Hobart* acted on the erroneous supposition that he was tenant in fee, and had he known his title as tenant in tail, would probably have taken care to maintain the charge.—But the question is, Whether on such conjectural reasoning, the Court can interfere to do that which the parties omitted?

The reply was stopped by—

The *Lord Chancellor* [Eldon]. On the hearing of this cause it appeared to me impossible to determine whether those who represent the persons by whom the £6000 were paid were entitled to maintain that that sum should in equity be a charge on the *Wray* estates, without knowing accurately how the securities have been dealt with, and every particular of the transactions. The case now comes before the Court from the Master, on a long and complicated detail of facts, the effect of which, however, may be stated in few words.

The question does not depend much on the doctrine relative to tenants for life or in tail paying off incumbrances. The rules of the Court in those cases are well understood. If a tenant for life pays off a charge on the estate, *prima facie* he is entitled to that charge for his own benefit, with the qualification of having no interest during his life; if a tenant in tail, or in fee simple, pays off a charge, that payment is *prima facie* presumed to be made in favor of the estate; but the presumption may be rebutted by evidence as by call-[200]-ing for an assignment, or by a declaration. In *The Countess of Shrewsbury v. The Earl of Shrewsbury* (3 Bro. C. C. 120; 1 Ves. Jun. 227) it was held that if a tenant in tail without power of suffering a recovery, who was considered in this Court as a tenant for life, paid off a charge, his dealing did not raise the presumption which results from payment by a tenant of the inheritance. (See *Ware v. Polhill*, 11 Ves. 257. *Redington v. Redington*, 1 Ball & Beat. 131.)

In this case, the original settlement charged on the *Wray* estates, which the Countess *Albinia* became entitled to, a sum of £6000, secured by a term of 500 years. In the course of dealing with these estates, a recovery was suffered by *Albinia* and her husband, and the estates were limited to certain uses to be declared by a deed enrolled in Chancery in execution of a power, and in default of appointment, to the old uses; the execution of the power being defective, in consequence of an omission to enrol the deed, the estates remained in *Albinia*, and eventually came to her second son as tenant in tail. Under the effect of this imperfect execution of the power, all parties conceived him to be tenant in fee, and there was a scheme for paying off the £6000 and other sums, by borrowing an amount of stock which produced £12,710; and it being supposed that *George Vere Hobart* was tenant in fee of the estate of which he was only tenant in tail, a mortgage was made of this estate and of some other estates, of which he was tenant in fee, for £12,710, and of that sum £6000 were applied in payment of the portion charged, and a receipt was given; but the term remained in no way dealt with, and has not yet been assigned to any one. The sales are without prejudice to the question.

[201] If we are to advert to cases on the intention of tenants in tail paying off charges, the answer to applying that doctrine to this case is, that the party never conceived himself to be tenant in tail; believing that he was tenant in fee, his meaning unquestionably was to pay off this sum of £6000, and so that it should no longer be a charge on the estate, but at the same time, by virtue of his interest as tenant in fee, to create a charge on the other estates for £12,710, part of which had been applied in payment of the £6000.

*George Vere Hobart* died in ignorance that the mortgagees had a bad title, and with a conviction that the estates were discharged of the £6000; at least I think that it must be so taken: it now appears that the title of the mortgagees was bad. Suppose that the question had arisen with them. They dealt for a security for £12,710, not taking an assignment of the term, but omitting to take it on the ground that that term would be attendant on the inheritance in fee; it could not be so attendant on the fee in them, because they had not the fee; but that term being attendant on the estate tail which was in their mortgagor, and not barred by recovery, and it being the intent that the term should be attendant on the inheritance, and that the inheritance should be in them, it could not have been maintained in a court of equity that they should not have the benefit of the term, because it could not be actually attendant on the inheritance in them; as purchasers they would have a right to say otherwise.

If *George Vere Hobart* had paid off the mortgage in his life-time, and taken an assignment, he would then have stood in the same situation as the mortgagees, and would have been entitled to object to his issue in tail that they should not have the benefit of this sum, unless [202] they allowed the term to attend the inheritance. His assets paid the charge.

It appears to me that this case is not one in which the intention of the parties must be taken to have been to maintain the charge, but to destroy it; but it must finally be determined, that if the whole of the estate cannot be enjoyed according to the whole of the intention, the term, which has never yet been assigned, shall be considered as subsisting to secure the £6000. I am of opinion that the parties are entitled to have the term so considered.

"His Lordship doth declare that the Plaintiff *Robert Earl of Buckinghamshire*, deceased, and *John Sullivan*, as devisees in trust under the will of *George Vere Hobart*, are entitled to have the £6000, remainder of the mortgage for £12,710 in the pleadings mentioned, and interest, raised out of the *Wray* estates; and it is ordered, that it be referred to the said Master to take an account of what is due to the trustees for principal and interest in respect of the said £6000; and it appearing by the said Master's report, bearing date the 1st day of *June* 1815, that the *Wray* estates have been sold, and the money arising therefrom has been paid to the Plaintiff *Robert Earl of Buckinghamshire*, since deceased, and *John Sullivan*, it is ordered, that what the Master shall find due in respect of the said £6000 and interest, be paid to such of the Plaintiffs as are the younger children of the said *George Vere Hobart*; and for the better taking the accounts, &c. And his Lordship doth not think fit to give costs on either side." Reg. Lib. A. 1817, fol. 2221.(1)

(1) *Earl of Kinnoul v. Money*. Hearing, *Michaelmas Term* 30 G. 2. Rehearing. 18th and 21st March 1767.

A woman, being entitled to some estates in possession, and to others in reversion on the decease of her mother, settled them previous to her marriage, to trustees for 99 years to secure pin-money, remainder to herself and her intended husband for their joint lives; and in case she should survive, remainder to her for life; with remainder as to the estates in reversion, to the first and other sons of the marriage in tail male, remainder to such uses as she, notwithstanding coverture, should appoint, and in default of appointment, remainder to her in fee; with remainder, as to the estates in possession, after her death, to such persons as she should appoint, with like remainder in default of appointment; and by the marriage articles it was agreed, that if the husband would have been entitled to be tenant by the curtesy, in case of no settlement, he should enjoy the lands as if no settlement had been made. The husband became entitled to be tenant by the curtesy; after the marriage, a sum of £2500 for paying debts of the wife due prior to the marriage, was raised by mortgage of the estates, the husband joining and covenanting for payment of the mortgage money; and a further sum of £4500 was raised on a like security; and afterwards a sum of £1000 for paying interest on the former sums: the wife died without issue surviving her, having by her will devised the estates to her husband for life, with a limitation of them after his decease, "subject to such incumbrances as they were then subject to": on a bill by the husband, an inquiry was directed into the application of the money



raised, and the husband was held discharged from so much as was applied to the wife's use, except that as tenant for life he ought to keep down the interest; but the will of the wife was construed not to charge the estates with the whole sum, in exoneration of the husband.

In 1740, *Constantia Earnle* was seized in fee of freehold estates in *Wilts* and *Hereford*, worth about £800 *per annum*, in possession, and of other estates in reversion (expectant on the death of her mother *Constantia Earnle*, who survived her), of about £1200 a-year; subject to and chargeable with sundry debts and legacies of her father. 12th June 1741, Miss *Earnle*, in prospect of a marriage with the Earl of *Kinnoul*, then Lord *Duplin*, covenanted and agreed to settle all her estates both in possession and reversion, to the use of trustees for 99 years, for securing £200 a-year pin-money, remainder to Lord and Lady *Duplin* for their joint lives; and in case the lady survived, then to her for life; remainder, as to the estates in reversion, to trustees for 500 years, which never took effect; remainder to the first and other sons of Lord and Lady *Duplin*, in tail male, remainder to such uses, and subject to such charges as Lady *Duplin* should, notwithstanding her coverture, by any deed direct or appoint, and for want thereof, remainder to Lady *Duplin*, her heirs and assigns; and as to the lands in possession, after Lady *Duplin's* death, to the use of such person or persons, and subject to such charges, as she should appoint; with the like remainder in fee to her own heirs in default of appointment. And it was by the marriage articles agreed, that in case Lord *Duplin* should be or would have been entitled to be tenant by the curtesy of all, or any part of the estates, in case of no settlement, then that he should enjoy such lands for his life, as if no articles or settlement had been made, and that the estates should after his death follow the uses limited as above.

The marriage was had, and Lord *Duplin* earned his curtesy estate; but the child died very young. Lady *Duplin* having, previous to her marriage, treated about the loan of £2500 to pay her father's debts, and some of her own, completed the mortgage in July 1741 (soon after the marriage), wherein Lord *Duplin* joined, and covenanted to pay the mortgage money, which was secured on the estates, both in possession and reversion. In 1746, they raised the further sum of £4500, secured likewise on both estates. In 1752, an arrear of the interest having accrued on both sums, amounting to £1000, the mortgagees assigned, and Lord and Lady *Duplin* confirmed both estates to new mortgagees, for securing £8000 and interest.

20th June 1753, Lady *Duplin* made her will, and charged her estates in reversion with the payment of certain debts of her mother, and of sundry legacies given by her own will, and directed that they should be a lien and incumbrance on those estates, and be raised and paid by sale or mortgage, as soon as might be after her mother's death; and she devised the said estates in *Wilts* and *Herefordshire*, subjected by her as aforesaid, to her husband Lord *Kinnoul* for life, with power to make leases; and after his decease she devised the same estates, so subjected and charged by her as aforesaid, together with certain other estates in *Wilts* and *Herefordshire*, "subject to such incumbrances as the same are now subject to," to Mr. *Washbourn* and others, for their lives, and the survivor of them; then she devised all the said estates which were her late father's, as well those jointured, as otherwise, "subject to such incumbrances as the same are now subject to," and all her estates, &c., unto the Defendant *James Money* and his heirs for ever.

Lady *Duplin* died 26th June 1753, without issue, and without revoking her will. This bill was soon afterwards brought by Lord *Duplin*, in order to have the estate sold to satisfy the incumbrances, and that a value might be set on his life estate, and that he might have a contribution from the persons in remainder of the reversionary estates, for the interest paid in Lady *Duplin's* lifetime, and since her decease, and before the death of Lady *Duplin's* mother. The Defendants insisted that the mortgagees remaining satisfied with the security, the estate ought not to be sold, and that the sum of £8000 being advanced during the coverture, ought to be considered as the debt of Lord *Duplin* himself, and that he ought to keep down the interest of the same.

At the hearing the Plaintiff's counsel relinquished the prayer of sale, and prayed that Lord *Duplin* might redeem the mortgagees, and that the Court should declare the estate to be liable to the debt of £8000, the money being advanced for the use

of Lady *Duplin* herself, and that the Defendant might contribute towards the interest.

Mr. *Yorke*, Solicitor General. The question is, whether this is not a debt to be charged upon the estate, and whether therefore the Plaintiff as tenant for life, is not intitled to redeem? and the ground on which the Defendant must argue this, is much too large; for the Court has never yet said that a wife cannot make a gift to her husband. This Court has never yet broken in upon the rule of law, that where-ever a feme covert levies a fine, and declares the uses thereof, she may give a benefit and interest in the estate to her husband. Lord *Huntingdon's* case (2 *Vern.* 437). A sum of money was borrowed on Lady *Huntingdon's* estate for my lord's use; Lord *Huntingdon* afterwards took an assignment of the mortgage in trust for himself, and devised the same to his second wife: upon an appeal the lords decreed that the mortgage should be assigned to the heirs of the first Lady *Huntingdon*. This appeared on the deed itself to be borrowed to buy Lord *Huntingdon* a place. So in the case of *Tate v. Austin* (1 *P. W.* 264). But in the present case, it is a gift from the wife to the husband; nothing appears on the face of the deed to shew the money was raised for the benefit of the husband. In the case of *Bagot v. Oughton* (1 *P. W.* 347), it appears there was a covenant from the husband to pay the mortgage money, yet his personal estate was held not to be liable to pay the same, because it was not his debt. In the present case, this is the proper debt of the wife; the treaty for the mortgage was before the marriage, and the application of the money raised was in discharge of debts of Lady *Duplin's* father; and all that has been raised since the first mortgage, has been applied in discharging her debts. But in case this would not avail the Plaintiff in order to make this to be considered as Lady *Duplin's* debt, and for which the estate will be liable, yet it plainly appears to be the intention of Lady *Duplin*, to make her estate chargeable with this incumbrance in the hands of the remainder man, for she devises it to him subject to such incumbrances, as it was then charged with.

Mr. *Harley*, for the Plaintiff. The questions are, 1. Whether Lord *Duplin* is to be considered as principal debtor, and the land only as a collateral security? 2. Whether Lord *Duplin* is a creditor for the interest paid? As to the first, this case differs from *Pocock v. Lee* (2 *Vern.* 604), for here the money was raised not for the use of the Plaintiff, but to pay the debts of Lady *Duplin*. And though the mortgage was executed after the marriage, yet it was in consequence of an agreement before; and though the Plaintiff covenanted to pay the money, that can be of no weight, for no person else could covenant; and in the case of *Bagot v. Oughton*, it was held that the land was liable, and the covenant only a collateral security. 2dly, Whether the Plaintiff is entitled to a contribution out of the estate in reversion towards payment of interest? The estate in reversion as well as that in possession, was in the contemplation of the parties at the time of lending the money. Nothing further was intended, only that the estate in possession should be the primary fund; and when the words of Lady *Duplin's* will come to be considered, there can be little doubt; for when she devises the remainder of her estate, she makes use of the most general and comprehensive words. No intent appears in the will to throw the burthen upon the estate in possession only: and then the inquiry will be, whether the estate in reversion should not contribute to the payment of the interest? In the case of *Carter v. Barnardiston* (1 *P. W.* 505), one seised in fee of the manors of A. and B., mortgaged A. for £4000; and by will charged all his real estate for payment of his debts, and devised A. to C. and B. to D., and died; the devisee of A. shall compel the devisee of B. to contribute to the payment of the mortgage on A.: *Heveningham v. Heveningham* (2 *Vern.* 355), where two estates are subject to the raising a portion for a daughter, by a term of 100 years, after the decease of two several lives, and the life on one estate falls, and J. S., to whom the estate comes, pays the portion, and afterwards the life on the other estate falls, J. S. shall have contribution. So that upon the reason of these cases, Lord *Duplin* the Plaintiff ought to have contribution out of the estate in reversion, now falling into possession by the decease of Lady *Duplin's* mother.

Lord Chancellor *Hardwicke*. Some parts of this case are extremely clear. As to the prayer of a sale, that is certainly improper: the tenant for life of an estate subject to a mortgage is not entitled to pray such relief, though the mortgagee himself might be, if he thought it a scanty security; but the tenant for life is bound

to keep down the interest. The clear equity is to have a redemption, and stand in the place of the mortgagee; and I think the Plaintiff may pray any thing consistent with the nature of his case, under the prayer of general relief.

I differ entirely from the Plaintiff's counsel, who say it is incumbent on the Defendant to shew that the money was borrowed for the benefit of the husband; for the general rule is, that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to shew the contrary. This Court *prima facie* considers it as a pledge for the husband's debts; and his estate shall first be applied to exonerate it, unless a special case appears. A distinction is made, which appears in the case of *Bagot v. Oughton*, where a wife had joined with her husband by way of mortgage, to raise money on her estate, and there was a prior mortgage on such lands, and the husband has joined in the assignment, and covenanted to pay the money, the land there shall be liable, and not the husband. But though this is the general rule, that the husband shall be liable, yet it is but an equity, and therefore it may be rebutted by another equity, which may be set up by parol proof. It has been insisted that this money was paid and applied in discharge of Lady Duplin's debts; but the proof goes only to £2500, and therefore I think that it will be proper to send this to the Master to be further inquired into, and let it come back on his report.

Mr. Attorney General Sir *Robert Henley*, insisting to have his Lordship's opinion, whether Lady Duplin's will had not made the estate liable to this mortgage, and discharged her husband; that point only was directed to be spoken to. The words of the will on which the doubt arose, were on the devise of the remainder to W. and A. for life, remainder in fee to the Defendant *Money*, subject to the incumbrances the estates are now charged with.

Lord Chancellor *Hardwicke* gave his opinion upon this part of the case. If Lady Duplin has by her will charged this estate with this incumbrance, then there will be no occasion to direct the inquiry before the Master; and though Lord Duplin did deserve all the bounty that could be shewn a very affectionate husband, yet I must make such a construction as is agreeable to law. The question is, whether Lady Duplin, by devising this estate to her heirs at law, with particular interests, subject to such incumbrances as they are now charged with, has thrown the burthen of these incumbrances upon the estate? And upon the best consideration I can give this matter, I do not think the words can have that operation; and if I was to be of that opinion, I think it would be of very dangerous consequence.

Lady Duplin had two estates, one in possession, the other in reversion. Both these estates were subject to the mortgage: her intention by her will was, first, a just one, to pay her own debts; next, a generous one, to discharge such debts as were due from her mother, at her own death, and to give several legacies: and these she charges on the estate in reversion: then she devises the estate in reversion to Lord Duplin for life, subject as aforesaid; that is, to her own debts, to her mother's debts, and to her legacies; and after the decease of Lord Duplin, she gave the said estate to W. for life, then to the Defendant *Money* in fee. This was a devise of the remainder of the reversionary estate; and then she devises the remainder of the estates in possession to the same person, subject to such incumbrances as they are then charged with. The question is, therefore, whether these words are such as the law would have supplied, and therefore nugatory; or whether they are intended to discharge Lord Duplin of what he otherwise would have been liable to? I think the former is the right construction. Can any stronger words be made use of by a drawer of a will to express that the incumbrances should remain in the same state, and that no alteration was intended in the nature of them? And where the real estate is by will made liable to the debts, shall not an heir at law or an *hæres factus* have the benefit of the personal estate to exonerate the real? Suppose a mortgagee should take a bond of a third person, as a further security, and the mortgagor was to devise the land subject to the incumbrances, would this discharge the bond?

But I go further in this case, and I think the drawer of the will had a view to make a difference between the charge by will, and the charge of the mortgage. He was afraid it would have made both the estates subject to the same charge as the estate in possession was before; and the intention was to make the estate in reversion chargeable, with what was imposed by the will, and also the mortgage incumbrance, but to subject the estate in possession only to the mortgage: and therefore I am of

opinion, that the Plaintiff Lord *Duplin* is still liable to this debt. subject to such inquiry as is before mentioned.

*March 1767.* The Master reported that £2500 were applied for Lady *Duplin's* use, or in payment of her father's debts, and that the remaining £4500, except about £234, were received by Lord *Duplin*, and applied to his own use. Though the report was not confirmed, the Plaintiff declined to bring on the cause in that manner, because Lord *Hardwicke's* directions seemed to bear towards charging him with part of the £8000, and therefore the cause came on by way of rehearing; but Lord *Camden*, C., objected to the method, and on saying he should not think himself bound by the former decree if he were of a contrary opinion, the parties consented that the report should be read as if confirmed, and that the cause might come on for further directions.

Mr. Attorney General *de Grey* for the Plaintiff. The dispute here is between the devisees and the heirs at law, whether these estates are not to be considered as estates of the wife charged with the husband's debts, and that consequently his assets ought to exonerate the mortgaged premises? The first point is to be considered the incumbrance on the general principle, independent of the will: 2d, on the construction of the will, explanatory of the lady's intention.

The general rule is, that wherever the wife's estate is pledged for the husband's debts, his covenant shall bind his own assets, he becomes the principal debtor, and the wife's estate the security. The exceptions to the rule are, when it appears that the husband did not receive the money; so it is when the estate comes mortgaged to his hands, and he assigns, though he gives a bond, and covenants to pay the money: here the rule is reversed, he is only the surety, and the estate the real debtor; and this is settled in *Bagot v. Oughton* (1 P. W. 347). Thus the leading principle governs in respect to an entire disposition of the mortgage money; but where the application is of a mixed nature, the Court will not weigh it minutely, nor split the consideration money; agreeable to *Lewis v. Nangle* (Amb. 150; 1 Cox, 240), which was stated as follows, from Mr. Attorney General's note book; *Margaret Lloyd* being seised of an estate in fee previous to her intermarriage with *Nangle* the Defendant, by articles covenanted to settle the estate on the husband for life, and afterwards on the issue of the marriage, with remainder to herself and her heirs, and there was a clause by which the husband and wife jointly were empowered to revoke those uses, and to resettle the estate: they did afterwards accordingly revoke the uses, and mortgaged the estate for a sum of money, part of which was to enable the husband to carry on his trade, and to pay his debts, which he was unable to pay, he being very poor at the time of the marriage; and the other part to pay her debts, and he covenanted to repay the mortgage money: and subject to the mortgage, they resettled the estate on their children, with remainder to her and her heirs; and the bill was brought to have the estate discharged of the mortgage money, by the Defendant. In that case Lord *Hardwicke* would not determine the matter upon any general principle, but was of opinion that *Nangle* was obliged to keep down the interest of the money, and that the estate should pay the principal. But in that case the husband had given up a power of committing waste. It is material here, that the wife joined in mortgaging, and that part of the money was applied to her use, and in payment of her mother's debts; and there is no instance that in such case the husband shall disincumber.

2d. As to the point of intention, she charges her estate in reversion with debts and legacies; the estates in possession are devised subject to such incumbrances as the same are now subject to: she would have said discharged, if she had meant to charge Lord *Kinnoul's* own estate or his assets.

Mr. *Yorke* on the same side. This is a question of construction on the will, whether Lady *Duplin* intended that the whole £8000 should be satisfied out of her own estate? For the previous question as to the original intention at the time of the loans, will lead to the second of construction, and if Lady *Duplin* agreed that her estates should originally be liable, it will corroborate her will. The heir of the wife, he allowed, would be a creditor on the assets of the husband; and his real assets shall exonerate, where the wife has no part of the money paid to her use, or in discharge of her debts; but it is otherwise when applied for the benefit of both; as in *Lewis v. Nangle*, decreed by Lord *Hardwicke* in 1752, if the wife is entitled to a jointure, and levies a fine to let in a charge on that estate, the husband shall make a satisfaction. Equity will not suffer her tenderness for him to prejudice her. So, if she does any act to charge her own estate, whether settled or not, the husband shall exonerate. The first presumption

is that she does it for his benefit ; but this may be repelled by facts. *Tate v. Austin*, Lord *Huntingdon's* case, and *Pocock v. Lee*. Yet the law is otherwise, as in the present case, where the husband is a purchaser of the incumbrances, by giving up his rights ; he departs with his estate of freehold so long as the mortgage subsists ; he has given a consideration for the several loans, and they are to be considered as one entire transaction ; and though in such case, he must pay the whole in law, yet he will be relieved in equity.

2d. How does it stand on the will ? Lady *Duplin* has reserved no equity, there is no rule of this Court against the husband, and shall this Court interpret the words ; " subject to such incumbrance as the same are now subject to," to be *expressio eorum que tacite insunt* ? Do they not import that the devisees shall take without any equity or demand against the husband ? That every devisee shall take *cum onere*, not only with regard to mortgages, but also the husband ?

Mr. *Ord* on the same side. The Lady here is to be considered *sui juris* ; she mortgages in pursuance of a power ; the articles were never carried into execution ; the legal estate remained in her all along ; and, therefore, the personal covenant of the husband ought not to be called in aid of this estate. *Evelyn v. Evelyn* (2 P. W. 659).

*Wedderburn* for the Defendants, observed that the Plaintiff has brought this rehearing after an acquiescence of ten years under the spirit of Lord *Hardwicke's* decree ; that the established principle is, that whosoever receives the benefit shall be the principal debtor, and liable to discharge the incumbrance ; Lord *Huntingdon's* case ; the reversal of that decree in the house of lords, laid the foundation of *Tate v. Austin*. With respect to the original security for £2500, Lord *Duplin* did no more than the Court would have compelled him to do ; that is, to mortgage or sell part of the estate for payment of debts, to which those estates were subjected. In regard to the will she has shown no favour to Lord *Duplin*. He took the same estate under the articles ; and if she had intended to serve Lord *Duplin*, she would have said so, as she has done with respect to her mother's debts. There is nothing to show that she meant to subject the estates in possession, otherwise than the rules of law and equity subject them ; she had no benefit from the loan, it did not increase their income, as in Lord *Huntingdon's* case ; and thus the general principle, the authorities of the Court, and the circumstances of the case, support the decree.

Mr. *Maddox* on the same side. The presumption is when money is borrowed by husband and wife on the wife's estate, that it is for the husband's use till proof is made to the contrary. Where the wife has the estate settled to her separate use, the rule is stronger, that she only lends her estate to the husband, and it shall be his debt. To take the case out of this general rule, there must be evidence of an agreement between them. In the case of *Lewis v. Nangle*, there was the strongest implied contract, and evidence of agreement. The husband was necessitous, assigned over all for his benefit ; he had a joint power of revocation of the uses, and had nothing of his own to pay, or wherewith to exonerate her estates. There is no shadow of such evidence of agreement in the present case, or that the lady's estate should be charged with second and third mortgages. But so far as they are liable, the two estates must be liable proportionably. The will only makes a difference as to the reversionary estates. It was necessary to give him a life estate therein, as he could not be tenant by the curtesy thereof. He cited *Serle v. St. Eloy* (2 P. W. 386), which was the case of a devise of mortgaged and other lands subject to the incumbrances upon them, yet the devisees took them discharged ; but this arose from a particular devise of lands for payment of debts, which shall mean all debts.

The *Attorney General* replied. The cases cited for the Plaintiff were designed to show that the Court will vary the general rule upon small alterations. The question of intention upon the will is the true one. By the will she means to give Lord *Duplin* a certain income for his life ; she knows not the equity of this Court, that the wife and her estate are only a surety, and the husband's estate bound. The remainder men are volunteers, and it becomes a question whether they have any right to have the debt out of Lord *Duplin's* estate ? In case of pin-money, where many years are in arrear, the husband's estate shall be liable only to one year ; the rest shall be supposed a gift to the husband. The rents of the estate in possession were not sufficient to pay the interest of the £8000 after paying lady *Duplin's* pin-money ; the intention is express and equal as to the whole £8000, and if the estate is to be the primary fund as to legacies, it must be so as to debts. What construction

shall we put upon the words, "subject to such incumbrances as the same are now subject to?" Do they mean subject as it was before in regard to the creditors, or as it now stands between my husband and me? The sense put upon them by the other side gives no meaning or operation to the words. There is not the least indication of intention to charge his estates, or that her own should be a security as to the £4500, and the principal debtor as to the £2500. In *Serle v. St. Eloy*, there was not only a devise for payment of debts, but the rents were to accumulate for the infant; and it is a contradiction to say that part of it shall be taken away to pay the interest.

Lord Camden, C. This, in my opinion, is a clear case. The Earl of Kinnoul files the bill, and his principal view of relief, is to have the estates sold or mortgaged, and his part of the incumbrances discharged by such sale or mortgage; for the relief is of course as to the debts of the mother. The £2500 were manifestly borrowed to pay the debts of Lady Duplin's father. It is as manifest in point of fact, that the large sum of £4500, except about £200, was applied by Lord Duplin to his own use. This brings us to the £1000 for interest of both sums, which requires a mixed consideration. Lady Duplin devises her estate in possession to Lord Duplin for life, and expressly charges it with her mother's debts. The estate in reversion she likewise devised to him for life, subject to such incumbrances, as it was then subject to; and under these special circumstances it has been contended that equity will discharge him, as an exception out of the general rule.

The principle is well known, and old as the Court itself; that when husband and wife raise money out of the wife's estates, with the reversion to one or to the other, this Court inquires into the uses, considers them as two persons, and, if I may use the expression, dissolves the marriage, *quoad* the transaction. Though the husband covenants to pay the money, and gives bond, yet the application determines who is the principal, who is the surety. This is the case of principal and surety at common law, the principal is first obliged to pay, and the surety only in default; in equity the surety comes in aid of the principal debtor. The cases of Lord Huntingdon, *Tate v. Austin*, *Pocock v. Lee*, are all in point.

It has been said, that where the husband has one part, and the wife another, the Court will not look too nicely into it, nor separate the debt. But no case has been cited to prove this point, except *Lewis v. Nangle*, which is so particular a case, that it cannot serve as a precedent; nor is it an authority to govern in any other case, unless the circumstances are very like it. There the estate was settled, with a joint power of revocation; the power was jointly executed, and the estate re-settled, subject to £1300 incumbrance, which they took up, and applied partly in payment of the wife's debts, and partly to establish the husband in trade, who was in necessitous circumstances. Lord Hardwicke made two points, but declared that he meant not to lay down any general doctrine as a positive rule. The first was as to the mixed sum; but upon the second, he determined upon the particular circumstances of the case. The equity is very nice, but it seems to me to be just. [218] The money was not borrowed to pay the husband's debts, but to enable him to live, and he is besides a purchaser of that very loan from the joint power of revocation.

My opinion having gone so far, I can see no reason why the Master shall not inquire into the application of the money. It would destroy the fundamental rule of this Court, to say who shall be principal and who the surety. As to the £1000 interest, I do not see any reason that Lord Kinnoul should pay off the interest of his lady's money, any more than the principal. He is bound indeed to pay the whole as to the mortgagees; the interest would have been decreed to them in this Court, yet the husband would have credit for it, in an account here between him and his lady.

Thus stands the matter upon the articles; and now the next question is, whether the will has made any alteration? There are no words in the will, but only those, "subject to such incumbrances as the same are now subject to," which can by any possibility make the estate liable to the whole £8000. These words import no intention as to the equity between the husband and wife, but only as to the mortgagees; they must mean, subject to every incumbrance that the wife was liable to pay. But if I think with Lord Kinnoul and his counsel, I must say that Lady Kinnoul intended to pay the whole £8000 upon the estate in possession, and that, subject to his life estate; and why should she intend to charge the estate in possession, and not that in reversion? It is *expressio eorum quæ tacite insunt*, for the same

words, "subject, &c.," are implied as to the estate in reversion. Mr. *Yorke* has laid great stress on the word, now to charge the estate with the whole £8000; and so do I, in support of my decree. For if the estate is to be otherwise charged or affected, than it was at the time of making the will, it must totally alter it from its then situation.

I am therefore upon the whole just as clear as Lord *Hardwicke* was, that the will makes no alteration; the prayer of the bill was to have the estate sold; but Lord *Hardwicke* said that was improper, inasmuch as a tenant for life of a mortgaged estate cannot ask to have the estate sold, but may redeem and put himself in the place of the mortgagee. I must therefore dismiss the rehearing, and confirm Lord *Hardwicke's* decree, and as the Defendant, Colonel *Money*, is desirous to redeem, let it be referred to the Master to inquire how much of the £1000 was applied to pay the interest of £2500, Lady *Duplin's* part, and how much the interest of £4500, the Plaintiff's part. And let the Defendants, the mortgagees, convey, on having six months' notice, after the Master has made his report, and being paid off; and with respect to that part of the case relative to the estates in jointure to Lady *Duplin's* mother, as directions have been already given in another cause, *Williamson v. Earl of Kinnoul*, the Court makes no order, but leaves the parties to apply; the mortgagees must have their cost decreed agreeably to the Master's report; as to the sums lent on mortgage, the estate of Lady *Duplin* is the principal debtor for the sum of £2733, 19s. 8d., and Lord *Kinnoul* discharged therefrom; and for the sum of £4266, 0s. 4d., Lord *Kinnoul* is the principal debtor, and the lady's estate discharged therefrom. Therefore let each party redeem his respective share of the £8000, and the Defendant having offered to raise his part of the principal, interest, and costs, in default of payment of the mortgage money, let the plaintiff's bill so far as it relates to this mortgage, be dismissed with costs; and reserve for future consideration how far these costs, or any, ought to be paid as between the parties; and Lord *Kinnoul* must in the mean time as to the mortgagees, keep down the interest of the whole, but he shall be considered as a creditor for his wife's part of such interest, though he is tenant for life, subject to the incumbrances.

*March 26.* Lord *Camden* having doubted whether he had determined rightly as to the matter of interest, ordered the cause to be brought on again to day, when he said as Lady *Duplin* was the principal debtor for the sum of £2500 raised by mortgage, he thought at first, that she ought likewise to be answerable for the interest, but as Lord *Kinnoul* was tenant for life of the estate, and as such had received the rents, which were to pay the interest, he ought to pay the whole interest himself, for then he became the principal debtor for it; and therefore decreed that Lord *Kinnoul* should pay the whole £1000 raised for interest.—Mr. *Holliday's MSS.* (See *Innes v. Jackson*, 16 *Ves.* 356; 1 *Bligh*, 104.)

*21st March 1767.* "His Lordship upon the said Master's report, doth declare that the sum of £2733, 19s. 8d., part of the principal sum of £8000 advanced on the mortgage of the estates in question, was applied to pay the debts and legacies which Lady *Duplin* was obliged to pay, and that therefore she ought to be considered as principal debtor for that sum; and the Plaintiff, the Earl of *Kinnoul*, discharged therefrom as against her heirs, save only that, as tenant for life, he ought to keep down the interest thereof; and that the sum of £5266, 0s. 4d., other part of the said principal sum of £8000, appears to have been received by the Plaintiff, the Earl of *Kinnoul*, only, and converted to his use; and that therefore he ought to be deemed the principal debtor for that sum, and also for the remaining sum of £1000, which was borrowed in order to pay the interest in arrear due for the said two former sums; and the Plaintiff the Earl of *Kinnoul*, [221] being desirous that the estates in mortgage should be redeemed, and the Defendant, Mr. *Money*, consenting to raise and pay so much of the principal, interest, and costs of the mortgagees, as he ought to advance according to the directions of this decree; it is farther ordered, that it be referred to the said Master to take an account of the principal and interest due to the Defendants, the mortgagees, on their mortgage," &c.—Reg. Lib. A. 1766, fol. 368.

[203] JONES v. the GUARDIANS of the POOR of the Parishes of MONTGOMERY and POOL, and the PARISHES, CHAPELRIES, and TOWNSHIPS united therewith in the Counties of MONTGOMERY and SALOP. *June 30, 1818.*

Creditors who had advanced money to a corporation established for the maintenance of the poor of a certain district, were held entitled to compel the assessment of rates sufficient, after maintenance of the poor, to pay the principal and interest of their debts.

By statute 32 *Geo. 3, c. 96*, certain parishes, chapelries, and townships were united and incorporated into one district for the purposes of the act; and all persons inhabiting any of the parishes, &c., and being assessed to the relief of the poor, and seised or possessed of freehold or copyhold lands or tenements of the yearly value of £20, or of any lands or tenements within the parishes, &c., of the yearly value of £10, or possessed of a personal estate to the amount of £500, were incorporated by the name of the guardians of the poor of the parishes, &c., with power to sue, &c., and hold lands, tenements, and chattels, &c., and to convey or release, &c., such lands, &c.

[204] The act prescribed a mode of election of directors, any five of whom were empowered to purchase lands or buildings for specified purposes, and to contract for and purchase provisions and materials for maintaining and [205] employing the poor; and declared that it should be lawful for the directors, or any five of them, for and in the name of the corporation of guardians of the poor, from time to time to borrow and take up at interest any sums [206] of money not exceeding in the whole the sum of £12,000, in such shares or amounts of not less than £100 each, as should be judged most convenient, and therewith to pay the expenses of obtaining and passing the act, and [207] such interest of the sums from time to time borrowed, as should become due during the three years next after the first court or meeting, and also the expenses which should be incurred in or be incident to the purchasing, [208] conveying, or hiring the said lands, tenements, goods and chattels, the erecting and furnishing a house or houses of industry, and first setting the poor to work therein, and such other costs and expenses as ought, in [209] the opinion of the directors, or any five of them, to be discharged and defrayed thereout; and also to convey and assign over by writing, under the common seal of the corporation, and the hands of some five of the [210] directors, to the respective persons advancing or lending the said monies, all and every the houses, lands, tenements, &c., of or belonging to the corporation, and also all or any part of the poor rates and assessments to be [211] collected within the parishes, &c., as a security for the repayment of the principal sums so borrowed with interest.

The act then directed that the conveyances and assignments should be in the form of a deed-poll, by which [212] the corporation of guardians for the poor of the parishes, &c., by virtue of the act, &c., conveyed and assigned to A. B. the houses and hereditaments belonging to the corporation; and the poor rates or [213] assessments to be raised and collected within the parishes, &c., with all powers and authorities for entering into and upon the houses, &c., and for receiving the rents, &c., and also for collecting and raising [214] the poor rates and assessments, to hold to A. B., his executors, administrators, and assigns, for his and their own use, until the sum of £ and interest should be repaid.

[215] The act then prescribed the form of transferring the securities; and directed copies or abstracts of the conveyances, assignments, and transfer, to be entered by the clerk of the corporation in a book kept for that purpose, before any one claiming thereby should be entitled to receive the principal and interest.

The act then empowered the directors or any five of them, for paying the principal and interest of money [217] borrowed, and the expenses of maintaining the poor, and the other purposes of the act, to fix and charge upon the respective parishes, &c., such sums as should be needful from time to time, to be raised and paid by [218] and out of the places respectively, as their quotas, according to the proportion stated in the act, and to issue warrants to the churchwardens, &c., for payment of such sums to the treasurer; and provided means for levying [219] the money from the inhabitants of the parishes, &c., and declared that the parishioners and inhabitants of the townships should be answerable for the sums so to be raised on them, and not paid by their respective church-[220]-wardens, &c., and should be



compellable to pay the same upon re-assessment, and such rates, or assessments, or re-assessments, should be assessed, levied, and recovered, on and of such persons, and in such manner, as money [221] assessed for the relief of the poor, was by the laws then in being to be assessed, &c.

( It was also enacted (section 19), that as soon after the expiration of 10 years from the first court to be holden for putting the act into execution, as the expenses directed to be defrayed out of the rates or assessments (exclusive of any principal money borrowed) should be reduced to two parts in three of the average annual expenditure for seven years preceding *Easter* 1791, the directors, with the consent of the guardians, should appropriate an annual sum, not less than £100, nor more than £300, out of the rates, at interest, or in the purchase of stock, and lay out the interest, as an accumulating fund, until a sum should be produced sufficient to discharge the whole money borrowed.

By stat. 36 *G.* 3, c. 38, the directors were empowered to raise a farther sum not exceeding £7000 by annuity, and it was enacted, that all mortgages and grants of annuity, should be distinguished in the margin by a numerical progressive figure, and that when the directors should think proper to pay any part of the money borrowed, they should settle by lot, or in such other [222] manner as should be consented to in writing by the persons to whom the money should be due, which debt should be paid, and after notice of time and place of payment, no interest should accrue.

Under the first act, *David Pugh, J. Turner, John Pugh, and Robert Griffiths*, bankers at *Pool*, advanced £2000 to the corporation of guardians of the poor, who executed to them a mortgage, according to the provisions of the act.

The bill, filed on the 28th *November* 1816, by the assignees of *Robert Griffiths*, the surviving partner in the banking-house, claiming to be entitled to the £2000 and interest as a charge upon the estate of the corporation, alleged that the corporation purchased certain lands, and erected a house of industry thereon, and other buildings, and were seized and possessed of real and personal estate of great value, and had, by virtue of the act, been enabled to collect sums sufficient to pay the mortgage; and that *Griffiths* and his partners, previous to *Michaelmas* day 1815, gave the corporation notice to pay the mortgage; and prayed an account and payment of what was due on the mortgage, and that the defendants might, if necessary, be ordered to levy by proper rates, a sufficient sum to answer the mortgage debt, and all other mortgages and incumbrances affecting the premises, and that the whole, or a competent part, of the estate and effects of the corporation, might, if necessary, be sold for those purposes; and that a receiver might be appointed, to set, let, and manage, all the real estate belonging to the defendants, and to receive the rents and profits thereof, and to collect all sums due or to become due to the defendants by means of assessments or otherwise; and that all monies so re-[223]-ceived and collected, might be applied towards payment of the demands of the plaintiffs, conformably to the acts of parliament.

The answer stated, that in consequence of the great expense incurred, in the maintenance of the poor, the defendants had not been able to form any accumulation of money, but were in debt £880, 11s.; that the only provision in the acts of parliament enabling the defendants to raise money for paying any sums borrowed, was the nineteenth section of the first act (3 *Swans.* 205); that the average annual expenditure of the seven years previous to *Easter* 1791, amounted to £3039, 16s. 0 $\frac{3}{4}$ d.; and the annual expenditure since the act considerably exceeded that sum, and in the year ending on the 30th of *June* 1817, amounted to £8178, 14s. 4d.; that the defendants had been therefore unable to raise funds sufficient for the payment of the money borrowed on mortgage, which amounted to £11,900; the event in which alone they are authorised to raise money for that purpose (namely the reduction of the annual expenditure to two-thirds of the average amount, previous to *Easter* 1791), never having taken place; but that they had directed £100 *per annum* to be raised beyond their necessary expenditure, for the purpose of paying off the sums borrowed; and had applied £200 in payment by lot; the acts having directed that there should be no priority among the creditors.

The defendants, alleging that the estate and effects of the corporation were not sufficient to satisfy all the mortgages, and that they had no power to sell for that purpose, submitted whether they were bound or autho-[224]-rised to make any

rates or assessments under the acts, or by sale of their estate to raise money for paying the debts; and insisted that as the mortgage was granted, and the money secured thereby lent, under the first act of parliament, with full knowledge of the only means provided thereby for repayment, the plaintiffs were not entitled to the relief prayed by their bill.

The Plaintiffs having given notice of a motion for appointment of a receiver, to set, let, and manage all the real estate belonging to the defendants, and to receive the rents and profits thereof, and to collect all sums of money due or to become due to the defendants, by means of assessments or otherwise, it was arranged that the cause should be heard at the same time with the motion.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Owen*, for the Plaintiffs, insisted that the mortgagees were entitled to require the directors to levy sums sufficient for the payment of the principal and interest of the debts.

Mr. *Horne*, and Mr. *Temple*, for the Defendants, contended that the directors were not authorised to raise sums not necessary for the maintenance of the poor; and that the mortgagees must wait the gradual repayment provided by the acts.

The *Lord Chancellor* [Eldon]. The object of the two acts on which the question arises, was to incorporate into one district, certain parishes and townships, for purposes which could not be accomplished without considerable expenditure, and it was necessary therefore to provide a mode in which funds should be raised. The first material clause is [225] the 31st section of the former act (3 *Swans*. 204); and on reading that clause the question cannot fail to occur, how the different subjects of property which it enumerates, the houses and lands of the corporation, and the rates and assessments to be collected, can consistently with their nature and destination, be made a security for the repayment of money borrowed. Recollecting that the purpose of the act was to construct buildings in which the poor were to reside, and levy rates by which they were to be supported, on a clause which contemplates the assignment of such subjects as a security for the repayment of principal and interest, the Court must put such a construction as is consistent both with the design of employing and maintaining the poor, and also with the security of those who have lent money, and who by the express terms of the clause, are to have security for the repayment of interest as well as of principal; and I agree that such must be the effect of the assignment whatever are its terms; it clearly intended by some mode of dealing with the subjects assigned, to work out payment of principal and interest.

The clause by which the trustees are empowered to levy money from the parishes, according to certain proportions, is material, because it may be worth consideration whether the word "empowered" does not give a construction to the words "all powers and authorities," in the instrument of assignment. Whether the payment of sums borrowed was not one of the purposes for which money was to be levied, is not left to conjecture; three purposes are specified; payment of interest, maintenance of the poor, and repayment of principal; the other purposes are left to be inferred from general words. The plan was to determine the quota of each [226] parish by the proportion of its contribution in preceding years, but the aggregate to be raised was not limited to the amount raised in those years, but must be, measured and ascertained by the purposes to which it was to be applied, including the repayment of the principal of money borrowed.

In giving an opinion on the construction of this act, I am dealing with a pure question of law. The 35th section (3 *Swans*. 205,) directs that the assessments shall be levied and recovered in the same manner as money assessed for the relief of the poor; if, therefore, I were now to order the directors to levy money for payment not only of sums required in the maintenance of the poor, but of the principal of debts which the mortgagees desire to have discharged, or to appoint a receiver, and declare that the money might be levied in the same manner as sums assessed for the relief of the poor, I should make that declaration at the hazard of what would be decided when the question was litigated in a court of law.

The 19th section of this ill-drawn act (3 *Swans*. 205) rather supports than opposes the construction, that the directors have power to levy money for payment of principal. That clause was founded on the expectation of the corporation becoming rich; and speaks not only of a reduction of the rates within 10 years, but of payment of principal within that period. The question is, whether the

payment of principal was one of the expenses directed to be defrayed out of the rates ? I answer that question by reading the words in the parenthesis, "exclusive of the payment of any principal money borrowed."

There is great difficulty in the construction of the act, but that must be relieved by considering its policy [227] and all its purposes. It is necessary to consider its policy ; because if it deprives the poor of the benefit of the statutes of *Elizabeth*, and the ordinary law, we must not put such a construction on it, as defeats all its purposes, and takes from the poor the bread which it meant to give. Then, the purpose of the act first in importance, being the maintenance of the poor, and next the securing to the creditor the principal as well as interest of his debt, and the act being probably founded on a supposition that principal would never be demanded except where it could be easily paid, and therefore framed in a way which presents great difficulties in discussion, the question is, whether the parishes have not placed themselves in this situation, that they undertake to raise from time to time such sums as are sufficient for the support of the poor, and the payment of interest (in every clause mentioning interest, the act mentions also payment of principal), and having no fear that the principal will be demanded, they pledge themselves to raise money for that also, entertaining no doubt of being able to relieve themselves from any difficulty.

My opinion is, that if a mortgagee calls for his money, and by consent of the other mortgagees, or by arrangement made under the second act for payment of principal, other creditors do not insist on equality, and all absence of priority, and if the corporation does not find other means of repayment, they must make assessments, which must be adequate, first to the maintenance of the poor, next to the payment of interest to all the creditors, and lastly, to the payment of principal to the particular creditor who demands it. They have involved themselves in this difficulty, from a confidence that the case would never arise.

I shall certainly not object to a case for taking the opinion of the Court of King's Bench, before whom all [228] cases relative to the support of the poor must come, on the question whether the directors are authorised to levy rates for the payment of the principal of debts ; but such is my opinion.

I will not say whether I shall appoint a receiver : this intimation of my opinion will probably produce an arrangement.

MORTIMER v. WEST. July 1, 7, 1818.

Reported on another point, 1 *Swans*. 358.—Exceptions to a report of impertinence cannot be taken after the impertinent matter has been expunged, nor without a special order, while the order to expunge remains in force. A report of impertinence having been obtained by surprise, the master was ordered to abstain from acting under the order to expunge, until the exceptions had been argued.

The answer of the Defendant, on a reference to the matter having been reported impertinent, the Plaintiff on the 13th of *June*, obtained an order for the master to expunge the impertinence ; the Defendant then filed exceptions to the master's report, and on the 20th of *June*, obtained an order for setting them down. The Plaintiff now moved that the order of the 20th of *June*, might be discharged for irregularity, and that the master might be directed to expunge forthwith the impertinence in the Defendant's answer, pursuant to the order of the 13th of *June*.

Sir *Samuel Romilly*, and Mr. *Joseph Martin*, in support of the motion. Admitting that under the authority of *Norway v. Rowe* (1 *Mer.* 135), exceptions may be taken to a report of impertinence, after an order for expunging the impertinent matter, that order must first be discharged ; to allow exceptions to the report, while an order to expunge [229] remains in force, involves the existence of two inconsistent orders ; one for reviewing the report, and another for carrying it into execution.

Mr. *Belt*, against the motion. It appears from the registrar's book, that in *Norway v. Rowe*, the exceptions were set down for argument, while the order to expunge remained in force.

The Lord Chancellor. In *Norway v. Rowe*, my opinion was, that notwithstanding the order to expunge, the Defendant might except ; but there is this singularity,

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after expunction it is too late to except ; and when an order to expunge has been obtained, the Plaintiff may expunge immediately.

*July 4.* The *Lord Chancellor* [Eldon]. I have seen the registrar's book ; and I think that the order in *Norway v. Rowe* was wrong in this respect, that it leaves the order for the Master to expunge the impertinent matter undischarged, and yet supports exceptions to his report.(1) I have consulted the Masters ; and the notion which they entertain is, that the court ought in some way to dispose of the order to ex-[230]-punge, either by directing the Master to act on it, or by discharging it before exceptions to the report can be filed. I rather think the better way will be to discharge the order.

*July 7.* The *Lord Chancellor*. For settling the practice of the Court I wish it to be understood, that after a report of impertinence, and an order to expunge the impertinent matter, exceptions may be taken to the report ; but an application must be made to the Court for suspending or discharging the order to expunge.(2)

[231] The Defendants afterwards moved, that the Master might be directed to abstain from acting under the order of the 13th of *June*, until after the exceptions taken by [232] the Defendants should be disposed of ; and it appearing by affidavit that the Master's report had been obtained by surprise, on the 7th of *November* 1818, an order to that effect was made.

(1) *February 3rd*, 1816. The entry recites an order of the 21st of *April* 1815, referring the answer for impertinence ; the Master's report of the 7th of *December* 1815, that the answer was impertinent ; and an order of the 9th of *December* 1815, for expunging the impertinence : and the order is as follows : " His Lordship doth order, that the Defendant *J. Rowe* be at liberty to file exceptions to the report of Mr. *Campbell*, one, &c. ; and it is ordered, that the same be set down before his Lordship."—Reg. Lib. B. 1815, fol. 304.

(2) *Wadman v. Birch. In Chancery. October 30th*, 1792.

Exceptions to a report of impertinence cannot be taken, nor be set down for argument, after an order to expunge, without special leave.

Order of 19th *May* to refer Defendant's answer for impertinence ; report of impertinence dated 16th *July* ; second order to expunge dated 17th *July* ; impertinent matter in fact expunged on the 23d. Exceptions were afterwards taken to the report, and an order for setting down the exceptions to be argued was dated on the 27th *July*.

It was moved on the part of the Plaintiff to set aside this order for setting down the exceptions for irregularity ; by reason that it was obtained after the matter reported impertinent was actually expunged.

And on the part of the Plaintiff it was insisted, that the Defendants had slipped their opportunity of excepting, which they ought to have done, if at all, before the order to expunge.

*Mitford*, for the Defendants. The practice in these cases is calculated to prevent delay. Therefore the Master delivers out his report to the party applying for the reference, and the second order to expunge is made on motion of course. This, though a wise practice in general, yet certainly goes far to prevent the other side from having an opportunity to except. Here it may be doubted whether the Plaintiff has proceeded properly to expunge, though he has obtained the order regularly ; for there ought to be warrants on the adverse party to attend the expunging, to see that the record is altered according to the report. It is therefore certainly necessary to serve these warrants, for they are in fact the only notice to the other party of which he can avail himself in order to except to the report in time. Until the report is signed, no exceptions can be taken ; and therefore it is very material that these warrants should be really served, for otherwise it would be almost impossible for the party to take the exceptions in the time which by the course of the Court he is allowed.

The Lord Commissioner *Eyre* thought the order for setting down the exceptions was clearly irregular, and that no notice was necessary to be given of the expunging ; but the party who wishes to except must watch his opportunity, when the report is signed. If there is really any material injustice done to the Defendants by this

report of the Master, the application must be to set aside the order for expunging upon the particular circumstances; but while the order for expunging stands, this order for setting down the exceptions must be irregular. Therefore it must be set aside with costs.—Mr. *Cox's* notes. From Lord *Colchester's* MSS.

"Their Lordships do order, that the said order of the 27th day of *July* last be discharged for irregularity, and that the exceptions be struck out of the paper; and it is further ordered, that the sum of £5 deposited with the register on filing the said exceptions be returned to the Defendants."—Reg. Lib. B. 1791, fol. 543.

*Barnes v. Saxby. In Chancery. June 21st, 1792.*

1 *Harrison, Chanc.* 190.—A Plaintiff cannot refer an answer for impertinence after replication, or an undertaking to speed the cause. But he may refer for scandal at any time.

A motion was made to discharge, for irregularity, an order for referring an answer for scandal and impertinence. The irregularity complained of was, that the order had been obtained after an order to speed the cause, though the replication was not actually filed. The case of *Kenworthy v. Allen*, 1 *Bro. Cha. Rep.* 400, was cited to show that the Court would make such a reference in any stage of the cause.

But the Lords Commissioners said, that after replication they would not refer for impertinence, though they would at any time for scandal; and that the order to speed the cause was tantamount to a replication filed.

The order was therefore discharged, so far as it referred the answer for impertinence.—From Mr. *Cox's* notes, Lord *Colchester's* MSS.

*Martyn v. Broughton. In the Exchequer. March 2d, 1793.*

The Master's report on a reference for impertinence needs no confirmation; and a report that the bill is not impertinent, entitles the Plaintiff to an injunction, unless an answer has been filed.

The Plaintiff filed his bill praying an injunction; the Defendant referred the bill for impertinence, but the Plaintiff obtained the report of the Master in his favour. *Kidd* moved in the first place, to have the report confirmed.

*Per Cur.* It wants no confirmation.

He then prayed for an injunction.

*Per Cur.* It ought to issue. The motion to refer for impertinence is a dilatory of itself; and an injunction might have been granted upon that. (*Contra, Neale v. Wadeson*, 1 *Bro. C. C.* 574; 1 *Cox*, 104. *Macnamara v. Kinderley*, 1 *Fowl. Ex. Prac.* 276.)

*Richards*, for the Defendant, shewed for cause against this that the answer was actually in; and as no injunction had issued, none could now issue.

And of that opinion was the Court.

*Eyre*, Chief Baron, and *Thomson*, B. The injunction is, till answer or further order, which pre-supposes that the answer is not in. Being now in, you cannot have such an order:

Order refused.

From M. *Le Mesurier's* notes, Lord *Colchester's* MSS.

[233] *WILLIS v. PARKINSON. July 27, 28, 1818.*

No substantial addition can be made to a decree on motion, without consent.

The decree in this case having directed the issuing a commission for ascertaining the boundaries of the prebendal lands demised by the Plaintiff to the Defendant (2 *Mer.* 507; 1 *Swans.* 9), a motion was now made on behalf of the Plaintiff, that the decree might be extended to copyhold as well as freehold lands.

Mr. *Bligh*, in support of the motion.

The Lord Chancellor. If the motion is not opposed, take the order. One proceeding is a consequence of the other. A direction to ascertain the boundaries of the freehold lands is useless without ascertaining the boundaries of the copyhold.

*July 28.* Mr. *Heald*, for the Defendant, opposed the alteration of the decree.

[234] The Lord Chancellor [*Eldon*]. The question is, whether the direction

solicited is so strictly consequential on the direction already given, that the Court can make the alteration without consent? I am of opinion that it is not. It is a principle, that on motion no alteration can be made in a decree without consent, except in matter of mere clerical form; the Court cannot introduce a substantial addition.

Motion refused. (*Brackenbury v. Brackenbury*, 2 Jac. & Walk. 391.)

JAMES V. BIOU. January 20, 27, March 17, 1818; January 19, 20, May 4, 1819.

[See *Pearce v. Morris*, 1869, L. R. 5 Ch. 232. For subsequent proceedings (1825-26), see 2 S. & S. 600.]

An order dismissing a bill for want of prosecution, obtained after an injunction had been granted restraining the Defendant from proceeding in an action at law, on the Plaintiff's undertaking to give judgment to be dealt with as the Court should direct, and not to bring any writ of error; was discharged.

The bill, filed on the 25th of November 1817, stated indentures of mortgage dated the 20th and 21st of December 1754, by which William Browne and Sarah his wife conveyed to Joseph Biou in fee, a moiety of the manor of Netherhall, and other estates in the county of Suffolk, for securing the repayment of £300; and that Browne and his wife executed to Joseph Biou a subsequent mortgage of the entirety of some part of the premises, for securing the farther sum of £400.

The bill also stated, that before or in the year 1781, Sewell Mancell was seised of the equity of redemption of the premises, subject to the two mortgages to Biou, which were the first charges thereon, and to subsequent incumbrances; and being in possession of the rents and profits of the premises, by indentures dated the 30th and 31st of July 1781, conveyed them to Abel Jenkins, in trust to pay the sums of £300 and £400 with interest at the rate of 5 per centum per annum, although interest was reserved on one of the mortgages at the rate of 4 per cent. only; that Abel Jenkins paid all interest in [235] arrear to the time of his death, the mortgagees not requiring payment of the principal; and by his will dated the 27th of June 1802, devised all his real estates to the Plaintiffs Charles James and David Owen, his executors, and died leaving the Plaintiff Abel Jenkins his heir.

The bill farther stating that the mortgaged premises had become vested in Susannah Biou, who was entitled to the principal of the mortgage money, and had received interest from the Plaintiffs at the rate of 5 per cent. to July 1816; prayed a reconveyance of the mortgaged premises, on payment of what was due for principal and interest, and an injunction against entering on the Plaintiffs' tenants, or giving notices to them, or otherwise preventing them from paying their rents to the Plaintiffs, and against bringing an ejectment.

On the 5th of December 1817, the Plaintiffs moved, that upon payment into court by them of £300 and £400, the principal due on the mortgages, and £50, 12s. 9d. for interest to the 20th of that month, an injunction might be issued against the Defendant in the terms of the prayer of the bill.—The Lord Chancellor directed the motion to stand over until the time for answering had expired.

The Defendant, by her answer, claiming as heiress at law and administratrix of Joseph Biou, who died intestate in 1760, and admitting the first mortgage for £300, denied that Browne and his wife executed a second mortgage for £400; stated that in July 1759, George Keightley, by the direction of Mathews Sewell, mortgaged the other moiety of the premises to A. Maseres for £400; and in January 1775, that mortgage was purchased by the Defendant from Keightley, in whom it had become vested.

The answer further stated, that Keightley paid the interest on the mortgages as the solicitor of Sewell and [236] steward of the estates, in which capacities he was succeeded by Abel Jenkins, deceased, who continued the payment of interest till his death in 1802; and from that time the Plaintiffs Charles James and Abel Jenkins acted as stewards of the estates, and paid the interest; that in 1816 the Defendant having applied to Jenkins for an account of the rents of the estates, Jenkins gave notice to the Plaintiffs that he intended to pay the principal of her mortgage, and a correspondence ensued, Jenkins claiming to be entitled to redeem by virtue of

conveyances executed by *Sewel Mansel* to *Jenkins'* father in trust to sell. The conveyances, as he alleged, directed payment of the purchase money in discharge of incumbrances, and reserved the surplus to *Mansel*; upon the death of *Mansel* intestate, his father obtained letters of administration, and assigned his interest in his son's property to the father of *Jenkins*; and in 1783 the *Mansel* family claiming the property, Serjeant *Hill* gave an opinion that *Sewel Mansel* at his death had only an equitable interest in the surplus of the money to be raised by sale of the estate, which, as a chattel interest, passed to his administrator.

The answer stated, that the title of *Sewel Mansel* to the equity of redemption of the estates had never been made out; that the indentures of the year 1781 were studiously concealed, and had not been acted on; and submitted that the Plaintiffs ought to set out and establish their right to redeem the estate, and that the heirs or other representatives of the respective mortgagors ought to be parties to the suit; and insisted on the Defendant's right to the possession of the estate, until redeemed by some person entitled to redemption.

The Defendant having commenced actions of ejectment against the tenants of the premises, the Plaintiffs' motion for an injunction was renewed.

[237] *January 20.* The *Lord Chancellor*. It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due, except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee. A party coming to redeem a mortgaged estate, must prove, at his own costs, that he is the individual entitled to the equity of redemption. The opinion of Serjeant *Hill*, whom I know to have been during many years the best lawyer in the kingdom, has little application to the question now before the Court.

*January 27.* The *Lord Chancellor* [Eldon]. A mortgagee may retain the mortgaged estate against every one who cannot show a title to compel redemption. The mortgages which the bill seeks to redeem are not the mortgages held by the Defendant. It must be assumed that the parties making the conveyance in 1781, are the parties entitled to the equity of redemption, and I doubt whether in 1782 *Jenkins* could have compelled the mortgagees to permit him to redeem, and whether his trust is not much more special. The bill and the correspondence of the Plaintiffs represent the beneficial interest to be in different persons.

I perfectly agree with Serjeant *Hill's* opinion; that the utmost interest in *Sewel Mansel* was a pecuniary, and not a real interest. By their correspondence the Plaintiffs erroneously represent the interest to be in him and another person. Were a decree now made, ought the reconveyance to be absolute, or subject to redemption?

On the 17th of *March* 1818, the *Lord Chancellor* ordered, that upon the Plaintiffs' undertaking to give [238] judgment in the actions against the tenants to be dealt with as the Court should think fit, and not to bring any writ of error, the Defendant should not proceed with them until the farther order of the Court.—Reg. Lib. A. 1817, fol. 634.

On the 11th of *November* 1818, the Defendant, by motion of course, obtained an order for dismissing the bill for want of prosecution.—Reg. Lib. A. 1818, fol. 6.

*January 19, 1818.* On this day the Plaintiffs moved to discharge the order for dismissal.

Mr. *Hart*, and Mr. *Boteler*, in support of the motion. After the order of *March* 1818, for an injunction, the bill could not be dismissed by motion of course. That order was decretal, and necessarily retained the cause for the purpose of determining how the judgment given by the Plaintiffs under the direction of the Court should be dealt with. By means of that order, the Defendant obtained judgment at an earlier period than that at which it could have been obtained in the ordinary course of proceeding at law; and this Court will not allow itself to be deprived by a motion of course, of that jurisdiction to control the use to be made of a judgment, which was expressly reserved by the order under which it was given.

Sir *Arthur Pigott*, Mr. *Wetherell*, and Mr. *Wakefield*, against the motion. No excuse has been offered for the Plaintiffs' delay, of which no advantage was taken, until five months after [239] the time when, by the course of the Court, the bill might be dismissed without notice.

By Lord *Bacon's* order, if the Plaintiff discontinue prosecution, after all the Defendants have answered, by the space of one whole term, the cause is to be dis-

missed of course, without any motion. (*Orders in Chancery*, ed. *Beames*, 11.) Since the statute of *Anne* (4 *Anne*, c. 16, s. 23), directed that, on dismissal of a bill for want of prosecution, the Plaintiff should pay full costs, the Court has indulged the Plaintiff till the end of the third term, and that is now become the course of the Court in this matter. (*Pract. Reg.* 375.) If during three terms the Plaintiff has taken no proceeding in the cause, his bill is subject to be dismissed by motion of course without notice. The authority on which the order is obtained is the certificate of the six clerk that no proceeding has taken place. *The Attorney-General v. Finch* (1 *Ves. & Beames*, 368). Nothing, therefore, which comes not within his cognizance is a proceeding; otherwise it would be necessary to produce, in addition to his certificate, an affidavit negating the existence of interlocutory orders.

*The Lord Chancellor.* Supposing that by consent an order had been made that the bill should not be dismissed, the six clerk would have no knowledge of that order.

Argument against the motion resumed. In such a case the Court would treat the application to the six clerk as a fraud.

*The Lord Chancellor.* The Court would dismiss the bill on production of the six clerk's certificate; but would the next day dis[240]-charge the order of dismissal, when informed of the order by consent.

Argument against the motion resumed. In *Degraves v. Lane* (15 *Ves.* 291), your Lordship restored the old rule, which dispenses with notice of the motion to dismiss. In *Naylor v. Taylor* (16 *Ves.* 127), and in *Day v. Snee* (3 *Ves. & Beames*, 170). it was expressly decided that an injunction constitutes no objection to the motion.

The only objection to a motion of this kind is some proceeding within the time limited; and no act is a proceeding which does not advance the cause to a hearing. Amendments and exceptions are proceedings, because they tend to prepare the record for the judgment of the Court. An order for an injunction before decree is interlocutory merely, and not decretal; the injunction preserves the property until the decree, but constitutes no part of the relief to be then given. The Plaintiffs might have dismissed their bill by consent; and an omission to proceed during a period which by the rules of the Court renders the bill subject to be dismissed, is an implied consent to its dismissal.

The Plaintiffs have suffered no prejudice by the terms of the order; the Defendant might before this time have obtained judgment; and the action being commenced by special original, no writ of error could be brought.

*The Lord Chancellor* [Eldon]. The merits of this case are not now in question; and on the present application I must assume that the order of *March* 1818, was properly made, although I acknowledge my mind is not free from doubt on that point.

[241] The Plaintiffs by their bill insist on a right to restrain the Defendant, who claims as mortgagee for two different sums, one of which passed to her by assignment, from taking possession of the mortgaged premises by means of her legal right. On the argument of the former order, I was of opinion that unless other parties were brought before the Court, the Plaintiffs had not a right to redeem. It appeared to me that the Defendant as mortgagee was in this situation, that she might refuse to convey the mortgaged premises to any one who was to become by that conveyance mortgagee or assignee of the mortgagee (because no mortgagee can be compelled to place another person in his stead as mortgagee), and might retain possession and refuse to reconvey, unless the persons entitled came to demand possession and reconveyance. It was never disputed that the Defendant is a mere mortgagee. The mortgage and costs are tendered to her; but she refuses to accept them, and insists on holding possession against all who cannot show a title to the equity of redemption.(1) Un-[242]-less all account against her was waved, she was entitled to hold possession till the account had been taken.

[243] In *March* 1818, the Court made the order on which the Plaintiffs on this occasion have relied; and it is admitted that, although that order had not been made, [244] the Defendant could not have moved to dismiss the bill for want of prosecution until *June*. The precedents which have been cited, and which were established by myself, I am anxious to follow to the utmost extent to which principle will authorise me; namely, that after an injunction has been obtained, if the Plaintiff takes no step during three terms, the Defendant may dismiss the bill for want of prosecution, by motion of course; although there is an order staying execu-



tion, or trial, or even sometimes the commencement of an action. In those [245] cases, on production of the six clerk's certificate, or on an assertion to which the Court gives credit that the certificate will be made, the bill is dismissed, and of course the injunction ends. The question is, whether the principle of those cases rules the present? I add only, that to what is called courtesy the Court can pay no attention; and that whatever may have been the practice of the clerks in court, notice of such a motion is not necessary. Forty years' experience authorises me to say, that these courtesies occasion more delay than any other transaction in the Court.

I agree that on the motion to dismiss the bill, the Court looks no farther than the certificate of the six clerk; but if any transaction between the parties renders that motion inconsistent with justice, the Court will advert to that transaction, on an application to discharge the order. The certificate, therefore, is not conclusive on the question whether the order shall remain; and the point to be decided here is, whether the principle of those excepted cases in which the Court [246] looks beyond the certificate, comprehends the present case?

It has been said that the Defendant gained no advantage by the order of *March 1818*; I think she gained much. Without this order she could not have obtained a judgment, on which the Plaintiffs could not have brought a writ of error, nor could she have moved to dismiss the bill until *June*; whereas on the first day of the term ensuing the order, if judgment had not been given according to its terms, she might have moved to dissolve the injunction; and an injunction is the object of the bill. The order amounts to this, that the Plaintiffs, giving judgment, shall have the benefit of all equitable considerations; and the Defendant, obtaining judgment, shall not receive the fruits of it until this Court has decided whether she is entitled to them. This Court therefore assumes the right of controlling the judgment at law.

Since *March 1818*, this case has been placed in circumstances quite different from those in which the Court commonly acts; from that time it was competent to the Defendant, stating that judgment had not been given as ordered, to obtain the dissolution of the injunction. Call the order interlocutory or not, it is a rule of Court which alters the situation of the parties in respect to the right to dismiss the bill for want of prosecution. The principle of the cases cited in support of this motion, is not applicable here; that principle is, that a party who has obtained an injunction shall not delay the cause further than if he had not obtained it; but if the order for the injunction affords other advantages, as an undertaking not to bring a writ of error, or an early opportunity of applying to the Court, it [247] seems that to such a case the ordinary rule can not be extended. (Note: See in addition to the cases cited, *Earl of Warwick v. Duke of Bedford*, 1 Cox, 111. *Hannam v. The South London Waterworks Company*, 2 Mer. 61.)

*May 4*. The Lord Chancellor stated, that on reconsideration he retained the opinion which he had expressed, that the bill could not be dismissed on motion without notice; and intimated that he would consider the terms which should be imposed on discharging the order of *November 1818*.

*4 May 1819*. "His Lordship doth order, that the order made in this case, dated the 11th day of *November 1818*, be discharged; and it is ordered, that the defendant *S. Biou* do restore the possession of the premises in the pleadings mentioned to the Plaintiff *Abel Jenkins*, undertaking to deal with such possession as the Court shall hereafter order; and it is ordered, that the said Defendant do retain the rents and profits she has received, without prejudice to either side." Reg. Lib. A. 1819, fol. 1800.(2)

(1) *Lomax v. Bird*, 1 Vern. 182. *Bickley v. Dorrington*, and *Monk v. Pomfret*, cited and approved, *Barnard*. 32.

*Pym v. Bowreman and Others*; and *Bowreman v. Pym, Stoddard, and Others*. In Chancery. December 20th, 1793.

Upon a bill to redeem, a *prima facie* title is sufficient; and an issue shall not be directed though the title is complicated, if uncontradicted.

Upon a rehearing before Lord *Loughborough*, the case appeared to be, that *Bowreman* had filed his bill in 1778 to redeem a mortgage made by *Nicholas Stoddard*.

*Bowreman's* ancestor, to *Pym*; that the Defendant *Stoddard* had filed his bill in 1779, claiming to be heir at law of the first mortgagor, and intitled as such to the equity of redemption, but afterwards disclaimed; that the Defendant *Pym* claimed to hold the premises discharged of the equity of redemption, but that the Defendant *Pym's* ancestor had, by an answer filed in the Court of *Exchequer* in 1772, admitted himself to be a mere mortgagee; that *Bowreman* filed a bill of revivor and supplement, and amended it in 1789; that *Pym* in 1790 filed his bill, as seised in fee of the premises, for delivery of the title-deeds.

These causes came on to be heard on the 27th November 1792; and *Bowreman* insisted that he had, by very full and sufficient evidence, proved himself to be heir at law of *Nicholas Stoddard*, the mortgagor, unless some nearer heir appeared; and that it was not suggested in the causes, that any such nearer heir had appeared, or was in existence; and that he had also by very sufficient evidence proved negatively that there could be no such nearer heir; and no evidence was entered into by the Defendant to disprove *Bowreman's* title as heir.

The Lords Commissioners had thereupon ordered the parties to proceed to a trial at law upon the following issue: whether *Bowreman* was the heir at law of the said *Nicholas Stoddard* deceased, reserving costs, and further directions.

Against this order, *Bowreman* presented a petition of rehearing, signed by his counsel, the Attorney-General *Scott*, Solicitor-General *Milford*, Mr. *Mansfield*, and Mr. *Stanley*.

The reasons alleged in the petition for rehearing were:

That the petitioner did, at the hearing of these causes, produce good and sufficient evidence to prove that the petitioner was such heir, which was not opposed by any evidence given on the part of the said *John Pym*; that it appears by the answer of the said *John Pym* put in to the petitioner's bill, that he had no right or title whatsoever to the mortgaged premises, inasmuch as the only right or title pretended by him by his said answer thereto was derived from *George Pym* deceased, upon supposition that the said *George Pym* had obtained a release of the equity of redemption of the mortgaged premises, and had levied a fine thereof in *Hilary Term* 1770; whereas it appeared by the answer of the said *George Pym* put in to the petitioner's bill in the Court of *Exchequer*, and sworn by the said *George Pym* in November 1772, that the said *George Pym* admitted that he had then no right, title, or interest, in the mortgaged premises, except by virtue of the said indenture of demise, and by way of mortgage for 100 years, and did not pretend to have obtained any release of the equity of redemption thereof, or to have gained in any manner any freehold interest therein; and submitted to be redeemed upon payment of principal, interest, and costs; so that the said Defendant *John Pym* had no right or title to contest the petitioner's title as heir at law of the said *Nicholas Stoddard* deceased, which title was not contested by the executors of the said *George Pym*:

That the evidence of the petitioner being the heir at law of the said *Nicholas Stoddard*, was such that the Court might have decided upon such evidence consistently with its rules and established practice, and none of the other parties in these causes had alleged himself to be the heir at law of the said *Nicholas Stoddard* in opposition to the petitioner:

And it not being even suggested that any other person, not a party, now sets up any title in such character to the mortgaged premises, or any right to redeem the mortgage, the said *John Pym* who is in possession merely in consequence of the possession obtained by the said *George Pym* as a mortgagee for such term of 100 years as aforesaid, had no right to call upon the Court to compel the petitioner to establish his title at law to the equity of redemption of the mortgaged premises, before the petitioner shall be at liberty to redeem the said mortgaged premises; such a redemption by the petitioner not being in the least prejudicial to the pretensions of any future claimant, should any ever appear to dispute the petitioner's title as such heir at law as aforesaid:

That considering the respective situations and interests of the petitioner and the said *J. Pym*, the evidence given by the petitioner to prove himself the heir at law of the said *Nicholas Stoddard* was amply sufficient; and that even upon much less proof than he has actually given, he ought to have been permitted to redeem the mortgaged premises, without the trouble and expense of a trial at law, and the delay consequential thereon, more especially as the said *John Pym* had not attempted

by any evidence whatsoever to contradict the evidence adduced by the petitioner, or even pretended that any person was or claimed to be the heir of the said *Nicholas Stoddard*; so that the said *John Pym* by insisting upon an issue to try whether the petitioner was the heir as aforesaid, could only mean to put the petitioner to considerable expense, and to delay the petitioner in obtaining possession of the mortgaged premises, the rents already received from the mortgaged premises exceeding by £1000 and upwards the principal and interest due on the said mortgage, and the said *John Pym* being, as the petitioner apprehended, utterly unable to pay the petitioner the costs of the trial of such issue, and the surplus rents due to the petitioner, and therefore meaning only to harass the petitioner, and to compel him to enter into some compromise to avoid the expense of such trial.

Lord *Loughborough* was of opinion with the petitioner, and accordingly reversed the decree of the commissioners, and proceeded to decree a redemption.—From Lord *Colchester's MSS.*

“His Lordship doth order, that the order on hearing of these causes dated the 27th day of *November 1792*, be reversed and be as follows (that is to say); it is ordered that the Plaintiff's bill in the first-mentioned cause do stand dismissed out of this Court with costs to be taxed, &c.; and in the last-mentioned cause his Lordship doth order and decree, that it be referred to the said Master to take an account of what is due for principal and interest on the mortgage in the pleadings mentioned, and to tax the Defendants the executors of *George Pym* deceased, their costs of that suit; and his Lordship doth declare, that the Plaintiff *William Bowreman* is entitled to redeem the said mortgage, and to have a conveyance made to him of the mortgaged premises”; with directions for taking an account of the rents and profits.—Reg. Lib. B. 1793, fol. 213–215.

(2) *Railton v. Woolrick. In Chancery. December 17th, 1791.*

An order to refer an answer for impertinence not prosecuted, is no objection to a motion to dismiss for want of prosecution, and the Defendant needs not proceed to obtain the Master's report in his favor.

The Defendant having put in his answer to this bill, the Plaintiff in *May 1791*, obtained an order to refer the answer for impertinence, but had never taken out any warrant before the Master, or proceeded under the order.

■ *Shuter* this day moved, that the order to refer the answer might be discharged, and that the bill might be dismissed for want of prosecution.

*Cooke* for the Plaintiff contended that the Defendant was not entitled either to have the order discharged or the bill dismissed; that the regular way for the Defendant to have got rid of the order, would have been by taking out warrants himself, and procuring the Master's Report that the answer was not impertinent; as in the case of exceptions, where the Defendant might proceed upon the reference to get the answer reported sufficient; and that the Defendant was not intitled to have the bill dismissed, because an answer referred for impertinence was not considered as any answer, and a Defendant who had not answered would not be intitled to move to dismiss a bill for want of prosecution; and he offered to proceed immediately before the Master upon the reference.

But the Lord Chancellor [Thurlow] said that the Plaintiff had abandoned the order by not proceeding under it, and he discharged the order, and would have dismissed the bill, but *Cooke* undertook to speed the cause.—From Mr. *Cooke*.—Lord *Colchester's MSS.*

17th *December 1791*.—“Upon motion, &c., it was alleged that the Plaintiff having exhibited his bill in this Court against the Defendant, he put in his answer thereto on the 28th day of *June 1790*, as by the six clerks certificate appears, after which the Plaintiff not having proceeded further in the cause, the Defendant gave notice that he should move to dismiss the Plaintiff's bill for want of prosecution, whereupon the Plaintiff applied for and obtained an order bearing date the 31st day of *May* last, whereby it was ordered that it should be referred to Mr. *Popham*, one, &c., to look into the Plaintiff's bill, and the Defendant's answer, and certify whether the Defendant's answer was impertinent or not, but the Plaintiff has not since proceeded under the said order of reference or in this cause; it was therefore prayed that the said order of the 31st day of *May* last may be discharged, and the Plaintiff's bill

may stand dismissed out of this Court for want of prosecution, with costs to be taxed, &c., whereupon and upon hearing, &c., it is ordered that the said order bearing date the 31st day of *May* last be discharged, and that the Plaintiff do go to commission this vacation, give rules to pass publication in this term, and procure the cause to be set down for hearing in *Easter* Term next, or in default thereof it is ordered that the Plaintiff's bill do stand dismissed out of this Court with costs, for want of prosecution, without farther motion; and it is hereby referred to Mr. *Pepys*, one. &c., to tax the said costs."—Reg. Lib. B. 1791, fol. 32.

*Attorney-General v. Lord Stamford. In Chancery. January 23d, 1792.*

Upon an order at the instance of a Defendant to amend by a short day or be dismissed, it is sufficient to amend by expunging another Defendant, though immaterial to the Defendant at whose instance the order was made.

After the answer in this cause had come in, the Plaintiffs remained three terms without any proceeding, and then obtained an order to amend their information, and having remained some time without amending it, the Defendants moved that the order to amend might be discharged, and the bill dismissed for want of prosecution. The Plaintiffs then undertook to amend within a limited time, but not having done it, an order was made on the Defendant's application on the 6th *December* last, that the Plaintiffs should amend the information before the last seal after *Michaelmas* Term or the information be dismissed. The Plaintiffs then amended the information, merely by striking out the names of two Defendants, and obtained an order to dismiss the information as to them with costs.

*Pemberton* now moved, for the other Defendants, that the information might be dismissed; and he contended that the Plaintiffs had not complied with the last order; that they had made no material amendment, none that related to the present Defendants, and therefore that the information ought to be dismissed.

The Plaintiffs did not appear, but an affidavit of service of notice of the motion on them was read.

The *Lord Chancellor* [Thurlow]. The conduct of the Plaintiffs is very vexatious, but yet they have literally complied with the order, and therefore the information cannot now be dismissed. Motion refused.—From *Lord Colchester's MSS.*

*Squirrell v. Squirrell. In Chancery. January 16th, 1794.*

After subpoena to rejoin, a bill may be dismissed for want of prosecution.

*Abbott* moved to dismiss for want of prosecution, after subpoena to rejoin. The registrar doubted, but 3 *Atk.* 558, being cited for the motion, it was ordered by the *Lord Chancellor* [Loughborough].—From *Lord Colchester's MSS.*—Reg. Lib. B. 1793, fol. 114.

[248] KYNASTON v. The EAST INDIA COMPANY. *March 27, April 6, May 4, 1819.*

[See S. C. on appeal in House of Lords, 3 *Bligh*, 153, and references in note.]

Owners and occupiers of houses in *London*, subject to tithe; Defendants in a suit by the tithe-owner, ordered to permit witnesses to inspect them preparatory to examination on interrogatories, for proving their value.

The bill, filed in *Trinity* term 1809, and amended under an order of *February* 1811, stated, that the Plaintiff was, and ever since the month of *May* 1804, had been seised of or entitled unto, and in the possession of, the rectory impropriate of *Saint Botolph without Aldgate*, part whereof is situate within the city of *London* or the liberties thereof, and other part in the suburbs of the city, and within the county of *Middlesex*: and was then, and ever since the year 1804, had been entitled to, and ought to have received, all the tithes, rates for tithes, sums and customary payments, or other duties, in lieu of tithes, which had become due and pay-[249]-able from the citizens and inhabitants, for the time being, of that part of the parish which lies within the city of *London* or the liberties of the same, for their [250] respective houses, shops, warehouses, cellars, and stables, situate within that part of the parish which lies within the city or the liberties thereof: and the bill then stated the decree, bearing date the 23rd day of *February* 1545, made by *Thomas*, then Archbishop of *Canterbury*,

and others therein named, in pursuance of the act of the 37th year of *Henry VIII.* c. 12.

The bill further stated, that by virtue of that act and decree, the Plaintiff became entitled to receive all [251] monies due and payable for and in respect of the tithes, oblations, and dues, arising and payable by the inhabitants and occupiers of houses, warehouses, wharfs, and quays, within that part of the parish of *St. Botolph Aldgate*, which is situate in the city of *London* or the liberties thereof, at and after the rates expressed and directed to be paid in the decree (that is to say), for every ten shillings rent by the year of all houses, shops, warehouses, cellars, and stables, within the rectory or parish, 1s. 4½d., and for every 20s. rent by the year of all houses, shops, &c., within such parish, 2s. 9d.; subject to certain abatements in the decree specified.

The bill further stated, that the Defendants had, ever since the month of *May* 1804, been, and then were, in the possession and occupation of several messuages or dwelling houses, warehouses, cellars, wharfs, quays, edifices, and buildings, situate within that part of the parish of *St. Botolph Aldgate*, which lies in the city of *London* or the liberties thereof, at and under certain yearly or other rents and reservations, or otherwise; and that certain yearly or other rents or reservations, in the nature of rents, had been or were formerly or theretofore, or at some times, paid or reserved, or made payable, for or in respect of the houses or warehouses, &c., or some or one of them, or of some other houses or buildings, which formerly or theretofore were erected and stood upon the scite, or upon the same pieces or parcels of land or ground, on which the houses, warehouses, &c., then in the possession, holding, or occupation of the Defendants, had been since erected and then stood, or had been made, and therefore the tithes, or yearly payments in the nature of tithes, were during the time they were in such occupation and possession, and then were, payable by them, for or in respect of the said messuages or dwelling houses, warehouses, &c., in manner and after the rate directed by the decree, according and in proportion to the rents respectively then paid by the Defendants or payments made by them, in the nature or in lieu of rent, during the time last mentioned, to the Plaintiff, as the rector or impropriator of the parish: and that the sums of money payable for or in respect of the tithes or dues, for or in respect of the houses, &c., in the occupation or possession of the Defendants, or any part thereof, had not, since the month of *May* 1804, been paid to the Plaintiff, or to any other person, by his order or for his use, and that there was then a considerable sum of money owing to him on that account, from the Defendants.

The bill, charging that the tithes were payable, and that the amount of the several sums to be paid by the Defendants for the tithes, or in the nature thereof, ought to be calculated and computed after the rate, and in the manner directed by the decree, according to the present or improved or last known rent or rents, or value of the houses, &c., and other buildings; prayed, that an account might be taken of the several sums of money due to the Plaintiff, for the tithes, rates for tithes, sums or customary payments, or other duties in lieu of tithes, on account of the messuages, &c., held and occupied by the Defendants, within such part of the rectory or parish, as aforesaid, or the titheable places thereof, in each year since the month of *May* 1804; and that the Defendants might pay to the Plaintiff the money which should be found due from them on the taking such account, the Plaintiff waiving all penalties and forfeitures, &c.

By their answer, the Defendants admitted, that they had, ever since the year 1804, occupied, and did then occupy, and were the owners of several stacks of ware- [253]-houses, and three dwelling-houses for their warehouse-keepers and servants, situate in and near *Gravel Lane*, *Petticoat Lane*, *Harrow Alley*, and *Cutler's Street*, and also certain warehouses then or formerly called *Parker's Gardens Warehouses*, situate in *Haydon Square*, near another alley or place also called *Harrow Alley*; and that they were then, and ever since the year 1804, had been the occupiers of certain warehouses called *Rumball's Warehouses*, situate also in *Haydon Square*. And they stated, that they believed that the whole of the warehouses and dwelling-houses, therein mentioned to be situate in or near *Gravel Lane*, *Petticoat Lane*, and the first mentioned *Harrow Alley* and *Cutler's Street*, and a small proportion of the warehouses called *Parker's Gardens Warehouses*, and a part of the warehouses called *Rumball's Warehouses*, respectively, are in that part of the parish of *St. Botolph* which is within the city, and that the residue of the warehouses, called *Parker's*

*Gardens Warehouses* and *Rumball's Warehouses* respectively, are situate in the parish of *Trinity, Minories*, in the county of *Middlesex*. And they further stated, that all the warehouses and dwelling-houses, before mentioned to be situate in and near *Gravel Lane, Petticoat Lane*, the first-mentioned *Harrow Alley* and *Cutler's Street*, and the warehouses called *Parker's Gardens Warehouses*, were built by the Defendants, and that they having built, and being themselves the owners of the last-mentioned warehouses and dwelling-houses, they did not then, nor ever did hold the same, or any part thereof, under any yearly or other rent, or for any consideration in the nature or in lieu of rent, and that no yearly or other rent had, at any time, been paid for the said warehouses, dwelling houses, or ground, though they apprehended and believed that certain dwelling-houses, or some edifices or buildings, did formerly stand upon [254] the scite, or upon the same pieces or parcels of land or ground, on which the said warehouses and dwelling-houses had been since erected, and then stood, and that some yearly or other rents or payments in the nature of rents, were reserved and made payable, for or in respect of such dwelling-houses, or other edifices and buildings, or the ground on which the same stood, but that the Defendants were unable to set forth what such rents or payments were, or whether they were paid or not: and that all such part of the warehouses, called *Rumball's Warehouses*, as are situate within that part of the rectory or parish of *St. Botolph*, which is within the city of *London*, or the liberties thereof, was then held by the Defendants, under a lease for a term of years then unexpired, at the yearly rent of six pounds, payable and regularly paid to the Honourable *John Olmuis*.

The cause was heard at the Rolls, on the 2d of *March* 1818, when his Honor declared that the Plaintiff was entitled to tithes, after the rate of 2s. 9d. in the pound, upon the annual value of all the messuages, warehouses, and other premises, held or occupied by the Defendants within the parish of *St. Botolph without Aldgate*, in the city of *London*, except the premises called *Rumball's Warehouses*; and ordered a reference to the Master to ascertain the value of the premises except as aforesaid, and to take an account of what was due to the Plaintiff for tithes, at the rate aforesaid: and it was ordered, that the Master should also take an account of what was due to the Plaintiff for tithes of the premises called *Rumball's Warehouses*, at the like rate of 2s. 9d. in the pound, upon the reserved rent of £6 *per annum*, without prejudice to the question, whether the Plaintiff was entitled to 2s. 9d. in the pound, on the value of the last-mentioned premises.

[255] In *November* 1818, interrogatories, on the behalf of the Plaintiff, were carried into the office of the Master, for the examination of the Plaintiff's witnesses; and three surveyors, *James Burton, William Mountague, and Joseph Kay*, were examined on his behalf.

In *December* following, at the instance of the Defendants, publication was enlarged for three weeks from the 9th of that month, and within that period the Defendants examined four witnesses. The time for passing publication elapsed; but the depositions not having been published, publication was again enlarged, at the instance of the Plaintiff.

On the sixth of *February* 1819, the Plaintiff having moved, before the Vice-Chancellor, that *Joseph Sills* and *William Smith* might be at liberty to inspect the several warehouses and premises, mentioned in the pleadings, in the occupation of the Defendants, situate in *Gravel Lane, Petticoat Lane, Harrow Alley, Cutler's Street, and Parker's Gardens*, respectively, preparatory to their being examined as witnesses on the part of the Plaintiff; the Vice-Chancellor ordered a reference to the Master to inquire and state to the Court, whether an inspection of the several warehouses and premises, mentioned in the pleadings to be in the occupation of the Defendants in *Gravel Lane, Petticoat Lane, Harrow Alley, Cutler's Street, and Parker's Gardens*, respectively, by the said *Joseph Sills* and *William Smith*, preparatory to their being examined as witnesses, upon interrogatories carried into the Master's office by the Plaintiff, in pursuance of the decree, was necessary for the Master to form his conclusion upon the matters referred to him.

[256] From this order the Defendants appealed to the Lord Chancellor.

Pending the appeal, by his report, dated the 24th day of *March* 1819, the Master certified that he was of opinion, that an inspection of the several warehouses and premises, mentioned in the order of reference, by the said *Joseph Sills* and *Robert Smith*, preparatory to their being examined as witnesses, upon the interrogatories

exhibited by the Plaintiff before him for the examination of witnesses, in respect of the matters referred to him by the decree, was necessary for him to form a satisfactory conclusion upon the matters so referred to him.

On the 7th of April 1819, the *Vice-Chancellor* [Sir John Leach] confirmed the Master's report, and ordered that the Defendants should permit *Joseph Sills* and *Robert Smith* to inspect the several warehouses and premises in the occupation of the Defendants, in *Gravel Lane*, *Petticoat Lane*, *Harrow Alley*, *Cutler's Street*, and *Parker's Gardens*, respectively, preparatory to their being examined as witnesses upon interrogatories carried into the Master's office by the Plaintiff.—Reg. Lib. A. 1818, fol. 822.

From this order also the Defendants appealed to the *Lord Chancellor*.

March 27. The *Solicitor General* [Sir Samuel Shepherd], Sir Arthur Piggott, and Mr. Wyatt, in support of the appeal. The order for inspection is unprecedented, unauthorized by practice or principle. The Court has no jurisdiction to compel the owners of houses to open them for [257] the admission of adverse witnesses, undertaking to furnish evidence against them on the question of their value. Parties may be themselves examined on interrogatories; but their freehold is protected from the entry of strangers. The order can be supported only on the principle that the Court is competent to compel the *East India Company* to open their doors; every house subject to the same claim of tithe must be subject to the same inspection. If the parties acted on such an order, and the *East India Company* brought an action for a trespass, how could the Defendants protect themselves by an order of this Court? What precedent is there of such a defence? The instances in which the legislature has, for the purposes of revenue, compelled inspection of houses, afford no proof of a like power in this Court.

If the proprietor of a mine, in working underground, has worked into the mine of his neighbour, and taken ore not belonging to him, inspection may be ordered; but the Court then acts at the instance of the owner of the mine invaded and of the ore taken. A tithe-owner is undoubtedly entitled to enter on the land subject to tithe for the purpose of seeing the tithe set out, and carrying it away, but the analogy of that right cannot authorize the Plaintiff in deputing strangers to enter and inspect the Defendants' freehold. On the principle of this order every tithe-owner may file a bill, not according to the established practice for discovery, but for inspection.

The right of inspection cannot be consequent on the title created by the act of parliament; on such a supposition it would be needless to insert in any revenue law a clause authorising inspection; the right would follow [258] the imposition of a tax: but the legislature has never sanctioned that reasoning; or supposed that a right of entry into dwelling-houses could be assumed from mere constructive inference, without express enactment.

The practice of view in a trial at law is no authority for this order; the view is made by the jury, and under the authority of a statute. (See 3 Swans. 262, n.)

The order is unnecessary; the value of the buildings may be ascertained by external view. The *East India Company* resist the claim of compulsory inspection; but in fact their warehouses are frequently opened for public sales; and during the last long vacation inspection was admitted.

Mr. Wetherell, and Mr. Palmer, in support of the orders. Upon principle, this Court possesses jurisdiction to pronounce an order which is necessary for administering the justice of the case. Every tithe-owner is entitled to enter on the grounds of the occupier, for ascertaining that the tithe is properly set out. Suppose that the agent of a merchant employed to purchase jewels, at a commission of 5 per cent., consigns to his employer diamonds which he represents to be worth £150,000; while the merchant values them at £70,000, and refuses to pay commission on the larger sum; if the agent files a bill for an account of his commission, will not this Court compel production and inspection of the jewels, in order to enable the Master to ascertain their value? Upon the same principle pictures may be inspected. The [259] principle is, that wherever in respect of the property of one individual, a right accrues to another which cannot be measured without inspection of the subject of property, the Court is competent to compel the proprietor to permit that inspection, as indispensable to the purposes of justice. Such inspection is no invasion of the *jus proprietatis*, but a legal consequence of the obligation affecting the

property and the proprietor. Supposing an agent employed to value timber at a commission, and the timber felled, and a dispute arisen on what amount commission is to be computed ; would the Court permit the owner of the timber to remove it, till he had afforded an opportunity of inspection for ascertaining its value ?

The Court has assumed jurisdiction to direct the specific execution of a work in which the public are interested ; as in the *Birmingham* canal case, the parties were directed to raise a bank to a given height.(1) If a doubt arose whether that order had been obeyed, would the Court be incompetent to compel inspection ? On a dispute between landlord and tenant, whether waste had been committed, or repairs performed, questions on the fact or the extent of waste or repair, might render necessary inspection of the house in the possession of the tenant. Why is a house or a warehouse more privileged from inspection than jewels, paintings, or mines ?

The statute of 4 Ann. c. 16, s. 8, for securing in all cases where it may be requisite, a view by a competent [260] part of the jurors, was rendered necessary by the want of that jurisdiction *in personam*, in courts of law, which is the characteristic of this Court ; and by means of which its orders are enforced.

The *Lord Chancellor*. Has the Court in any other case directed a preliminary inquiry before the Master, whether inspection is necessary ? It may be very difficult for the Master to dispose of such a reference. It is, indeed, a protection against needless inspection ; but supposing several witnesses who had made inspection, to have been examined, how can the Master, if publication has not passed, know whether inspection by other witnesses is or is not necessary ?

In a case not precisely the same *in specie* with others, the Court is cautious of introducing into its practice, what is an entire novelty, and may be productive of great expense, namely a reference to the Master to inquire whether inspection is necessary. On an application for a commission to examine witnesses in foreign countries, the Master receives testimony, and judges of the necessity of issuing a commission ; but is there any precedent in the analogous cases of mines, &c., of directing a reference to the Master on the necessity of inspection ? If the Master reported inspection unnecessary, the parties might except to his report, and the question would return to the Court.

Recollecting that the reference to the Master was, in this instance, directed after decree, I think it right.

Argument in support of the orders resumed.

[261] The daily practice of the Court, its whole jurisdiction in issuing injunctions, and writs of *ne exeat regno*, imposes more important restraints on the civil rights of the subject, than an order of inspection. The authority of this Court, zealously disputed in the time of Lord *Ellesmere*, has been established more than a century and a half. (*Vide* 2 Swans. 22, n.)

Though novel in circumstances, the case is not novel in principle. The purpose of inspection is to inform the conscience of the Court, and witnesses appointed by it are entitled to be considered as its officers. In a former suit in the Exchequer between the same parties, the surveyors examined on opposite sides, in their estimate of value, differed, and to the amount of £2000 *per annum*.

At the close of the argument, the following observations were made by

The *Lord Chancellor* [Eldon]. On the question what this Court will do, if it has jurisdiction, I entertain no doubt ; the order must compel the *East India Company* to permit inspection ; and if such an order were made, the Court, I apprehend, needs not trouble itself to consider the consequences of an action at law, because no action would be allowed.

For reasons which I may mention hereafter, I am of opinion that the statutes relative to revenue have not much application to this question ; the real question is this ; whether, when the legislature has declared, by this act of 37 Henry VIII. c. 12, that the owners or occupiers shall pay 2s. 9d. on the rent, if they receive rent, [262] and if not, on the value, and shall consider what would be the rent as the value, it has not as it were made a contract between the parties, that that act of parliament shall be carried into execution between them ; and whether this Court has jurisdiction to see that it is carried into execution as a private contract ? If there had been a private contract between the rector and the parishioners, that for avoiding litigation, the rector should take one-tenth of the rent, if the land were let, and if not let, one-tenth of the value, the question would have arisen, whether the



Court would compel the land-owner to permit *witnesses* to enter on the lands for the purpose of informing the conscience of the Court, what was its value ?

The right to view diamonds or trees in the cases suggested, is an implied right ; and so is the right to enter the mine of another ; the foundation is that necessity requires that entry ; there is certainly fraud, but the ground is necessity.

The cases of view are not analogous ; the view is made by the jury ; and that practice existed, I believe, at common law,(2) and was not introduced but regulated by statute ; but is no authority for an order to permit inspection by third persons for the purpose of giving evidence against the proprietor. No precedent is produced of an order upon a party to permit inspection for the purpose of giving evidence ; and the question is, whether the Court will make such an order in every case in which collateral evidence is less satisfactory than inspection ?

[263] *April 6.* The Lord Chancellor [Eldon]. The question is, whether the *Vice Chancellor* was right in taking a step which leads to giving liberty, if the Master should think it necessary, to the Plaintiff to appoint persons to examine the warehouses. On the Master's report the propriety of the order cannot be questioned. It may be right that the terms of the order should be altered, directing not that witnesses shall be at liberty, but that the *East India Company* shall give them liberty, to inspect ; and then comes the question whether this Court has authority to make an order on the Defendant to give such liberty ?

I have found no case in point, but on principle I think that the Court has authority. It has been admitted on all sides, that where houses and warehouses in *London* have never been let, tithes are to be paid according to the rent which they are worth to be let at ; some of the old cases say that there is no authority in the statute for charging those houses at all, but it was admitted at the bar that the point is now decided ; and I must take it that if a person has property of the various descriptions enumerated not let, the tithe-owner, whether lay or ecclesiastical, is entitled to 2s. 9d. in the pound, not on the rent, for there is none, but on the value ; that is, the value at which it might be let.

Under that act this Court has undoubted jurisdiction to entertain the suit ; that point, though formerly questioned,(3) is now settled by many decisions.(4) Having [264] jurisdiction, the Court must in course direct an account of tithes, by directing an account of what is the value of the premises to be let ; and the question is, whether in such a case, the Court must not have the means of ascertaining, by the inspection of witnesses, the nature of the premises, in order to ascertain their value ; and whether the law meant to leave it thus, that the Defendants were to state in their answer their opinion, and to send their own surveyor to give his opinion of the value, but on the other hand, the Plaintiff was to be in such circumstances that he could examine no witnesses who knew with precision the value of the premises ? It is obvious that the capacity of warehouses of equal external dimensions, for holding goods, might be greater or less, and that the rent would be higher or lower, according to the capacity and accommodation of a warehouse. It is admitted that where a man has a right to receive a certain sum in the pound on the value of trees, the Court has ordered inspection of the trees ; so in the case of a commission on diamonds, inspection would be ordered of the diamonds. I remember a case, where on a suggestion that a machine used by the Defendant was an infringement of a patent, the Court ordered the Defendant to allow an entry into his premises for the purpose of ascertaining by inspection whether the machine was an infringement. (5) So in the instance of partition of a house, the tenant having a right to the exclusive possession of it during a term, on a bill for partition the Court would order an entry, for the purpose of determining in what manner the house could be divided, or what must be paid for owelty of partition.

[265] But it is said that in these cases the parties had an interest in the property, or an interest under a contract ; I say that this parliamentary contract is on the same ground, because every person claiming under it has an interest in the premises ; and if without this proceeding the Court must miscarry, and cannot attain the justice of the case without inspection, my opinion is, that on principle, it has authority to order inspection, taking care to impose as little inconvenience as possible on those on whom the order is made.

Cases relative to the production of deeds and papers are not applicable, because there is a particular right to call for the production of those deeds ; but on these

general principles the Court must make the order. (See *Earl of Macclesfield v. Davis*, 3 Ves. & Beam. 16.)

May 4. "His Lordship doth order that the said orders dated respectively the 6th day of February 1819, and the 7th day of April 1819, be affirmed."—Reg. Lib. A. 1818, fol. 944.(6)

(1) In the *Birmingham Canal Company v. Lloyd*, 18 Ves. 515, the injunction was refused; but instances of the injunctions alluded to, which though in form prohibitory, are in effect mandatory, may be found in *Robinson v. Lord Byron*. 1 Bro. C. C. 588. *Lane v. Newdigate*, 10 Ves. 192.

(2) A view by the jury in certain actions, was a practice of the common law. The writ directing the sheriff to summon recognitors for trying an assize of *mort d'ancestor*, contained a clause, *et interim terram illam videant*. *Glanville*, l. xiii. c. 14; *Bracton*, l. iv. c. 19; *Fleta*, l. iv. c. 9, and many other passages. On the right of view, as at present exercised, see 1 Burr. 252 *et seq.*

(3) The doubt was founded on a construction of the decree (s. 19), incorporated into the statute 37 H. 8, c. 12, as conferring exclusive jurisdiction on the Mayor of London.

(4) *Kynaston v. Miller*, 3 Gwill. 903; 2 Dick. 773. *Canons of St. Paul's v. Crickett*, 2 Ves. Jun. 563. *Warden, &c., of St. Paul's v. Morris*, 9 Ves. 155. *Antrobus v. The East India Company*, 13 Ves. 9; 1 Dow, 464. *Warden, &c., of St. Paul's v. Kettle*, 2 Ves. & Beam. 1.

(5) In *Brown v. Moore*, Hilary Term 1816, such an order appears to have been made Mr. Merivale's MSS.), but no entry of it occurs in the Registrar's Book.

(6) *City of London v. Thomson, et e con.* Mich. 10 Geo. In the *Exchequer*.

In a suit by the City of London, the Defendants obtained an order to inspect the city books and their bye-laws.

The original bill in this case was brought for some duties claimed by prescription on the exportation of corn. The Defendant denied the right; and now moved for an order to inspect the city books and their bye-laws concerning this duty, and particularly entries in the cocket office.

It was objected that the motion is irregular, for that though it is allowed between private persons and the *South Sea Company*, yet it ought not here, for that would be to make the city produce evidence against themselves; and the city here are in nature of a private person. Besides no particular bye-law, &c., is specified; so that the search would be infinite.

In the cases between lord and tenant of a manor, where the tenant says the land is not part of the manor, he shall not be intitled to inspect the Court Rolls, for he has barred himself by denying the land to be within the manor.

*Chief Baron.* There is nothing extraordinary in this motion. In the case of a lord of a manor and his tenants it is constantly allowed, and the corporation being concerned in interest makes no difference, any more than where the lord of a manor is concerned in interest, and the dispute is with a tenant. It is always allowed.

*Cur.* of the same opinion. Rule accordingly.—Mr. Coxe's MSS.

*Gabbett v. Sir Henry Cavendish.* In the *Exchequer*. May 21st, 1791.

Upon what terms a party is to be excused the production of books of account and papers which are out of the kingdom, and necessary to his business.

*Cooke* moved that the Defendant should not be compelled to produce all the books of account and papers belonging to his late father, before the deputy remembrancer, pursuant to an order in this Court, he having offered and being ready to produce them to the Plaintiff's solicitor, or any agent of his in *Dublin*.

He had an affidavit of the Defendant, that he had produced all such books and papers as were here in his custody or power, and that as to those in *Dublin*, they were of consequence to the business carried on there.

*Scott*, Solicitor General *contra*, objected that the order in this case was made upon consent, and so that the Defendant was not now at liberty to move for any alteration in it.

*Eyre*, Chief Baron, said that he remembered there was a great deal of discussion

at the time, and he rather thought that he himself directed what the order should be ; but that it was understood that when the decree came to be enforced, the parties should be heard as to any point that should arise.

He thought that what ought to be done was, that the Defendant should deliver a schedule upon oath of all the papers which are in *Dublin*, and that the Plaintiff should have copies of all such as he pleased. His only doubt was at whose expense this should be done, as it was for the Defendant's accommodation ; but it was uncertain whether the Plaintiff would want any copies.

*Cooke* said there are large chests of papers, your Lordships would not expect that we should examine them all in order to schedule them.

*Eyre*, Chief Baron. It is no more than you must have done if the papers had been here. You must do it. Ordered accordingly. From *M. Le Mesurier's* notes.

*Potts v. Adair. In the Exchequer. June 12th, 1793.*

1 *Anstr.* 259.—A Plaintiff is intitled to the production of maps, rentals, &c., in the possession of and belonging to the Defendant, which elucidate the right of the Plaintiff.

*Abbott* moved that the Defendant might produce and leave in the hands of his clerk in court for the usual purposes, certain maps, terriers, rentals, plans, and particulars mentioned in the notice, and admitted by the Defendant by his answer to be in his custody. He waived so much of his notice of motion as respected copies of public instruments in the Defendant's custody.

The Plaintiff had filed his bill as vicar of *Hixton*, and intitled as such to glebe by endowment, stating that the Defendant was in possession of some of the glebe ; and that by confusion of boundaries the Plaintiff was unable to distrain, &c., and praying a commission.

The Defendant admitted the title of the vicar to the glebe, and his own possession of certain parcels of the glebe, which he conceived to be situated in such and such places as appeared by a map, rental, or particular of his estate in *Hixton*, and also by a sketch or plan.

*Abbott* stated the principle, that equity will give any party a discovery from the adverse party of all matters useful to the prosecution of his suit, or to his defence, *Mitf.* 154, &c. And *Bowman v. Lygon*, MSS. *Exchequer*, 1792 ; *Attorney General v. Corporation of Pool*, 2d seal before *Michaelmas* Term 1790, which was as follows : an information at the relation of persons claiming a right to elect a curate, and charging the Defendants to have papers in their hands respecting that right ; Motion for Plaintiff was, that the Defendants might leave in the hands of their clerk in Court, the papers admitted by them in their answer to be in their possession ; and ordered accordingly, though the papers were corporation deeds.

*Burton* and *Alexander*, *contra*, insisted that a Plaintiff could not look into a Defendant's title before hearing, and cited 2 *P. W.* 410. Sir *James Davers's* case ; and that the Plaintiff had no right at all events to look into the whole rental of the Defendant, and none to have copies of public instruments.

The Court said the case in *Peere Williams* was a motion to look into evidence in the cause before hearing, and was a different motion ; that this was of course ; That as to copies of public instruments, certainly the Plaintiff could not have a production of them from the Defendant ; That as to the maps and rentals, the Plaintiff had a right to see the whole, according to the description given by the Defendant in his own answer and perhaps the chief assistance might arise from seeing the rest of the plan besides what was pointed out by the answer.

Also *Thomson*, B., added, that this discovery might be useful in two ways ; 1st, if the Plaintiff on inspection was satisfied, he might come to the Court for delivery of possession, even without a commission ; or 2dly, upon the commission this previous assistance would better enable the Plaintiff to supply and conduct his evidence before the commissioners.

The order was for an inspection of these maps, &c., in the hands of Defendant's solicitor, with liberty to take copies of the whole.—Lord *Colchester's* MSS.

[266] DUCKWORTH v. BOULCOTT. *February 15, 1818.*

The farther answer of a Defendant, being sworn at the house of a Master, and filed in the six clerk's office, on the evening of the day on which the Master had reported a former answer insufficient, an order obtained at the sitting of the Court on the next morning for an injunction, is irregular; *secus*, if the answer had not been filed on the day on which it was sworn.

The Master having, on the 4th of *August 1817*, reported the Defendant's answer insufficient, on that day, the Defendant at the house of the Master swore to his farther answer, which, on the evening of the same day, was taken by the agent of the six clerk, who attended at the Master's house for that purpose, and filed, by being deposited in the usual manner, in the study of the six clerk. At the sitting of the Court on the 5th of *August*, the Plaintiff obtained an order for the common injunction on the Master's report of the insufficiency of the first answer; and that order was drawn up and an injunction issued, although the Defendant's solicitor, on the 6th of *August* informed the solicitor of the Plaintiff, that the farther answer had been filed before the order was obtained.

A motion was made on behalf of the Plaintiff to discharge the order of the 5th of *August* for irregularity. [267] The facts stated appeared by the six clerk's certificate, and the affidavits of the Defendant's solicitor, and one of the sworn clerks in the six clerk's office.

[268] Mr. *Bell*, and Mr. *Wingfield*, in support of the motion.

Sir *Samuel Romilly*, and Mr. *Hart*, against the motion.

[269] The Lord Chancellor [Eldon]. When an answer is sworn in town, the parties in the usual course swear to it at the public office of the Masters, and the confidential person in the office carries the answer to the six clerk's office: if the public office of the Masters is closed, the parties go to a Master's house, and swear to the answer there; and the Master keeps the answer, and delivers it himself to the six clerk. If the parties, not choosing to attend at the public office, [270] wait till that is closed, go to the Master's house, and the answer is brought to the six clerk's office the next morning, the answer cannot be considered as filed on the day on which it is sworn at the Master's house.

Here the agent of the six clerk attended with the parties at the Master's house, and the answer was filed on the same day on which it was sworn. The order for an injunction must be discharged.

The order of the 5th of *August 1817*, was discharged, and the injunction set aside with costs.—Reg. Lib. A. 1817, fol. 1297.

HACK v. TUCK. *Rolls. February 18, July 14, 1818.*

A testator having bequeathed annuities issuing out of a leasehold estate, to some annuitants for life, to some during the continuance of the fund, and to others indefinitely, with a general provision for an increase or diminution of the annuities, in proportion to the increased or diminished income of the estate; and a particular provision that, on the death of some of the annuitants for life, their portions should be paid to the survivors; the annuities given indefinitely are payable during the continuance of the fund; and the amount of annuities ceasing by the death of annuitants for life, not named in the particular provision, belongs not to the survivors, but forms part of the residue.

By his will dated the 30th of *April 1769*, *Thomas Betts* bequeathed a leasehold tenement in *Hoxton Town*, to his wife *Jane*, for so many years of the term which he had therein unexpired at the time of his decease as she should live, and after her decease, to his son *John Betts*, his executors, &c., for the remainder of the term unexpired at the death of his wife, provided he should leave any lawful issue at his death; but if his said son should die without issue, the testator bequeathed the same to his daughter *Jane*, her executors, &c., for the remainder of the term unexpired at the death of his son without issue, provided she should leave any lawful issue at her death; but in case she should die without issue, the testator bequeathed the same to his daughter *Elizabeth*, in like manner; and in case she should die without issue, then to *John Rogers* for all the residue of the term. The [271] testator bequeathed all his leasehold

estates in *Hoxton Market* and *Old Street Road*, to his two daughters, to be equally divided between them, share and share alike ; but if either should die without issue, to the survivor ; and if both died without issue, to his son *John*.

After the decease of the testator, and of his widow, *John Betts*, in April 1782, assigned by way of mortgage all his interest in the premises in *Hoxton Town*, to *Francis Carter* the elder, who had married the testator's daughter *Jane* ; he entered and continued in possession during the remainder of the life of *John Betts*, who died in 1785 intestate and without issue, and without having redeemed the premises. On his death, *Francis Carter* the elder and *Jane* his wife, entered into the possession or receipt of the rents of one moiety, and on the death of *Elizabeth Betts* unmarried, of the other moiety, of the premises in *Hoxton Market* and *Old Street Road*.

*Jane Carter* afterwards died, leaving *Francis Carter* the elder, her husband, and *Francis Carter* the younger, and *Jane Carter*, her only children. *Francis Carter* the elder obtained letters of administration of her personal estate, and continued in the receipt of the rents of all the premises until his decease. By his will dated the 28th of April 1798, he gave to his son *Francis Carter*, and *B. Waters*, and *J. B. Tuck*, all his estate and effects of every kind, both leasehold and copyhold, in trust, after payment of his debts and funeral and testamentary expenses, to lay out the surplus at interest, and out of the interest and the rents and profits of his leasehold and copyhold estates, to pay to his son *Francis Carter*, his executors, &c., the yearly sum of £20, so long as the rents and profits of his estate should produce annually the sum of £175, and so in proportion with the other [272] devisees, according to the annual amount of the estate ; and he also directed his trustees, out of the rents and profits aforesaid, to pay to his daughter *Jane Carter* the yearly sum of £30 quarterly during her life ; and to pay into the hands of *Mary Hack* otherwise *Carter*, the yearly sum of £110, until her son *W. F. Hack*, otherwise *Carter*, should attain 21, in case he should so long live, and after he should have attained that age, to pay to *Mary Hack* the yearly sum of £90 only, until her daughter *Louisa* should attain 21, if she should so long live, and immediately after that event, to pay to *Mary Hack* the yearly sum of £70 only, until her daughter *Maria* should attain 21 ; and immediately after that event to pay to *Mary Hack* the yearly sum of £50 during her life ; and as soon as *W. F. Hack*, otherwise *Carter*, attained 21, the trustees were to pay to him £20 yearly, with like directions for the payment of an annual sum of £20 each to *Louisa* and *Maria Hack*, for their separate use ; and the testator directed his trustees to pay to his sister *Ann Thompson*, the yearly sum of £15 during her life ; and he declared that if the interest, rents, &c., of his estate and effects should not be sufficient to pay the several yearly sums thereby given, every one of his devisees, except *Mary Hack*, should abate proportionately out of their several sums according to such deficiency ; and if the same should produce more than sufficient to pay the annual sums, they should be increased proportionately ; and that in case of the death of any of his children, *Francis Carter*, *Jane Carter*, *W. F. Hack*, *Louisa Hack*, and *Maria Hack*, under 21, the part of such child or children should be divided among the survivors ; and he bequeathed his household furniture to his wife for life, and after her death, to his son and daughter *Francis* and *Jane* ; and appointed *Waters* and *Tuck* executors.

[273] *Francis Carter* died in December 1800, and his son *Francis Carter*, the younger, in 1809, having appointed *Mary Tuck* sole executrix of his will ; after her death, in 1810, *J. B. Tuck* became administrator of *Francis Carter*, the younger, during the minority of the children of *Mary Hack*.

The bill filed by *W. F. Hack*, otherwise *Carter*, *David Tait* and *Louisa* his wife, late *Louisa Hack*, and *Maria Hack*, prayed that the rights and interests of the Plaintiffs under the will of *Francis Carter*, the elder, in respect of their several annuities, might be ascertained and declared.

The Defendants, *Jane Carter* in her own right, and *Tuck* as administrator of *Francis Carter*, the younger, insisted that the annuities given to the Plaintiffs were payable only during their lives, and claimed the residuary estate as next of kin of the testator.

*Mr. Bell*, and *Mr. Parker*, for the Plaintiffs.

*Mr. Heald*, *Mr. Shadwell*, and *Mr. Tead*, for the Defendants.

The Master of the Rolls. The express words of the will are decisive of this question. The testator has given some annuities expressly during the life of the annuitant,

others expressly during the continuance of the fund ; and a third class indefinitely ; the Court cannot introduce into the latter gifts, terms of qualification which the testator has not inserted. The conclusion is, that when the testator meant that the annuity should be paid only during the [274] life of the annuitant, he has so declared ; and that where he has not so declared, such was not his meaning.

*July 14.* A motion was made, on behalf of the Defendant *Jane Carter*, that the minutes of the decree might be varied by the insertion of a declaration, that, the next of kin of the testator *Francis Carter*, the elder, were entitled to the proportion of his property applicable to the payment of annuities for life, as those annuities became extinct by the death of the annuitants.

Mr. *Bell*, and Mr. *Parker*, for the Plaintiffs.

Mr. *Hart*, Mr. *Heald*, and Mr. *Shadwell*, for the Defendants.

The *Master of the Rolls* [Sir Wm. Grant]. The provision in the will for the proportionate increase or diminution of the annuities, refers exclusively to the increase or diminution of interest and rents of his property, not to the reduction of the amount charged on that property, by the death of annuitants for life. The testator has expressly declared, that on the death of some of the annuitants, their proportions shall be paid to the survivors ; the inference is, that his intention was different in the case of the annuitants for whose death no such provision is made. In the event that has occurred, the death of *Mary Hack*, a portion of the fund is undisposed of ; and falls therefore into the residue. The variation proposed must be made.

" His Honor doth declare, that *Francis Carter*, the elder, in right of his wife, became absolutely entitled to the leasehold estate in *Hoxton Town, Hoxton Market* [275] *Place*, and *Old Street Road* ; and doth declare that the said *Francis Carter*, the younger, *W. F. Hack*, otherwise *Carter*, *Louisa* the wife of the Plaintiff *David Tait*, and *Maria Hack*, otherwise *Carter*, are entitled to the several yearly sums of £20 each, absolutely, so long as the interest of the testator *Francis Carter*, the elder, in the leasehold property continues ; and that the Defendant *Jane Carter* is entitled to the yearly sum of £30, and the Defendant *Ann Thompson* to the yearly sum of £15, for and during the term of their natural lives ; and that *Mary Hack*, widow, deceased, in the will of the said *Francis Carter*, the elder, and the pleadings of this cause mentioned, was also entitled under the will of the said testator, to the yearly sum of £50 during the term of her natural life, and upon her decease, such last-mentioned annuity has fallen into and now forms part of the residuary estate of the said testator, and that the annuities so given to the said *Jane Carter* and *Ann Thompson*, as aforesaid, will also upon their respective deceases, fall into and form part of such residuary estate ; all which before mentioned yearly sums, amounting together to £175, being to be issuing out of the rents and profits of the said leasehold property, are to be increased or diminished rateably as such rents exceed or fall short of the said annual sum of £175 ; such several annuitants being entitled, under the will of the said *Francis Carter*, the elder, to have the whole of the rents and profits of the said leasehold premises distributed among them in such proportions as aforesaid : and that the said *Jane Carter*, as one of the next of kin of the said testator *Francis Carter*, the elder, and *J. B. Tuck*, as the personal representative of the said *Francis Carter*, the younger who was the other next of kin of the said *Francis Carter*, the elder, are equally entitled to the residue of the estate of the said *Francis Carter*, the elder ; and doth order that it be referred to Mr. *Campbell*, one, &c., to tax all parties their costs of this suit ; and it is [276] ordered that such costs when taxed, be paid out of the personal estate of the said testator *Francis Carter*, the elder."—Reg. Lib. A. 1817, fol. 1548–1550.

FRANCKLYN v. COLHOUN, FRANCKLYN v. THORNHILL, RUCKER v. PINNEY.(1) May 1, 1819.

[See *In re Slade*, 1881, 18 Ch. D. 657.]

A sequestration having issued for non-payment of money into court, an individual in possession of a sum claimed by the party against whom the sequestration issued, and by a stranger, was ordered to pay that sum into court.

On the 2d of May 1818, an order was made in the two former causes, directing the Defendant *William Colhoun*, on or before the 1st of July then next, to pay into

court to the credit of those causes, "the account of monies belonging to the personal estate of the late Defendant, *John Parson*, deceased," the sum of £9900, 14s. 1d. being the balance reported due from him, by the Master's separate report dated the 5th of August 1816, in respect of sums received or retained, and not accounted for by him as trustee for *John Parson*.

[277] *Colhoun* not having obeyed the order, and being beyond the jurisdiction of the Court, the solicitors of *Lucy Groome*, the widow and sole acting executrix of *John* [278] *Parson*, caused an attachment, and all the intermediate processes of contempt to a sequestration, to be issued against him, and also commenced an action against him [279] in the Court of the Lord Mayor of *London*, and according to the custom of the city, attached a debt due to him in the hands of *Daniel Henry Rucker*, esquire, of *Minc-[280]-ing Lane*. On the 12th of *December* 1818, Mr. *Rucker*, having pleaded to the attachment *nil debet*, filed a bill of interpleader against *Frederick Pinney*, *Charles Pinney*, [281] *Thomas Groome*, and *Lucy* his wife, and *William Colhoun*, praying that the Defendants might interplead and settle their claims in respect of the debt, and that the Plaintiff [282] might be at liberty to bring the sum of £1877, 6s. 6d. the amount of the debt, into court, for the benefit of the parties entitled; and an injunction. On the 4th of *Febru-[283]-ary* 1819, the solicitors of Mrs. *Groome* received a notice from the solicitors of Mr. *Rucker*, that he intended to proceed no farther with the bill of interpleader, but [284] to defend the action brought in the Lord Mayor's Court; and on the 12th of *February* 1819, obtained a writ of sequestration, to sequester the goods and effects of [285] *W. Colhoun*, for non-payment of the money ordered to be paid in by him, which, on the following day they served on *Rucker*, with a written notice that they, as two [286] of the commissioners named in the writ, sequestered the sum of £1877, 6s. 6d., admitted to be due from him to *Colhoun*, and all arrears of interest, and required pay-[287]-ment of the same. The writ of sequestration, and a similar notice, were afterwards served on *Frederick Pinney* and *Charles Pinney*. On the 2d of *March* 1819, the bill of interpleader was dismissed on the motion of the Plaintiff.

[288] The debt from *Rucker* to *Colhoun* arose on a bond dated the 14th of *February* 1778, and executed by *James Campbell* and three other persons, resident at [289] *Tobago*, for securing to *Colhoun*, £2874, 1s. 5d. sterling, with interest at 8 per cent. from the 2d of *April* 1778; *Rucker* being the executor of *J. Campbell*, the surviving [290] obligor, judgment had been obtained against him for payment from the assets of *Campbell*. The amount due for principal and interest on the 19th of *February* 1819, [291] was computed at £5494, 5s. 3d. The Defendants *Frederick Pinney* and *Charles Pinney*, claimed to be entitled to the debt, under an assignment from *Colhoun* to [292] their father *John Pinney*; the validity of which was disputed by Mr. and Mrs. *Groome*.

A motion was now made on behalf of Mr. and Mrs. *Groome*, that Mr. *Rucker* might be ordered to pay [293] into the bank on or before the 14th of *May*, the sum of £5494, 5s. 3d.

[294] The affidavit filed in support of the motion stated, in addition to the preceding facts, that the proceedings in attachment could not try the question of property in the debt, which being due from *Rucker* as executor only, he [295] could not be arrested for it, and by the custom of *London* it could not be made the subject of attachment.

Mr. *Hart*, for the motion.

[296] There is no other course of proceeding by which the justice of the case can be administered. The Court finding property belonging to the Defendant in the [297] hands of a third person, is competent to order payment into the bank; parties claiming an interest in it, may, as in the instance of sequestration of property in possession, be examined before the Master *pro interesse suo*. The Court will not require that a bill should be filed; the question may be as well determined under this [298] order. *Simmonds v. Lord Kinnard* (4 Ves. 735), *Opie v. Maxwell* (cit. 4 Ves. 742).

[299] Sir *Arthur Piggot* and Mr. *Blake*, Mr. *Heald*, and Mr. *Buck*, against the motion.

[300] If a sequestration can be made effectual against a *chose in action*, a point much doubted, it must be by the course pursued in *Simmonds v. Lord Kinnard*, a bill of [301] discovery. The Court will not decide the conflicting claims of strangers

on affidavits ; and direct payment into court of the money which they claim, in suits to which [302] they are not parties. The sequestration issues for payment of a personal debt of *Colhoun* ; the sum sought to be sequestered, is claimed by him as executor to his [303] father. A *chose in action* cannot be taken in execution at law, except under an extent at the suit of the crown ; and there the sheriff is not authorised to levy the debt [304] found by the jury, but the inquisition is returned to the Court of Exchequer, and a *scire facias*, or an immediate extent is issued against the party indebted to the debtor [305] of the crown. (*West on Extents*, 171.) In like manner here a bill must be filed. The bill of interpleader is dismissed, and no order can be made in that suit.

[306] The *Lord Chancellor* [Eldon]. I lay out of the question the bill of interpleader ; and it is quite immaterial whether the proceeding by attach-[307]-ment could, or could not, be enforced. As, during the suit of interpleader, if Mr. *Rucker* had paid the money into court, which he ought to have done, and had sug-[308]-gested that it was claimed by more than one party within the jurisdiction of the Court, and also by a person resident in a British colony, the Court would not have parted [309] with the fund until it had secured *Rucker* as well from the colonial claim, as from the claims here ; so, if sequestrators, by bill or otherwise bring the money into court, it will be detained until the Court is satisfied that the party by whom it has been paid cannot be compelled to pay it elsewhere.

The true question is, whether this *chose in action*, considering it either as the whole sum due from *Colhoun*, or only so much as exceeds what is due to *Pinney*, can be [310] taken by this sequestration ; or whether there must not be some proceeding in aid of the sequestration ? Speaking with the caution which befits one of a process so unusual, I have supposed it to be clear, that where there is tangible property, the Court will allow the sequestrators to lay their hands on it, whatever claims third persons may have, and will compel them to come in *pro interesse suo* ; but a *chose in action* cannot be so taken ; and the question arises, how are the rights of third persons to be decided ? It is generally done by [311] order ; whether it can be done in a case in which the third person does not appear, may be another question.

Before I decide this case, I will refer to *Simmonds v. Lord Kinnard* ; in the meantime *Rucker* must not part with the money.

An order was afterwards made for payment of the money into court.

(1) The following cases on sequestration are extracted from MSS. in the possession of the editor.

*Witham v. Bland*. 13th November, 25 Car 2, 1675.

Sequestration not defeated by a voluntary conveyance, *pendente lite*. Sequestration against the heir for a personal duty decreed against the father.

I allowed a sequestration to proceed against the heir, for a personal duty decreed against the father, because he did not claim as heir, but by conveyance *pendente lite*. The first bill by his father in 1664, demanded deeds taken away by which he had conveyed an estate to *Bland* ; on that bill the father was decreed to account, and on that account owed £5000. The cross bill in 1665 demanded the land according to the settlement. The conveyance to the heir was voluntary, and in 1666 ; which I looked on as a practice to defeat the decree.—*Lord Nottingham's MSS.*

*Witham v. Bland*. 11th December, 26 Car. 2, 1674.

*Rep. temp. Finch*, 126.—Sequestration defeated by revocation and new limitation of uses. Power of new limitation when incident to power of revocation, though not expressly reserved.

A sequestration of *Witham's* estate had long been fenced off by a conveyance *pendente lite*, viz. a conveyance in 1666, whereas the bill was filed in 1664. When this would not do, they resorted to former settlements, upon which there was this case. Anno 1653, a feoffment was made to the use of *George Witham* for life, remainder in tail unto *Henry Witham* (the now sequestered person), with power of revocation, but no new power of limitation reserved ; afterwards, anno 1668, the first settlement was revoked, and new uses were limited again to *Henry*. Mr. *Bland's* counsel urged that the first settlement was well revoked by the second, but the uses of the second were not well limited, for want of a new power of limita-



tion reserved, and by consequence, the fees descended from *George* to *Henry* without any settlement, and might well be sequestered in the hands of the heir for a duty decreed against the father, who had been also sequestered, and now the sequestration continued; and of this opinion they had several great counsel upon advice.

I said, the opinions of counsel were great or less according to the reasons. I thought *Henry Witham* to be well in by the second settlement; for when the second settlement had executed the power of revocation in the first, a power of new limitation by the second settlement must need be incident, though it was not reserved; first, because the revocation of the first conveyance extended only to the uses limited in it, but could not extend to the common law estate, which passed by the first, for that is irrevocable, *ergo*, a power to limit new uses upon it must remain to the feoffor without reservation, or his estate is lost; secondly, though no man can have a power of revocation unless he reserves it, no man can want a power of limitation unless he excludes himself from it; thirdly, when a power of revocation is reserved to a stranger, he has no power of limitation unless reserved; *secus ubi* the feoffor himself has the power to revoke.—*Vide Winstanley's case* (cit. 2 *Keble*, 270; 3 *Keble*, 7). So I discharged the sequestration.—Lord *Nottingham's MSS.*

*Crofts v. Oldfield.* 3d June, 28 Car. 2, 1676.

Lands, when bound from the institution of the suit; when not bound till sequestration.

A legacy was devised in 1627, and the profits of land during the minority of a daughter and heir, and until she came to 21, charged with it; these profits were received and applied till 13, and at 16, the daughter and heir married one *Crofts*, the Plaintiff's father, against whom a decree was had that the land should continue to be chargeable, which decree is vigorously prosecuted by *Oldfield* the Defendant, who is intitled to the unsatisfied legacy; but the persons truly grieved by this prosecution are *Brook* and *Foster*, two purchasers of part of the land, and another who was devisee of the other part of the land; and these make use of the Plaintiff's name to bring a bill of review to reverse this decree, from which they could not otherwise free themselves. When they appeared and were examined, the error assigned was, that the land was not liable after the daughter came to 21, yet the decree had continued the charge upon it. The Defendant, who demurred upon this bill, said that he had no intent to charge the land but only from the marriage till 21, and not after; and urged that he who broke the trust was liable in his person to make good all that might have been received until 21; it is true the land was not directly liable, but yet a decree against him or his heir, while the land was in his hands, binds the land; and a purchaser since the decree will be also bound. To which the Plaintiff said that *prima facie* every decree binds the person only, and the land itself whereof the profits were in demand is not bound till sequestration; whereof the consequence is that death before sequestration discharges the land, and if the Defendant devise before sequestration and die, the devisee will be freed.

I said, where the lands or the profits of the lands, which is all one, are directly in demand, the title is bound from the bill exhibited, and every purchaser *pendente lite* comes in at his peril; but where an account of profits is prayed by way of execution of a trust, there the person only is charged for breach of trust in not applying the profits, and the land is not charged but while in his hands, nor then neither till sequestration; so purchasers and devisees before sequestration are free: but overrule the demurrer, and after answer the Court may consider further.—Lord *Nottingham's MSS.*

*Coulston v. Gardiner.* 10th February, 33 Car. 2, 1680–81.

2 *Ca. in Cha.* 43. See 1 *Ves. Sen.* 182.—A sequestration prevails against a prior conveyance designed to defeat it; not against prior conveyances for valuable consideration, or *bona fide*.

After a decree against the father, and a report of £500 due confirmed; and just before a sequestration awarded, the father conveys £7000 of land to his son, which was his whole estate, without reserving any maintenance to himself, or any visible trust appearing. The considerations expressed were these: 1. To enable the son

to make a jointure to a wife who brought £1700 portion, and was married 10 months after ; 2. To pay the father's debts, *viz.* £800 on a mortgage, and £800 more in other debts.

This conveyance the son pleaded in bar of the sequestration, and if the son be either a purchaser or come in voluntarily and *bona fide*, the plea is good. Against the considerations of this deed it was urged : 1. The marriage settlement is but a pretence, for the deed was only between father and son, the wife's friends no parties ; also this conveyance not necessary to enable the son to make a jointure, for the father being seized in fee could have done it without this ; and beside, the settlement is strange, and very suspicious, for the father strips himself of all, and gives the son the portion too. 2. The payment of debts is but a pretence neither, for the £800 upon the mortgage needed no other provision, and the other £800 were voluntary debts created for this purpose.

At last the defence is made barefaced, and the Defendant retreats to this point ; that the sequestration binds not the land till laid on, at least not till the order made, and it is lawful to prevent a sequestration by a conveyance made for that purpose, before the date of the order ; as at common law a man may make a conveyance to prevent an outlawry : and this point strikes home indeed ; *ergo*, it is fit to settle this point once for all, without making use of any shifts or evasions, or straining the case to make a presumptive fraud or resulting trust, though there be ground enough for that too.

I will *ergo*, at this time, for learning's sake, and for use, enlarge myself a little upon the nature of sequestrations in chancery. The judges of the common law have been so very unwilling to support any proceedings in equity, that they have come to very strange resolutions. 41 *El. B. R. Brograve v. Watts, Cro.* 651, a sequestration of goods awarded by the Court of Requests, adjudged no bar in detinue ; *M. 5 Car. B. R. Bill v. Heber*, adjudged on argument, no bar in trover. *Noy. 20, Jac. B. R. Elwayt's* case, upon an indictment of murder for killing a sequestator, the Court inclined that he was no such legal officer, that it should be malice implied to kill him : which was a bloody opinion, but the prisoner durst not trust to that opinion, but sued out his pardon. *Note* at that time Bishop *Lincoln* was *Custos*.

This is not the first time that the judges have endeavoured, by several resolutions, to depress the chancery, and yet, after judges have been ashamed of those resolutions. 11 *E. 4. 8.* He who has notice of a trust, and then procures a release from the trustee, cannot be questioned in equity ; *cujus contrarium verum est.* 22 *E. 4. 6, 1 Roll.* 374. He that pays a statute or a bond without an acquittance, shall have no relief in equity if he be sued again. What can be more absurd ? *Tr. 11 Jac. Shelley v. Shute, Sir F. Moor (Selby v. Chute, Moor, 859)*, it was held that a suit in equity was no breach of a covenant not to sue, because the law takes no notice of a suit in equity ; but 22 *Car. 2. Scac.* in Lord *Saint Alban's* case, *Mich.* 1670. *Hale*, chief baron, justly denied this case. 12 *Jac. B. R. Glascock v. Rowly, 1 Roll.* 374 (1 *Roll. Rep.* 120 ; 2 *Bulstr.* 142), there ought to be no relief in equity, against an entry for a condition broken ; *risum teneatis* ? 13 *Jac. B. R. Fynn v. Smith, 1 Roll.* 376 (1 *Roll. Rep.* 338). If one joint tenant takes all the profits, there is no relief in equity. *Durus sermo.* 13 *Jac. B. R. Powell v. Harris, 1 Roll.* 376 (1 *Roll. Rep.* 263). No account can be required of executors in equity ; against all experience. 14 *Jac. B. R. Bromage v. Jennings, 1 Roll.* 380 (1 *Roll. Rep.* 354, 368), where damages may be recovered in an action upon the case, there shall be no relief in equity to compel the performance *in specie*. 3 *Car. B. R. Miller and Reames's* case, there shall be no relief in equity, when the bond is lost, 1 *Roll.* 375. These extravagant opinions no man will own, no more than the exploded opinion that to sue in chancery after judgment is a *præmunire*.

As the judges did of themselves reform these opinions, when they saw the inconvenience of them, and how little they prevailed against the Chancery, so they have since begun to relent even in the matter of sequestration. *Tr. 17 Car. 1, C. B. Serjeant Bacon*, moved for a prohibition to the Court of Requests, for granting a sequestration against the lands, and because the sequestration was of other lands than those which were in demand, the prohibition was granted, *March Rep.* 99, *pl.* 171. This admits that of the thing in demand a sequestration may be and goes as far as ever my Lord *Bacon's* rules went (*Orders in Chancery*, ed. *Beames*, p. 15, *et seq.*), *per Banks*, chief justice ; and this is warranted by the reason of law ; for every court baron may have *alevari facias*, only there it is renewed from time to time, whereas a sequestration is a continuing *levari*, and it were hard to deny the Chancery the power of a court

baron. So that by this time, it is become a settled point, that sequestrations may be, and of the thing not in demand, *viz.* of land for a personal duty, nay of a copyhold too, and this without doubt is much ancients than the precedents (see *The Marquess of Caermarthen v. Hawson*, 3 Swans. 294); for the records of the proceedings in equity have not been so carefully kept. The eldest precedent in chancery of a sequestration, is about 41 *Eliz.* but in the county palatine of *Chester*, there are precedents as ancient as 1 *Mar.* (Note: *Tothill* mentions a case of *Knightly v. Graunt*, 31 *Eliz.* *Transactions*, 175.) And, indeed, no Court of Equity can subsist without this process, nor is it any great severity to find out a way to make men pay their debts effectually.

In the next place, it must be observed that sequestration is not like any process at common law, nor is it awarded in imitation of any of those processes. 1. For first, it is not like a *levari facias*, which ceases by the death of the party. 2. It is not like the outlawry, where the profits are seized for the contempt, but do not necessarily go in satisfaction of the debt. 3. It is not like an execution upon the statute *Westminster*, 2, or an extent; for though an injunction for the possession be like a *liberate*, yet it covers the whole, and reaches copyhold lands, which no extent does. So that it is a special remedy, warranted by the course of the Court, and stands only upon its own rules.

It remains *ergo*, to consider the bounds and limits of it; and first, we may be sure that this being the process of a Court of Equity, is never to issue out against the rules of good conscience. *Ergo*, a purchaser for a valuable consideration, before the sequestration, is free; for though a decree, as to some purposes, be equal with a judgment, yet it is never so till a sequestration awarded, for till then neither lands nor goods are bound. So is he free who comes in voluntarily and *bona fide*; for the very same reason, after a sequestration laid on against the father, if he dies and the lands descend to the issue in tail, the sequestration is discharged; so ruled, 6th *July* 1673. *Earl Athol v. Comit. Derby* (1 *Ca. in Cha.* 223; 2 *Lev.* 71). But whether it continues against the fee simple lands was not then debated. It has been said that there is as much reason to continue a sequestration against the heir in fee, as to put the party to a new sequestration after revivor; but I conceive that the sequestration does not continue until the suit revived, against the heir, and also against the executor, who may have assets; no, not though the son came in and was examined in his father's lifetime, and set out his title by conveyance; for after his father's death a new title accrues to him as heir; but after revivor the sequestration will bind him as much as it did in his father's lifetime. And this was one of the points in *Bland and Witham's* case (3 Swans. 277. See *The Marquess of Caermarthen v. Hawson*, 3 Swans. 294).

The only difficulty is the point in question, how far a voluntary conveyance to the heir, on purpose to prevent and avoid a sequestration approaching, shall take place? And this ought to be no difficulty neither, for reason and authority are against it. 1. No such conveyance can be *bona fide*, which is made with an intent to avoid a just debt. 2. It tends to make all proceedings here illusory. 3. It teaches an art of cheating; for a man may borrow money to buy lands, and being sued in Chancery for the money, he may after a decree, make a voluntary conveyance to the heir, and defeat the remedy. *Bland and Witham's* case is an authority in point (3 Swans. 277. *Bird v. Littlehales*, 3 Swans. 297. *Hamblyn v. Lee*, 3 Swans. 299); for 4th *March* 1672, it was debated before the Earl *Shaftsbury*, chancellor, whether the sequestration could be continued against the son after revivor? But 13th *November* 1673, I did allow the sequestration to proceed. Afterwards *Witham* departed from the title he had made *pendente lite*, and set up a former settlement in 1653; upon which, 11th *December* 1673, I delivered my opinion against him. He desired a case to be made, but never argued it. 17th *May*, 29 *Car.* 2, *Langley v. Bredon*, decree for £400, sequestration awarded; the Defendant pleaded a voluntary conveyance before the sequestration awarded; yet ordered to answer.—Lord *Nottingham's* MSS.

Lord Pelham v. Duchess of Newcastle.

The circumstances of the case appear in the report, 3 *Bro. P. C.* 460.—A Defendant ordered to deliver a copy of a deed, and refer to it in her answer as a true copy.

The Master reported the answer insufficient, for not setting forth the deed that declares the uses of the fines and recoveries that were levied and suffered by the Duke and Duchess of the *Newcastle* estate; and upon the general exception to the report.

Sir *Thomas Powis*, for the Duchess, insisted, as the Defendant did by her answer insist, on the very same matter in bar of the discovery of this deed that had been before pleaded and overruled; with this further, that the intention for the preserving the estate in the name of *Cavendish* was continued to the making the deed, and a clause in the deed that provided for it was set forth in the answer; that what was prayed by the bill to have the deeds set forth *in hæc verba*, was worse than delivering it over to the Plaintiff, for that would discover it to all the world; that the Duchess had an estate for life limited to her by that deed, and that the Duke having agreed, in consideration of her joining in that settlement, that her estate for life should be protected from the incumbrances which amounted to £80,000, and affected that estate, she was a purchaser of the benefit of those incumbrances; and that those incumbrances being recited in the deed, the discovery might endanger her estate for life; that the Plaintiff was not entitled to that discovery, being an infant and not capable of confirming her estate for life, and not having proved the will and established the title at law. On the last head he cited the case of *Dr. Hamilton* and *Mr. Fleetwood*; that *Hamilton* claiming under the remainder man in fee, and the estate tail being spent to all but one person, who was under an incapacity, the doctor brought an ejectment, and after he had proceeded so far as that he got a special verdict, he brought his bill for discovery of deeds and writings, and to stay waste; that upon exceptions to a report of the insufficiency of *Fleetwood's* answer, the Court would not oblige *Fleetwood* to answer, because the doctor had not affirmed his title at law. (8 *Via. Ab.* 538.) He cited likewise *Whitcombe's* case (*Whitcombe v. Whitcombe, Prec. in Cha.* 280); which was, a man left two daughters by a first wife, and the second wife ensient with a son, who lived a year, and the uncle as heir to him, brought an ejectment, but was nonsuited by terms being set up by the daughters; he then brought his bill for a discovery of deeds, and particularly of the leases of the estate, to enable him to prove a possession in the infant; and upon exceptions to a report of the insufficiency of the answer for not setting them forth, the report was overruled; and at hearing, Lord *Cowper* would not compel the Defendant to discover, and declared that this Court would not in all cases help a person to deeds that he hath a right to at law; that it would not help a first purchaser against a second without notice, nor where there is a very hard bargain made between two, will it help the person that would take an advantage of it to enable him to do so at law; and that the present case was much stronger than coming here for a discovery before the hearing.

Note *Whitcombe's* case was said to have been a case of great compassion, and to have been compounded at last. And Lord Keeper seemed to think that decree wrong.

*Hooper* insisted that the Duchess was a purchaser, and that the Duke was not entitled to production without confirmation; and that in the case of *Sir Copleston Bunfield*, a jointress subsequent to a marriage was not compelled to discover; nor in the case of *Rook v. Rook*, where the deed comprised both the jointure and other lands.

*Cheshire*. A right to discovery is not substantive but dependent on a right at law, which the Plaintiffs ought to establish first, and they had room enough to try the validity of the will without discovery of the deed.

*Williams* put the case, that where conies are tithable by custom, and a bill is brought to discover the quantities and value; if the Defendant denies the custom, he will not be obliged to set forth the quantities, &c.

*Lord Keeper*. That is matter of account. In this case you say there are incumbrances; how shall the Plaintiff be able to try his right?

*Cheshire*. The Court may direct an issue, *devisavit vel non*.

*Peat*. We are a purchaser, though not of our estate for life, which is part of an old estate; yet of the incumbrances. Lord *Pelham* hath no right. We have denied the will and his title, and it must be taken now on our answer; and your lordship will not on a feigned suggestion oblige us to make any discovery. Our plea was overruled because the matter was not then fully discovered to the Court; it is now, having disclosed in our answer the clause in the deed that relates to that matter. If the words that direct the taking the name of *Cavendish* be not found enough to make either a condition or limitation, there is the greater reason that it should enure as a trust; continuing an estate in a name and family had been regarded in all ages; that was the reason of making the statute.

*Dr. Denis O'Williams.* If a plea is overruled for any mistake, the Plaintiff may insist on the same matter by way of answer.

*Sir J. Jekyll,* said (*inter alia*) that it could not be a trust, there being no obligation on the Duchess to take the name, and therefore no trustee made by the deed, nor *cestui que trust*.

*Attorney General.* The Duchess's fears of the incumbrances are groundless, she admitting by her answer that they were all assigned in trust for the Duke before the deed of settlement, and that there was a proviso in that deed that they should be assigned to protect the several limitations of that deed ; which agreement, *Howe* said, was as effectual in equity as if they had been actually assigned pursuant to the proviso.

*Vernon.* Two dilatories were never to be allowed by the printed rules of the Court ; and therefore a man cannot plead twice or demur twice, nor where a plea in bar is overruled, can he insist upon the same thing by way of answer, unless it be overruled for informality only, and not for the matter (which it was here). It is true they have thrown in some additional circumstances ; but if that contrivance would avail they might do so *in infinitum*. What was said by the Court before on their plea, *viz.* if there were such a trust, &c., the discovery would not hurt them, and if there were not, the concealing the deed were a manifest injury to the Plaintiff, and that without a discovery of the deed, it could not be brought before the Court in judgment, whether there was or not, was unanswerable ; and the Plaintiff did not claim paramount the Duchess ; and sought only a discovery of her own act. He never heard it said that a purchaser was not compellable to disclose his own title, nor that advantage might not be taken of any clause in the purchase deed.

*Cooper.* It was not possible for the Plaintiff to go to law without a discovery of the deed, not even upon the issue *devisavit vel non* ; for if it was not in the Duke, he could not devise it, and that was the only deed that brought the estate unto him.

*Howe.* The apprehension of danger of any strangers taking advantage of the discovery that was prayed, was expelled in *Lord Craven's* case ; and if there was any real danger of letting in any incumbrances of other persons by it, it ought to be particularly insisted on by answer ; there was no occasion here for confirming the Duchess' estate for life, she not being a purchaser of it, and it being created by the same deed under which the Plaintiffs claim, and the Duke having confirmed it by his will, which is much more effectual than a bare offer to confirm.

*Lord Keeper.* The Duchess is said to be a purchaser, and therefore not compellable to discover. She is no purchaser of any limitation in the deed ; those limitations are rather the considerations of her purchase of the benefit of the incumbrances ; there is no reason of her being purchaser of them, for her not discovering the uses of the deed, which is another thing ; the bill doth not seek a discovery of the incumbrances, but of a deed in which they are recited only ; your fears of those are imaginary. Let her set it forth *in hæc verba*.

He afterwards proposed to both sides, and they consented, that instead of that, she should deliver a copy of it, and refer to it in her answer as a true copy.

*Note :* That nothing was insisted on by way of answer in bar of a discovery, but what had been before pleaded and overruled, or allegations taken out of the deed itself ; if they had been pleaded, the plea would not have been proved without producing the deed, which, when produced, the Plaintiff might take advantage of. It seemed therefore vain to allege that, in bar of a discovery, which could not be proved without giving the discovery objected against.—From Mr. *Cox's* notes, *Lord Colchester's MSS.*

#### Lord Pelham v. Duchess of Newcastle.

Sequestrators forcibly dispossessed, restored by injunction.

The sequestrators having entered into *Powis House* (to which *Lady Henrietta Holles* made title as heir), and sequestered all the goods, &c., there belonging to the Duchess, they were forcibly turned out of possession ; and upon affidavit of it, *Grandman*, the Duchess's solicitor, who directed it, was committed, and an injunction awarded to restore the sequestrators to the possession ; but before they were actually restored, the *Lady Henrietta* moved the Court, that it might be referred to a Master to inquire what goods that were sequestered belonged to her, and what to the Duchess ; and that money in *Sir Francis Child's* hands, which had likewise been sequestered,

might be discharged, upon a suggestion, that though Sir *Francis* had given notes payable to the Duchess or order, it was really the money of the Lady *Henrietta*; but both parts of the motion were denied as irregular, the first being too early before the sequestrators were restored, and for the last, it was not proper for the Court to determine the property of the money upon affidavit.

It was then moved that Lady *Henrietta* might come in and be examined as to the money *pro interesse*; but that was denied too, because the sequestrators had not made any return; till they have, it cannot appear to the Court what is sequestered: after their return, any one who claims a title to the thing sequestered, may move to have the same, and be examined *pro interesse*.—From Mr. *Cox's* notes, Lord *Colchester's* MSS.

#### Lord Pelham v. Duchess of Newcastle.

A sum of money in the hands of the banker of a party against whom a sequestration had issued, sequestered. Proceeding for ascertaining the interest of a third person. Power of sequestrators to open boxes, &c.

Lady *Henrietta Holles* moving that she might be admitted by guardian, to be examined *pro interesse suo*, touching the money in Sir *Francis Child's* hands, and other things sequestered, upon process against the Duchess, she was directed to put her suggestions into an order, and to specify what she claimed title to, and how, and that Sir *Francis Child* should give the Plaintiff a copy of the account on which the balance in his hands that was sequestered arose, to the end that the Plaintiff might the better know how to form proper interrogatories.

Serjeant *Hooper*, for the young lady, said, that if a sheriff executed an execution upon goods that did not belong to the Defendant, the party grieved might have his action; but in case of sequestration, all the recompence a person could have, whose goods were wrongfully sequestered, was barely a restitution on proof of his right.

Lord *Chancellor*, as against the Duchess, allowed the sequestrators to open boxes and rooms that were locked, if the keys were denied them; to schedule the goods in them, but to remove nothing from *Powis* house without the special order of the Court.—From Mr. *Cox's* notes, Lord *Colchester's* MSS.

#### Lord Pelham v. Lord Harley.

Proceedings against a sequestrator for abuse of his power.

Mr. *Aislaby*, one of the commissioners of sequestration, being likewise an attorney and agent for Lord *Pelham*, made use of the sequestration and injunction upon it in many instances to compel the tenants of the Duchess's jointure, and the *Cavendish* estate, and of the other estates of the late Duke of *Newcastle*, to attorn and pay their rents to Lord *Pelham's* use; and in several places did the same thing by threats, or remitting them the land tax, or allowing for repairs, where neither were allowed by their leases, and giving them notes to indemnify them, and receipts in full.

Lord *Chancellor*, upon the petition of Lord and Lady *Harley*, complaining (*inter alia*) of this exceeding great abuse of power in Mr. *Aislaby*, declared that the sequestration ought not to be laid on any estate but the Duchess's; and that though the Duchess had possessed herself of the rest, her possession must be taken to be in right of, and the possession of, her infant daughter; that Mr. *Aislaby* having gained possession for the Plaintiff by the methods before mentioned, was a great abuse of the process of the Court; for which reason he directed that he should shew cause the last *Thursday* in term why he should not stand committed, and pay Lord *Harley* his costs; that the sequestration should be discharged, as to all the lands except the Duchess's jointure, and the *Cavendish* estate, in which the tenants should attorn to the sequestrators, and in the other re-attorn to Lord *Harley*; that the profits received by the sequestrators or for Lord *Pelham's* use, should be brought before a Master, and those that arose from the other estates be paid over to Lord *Harley*, subject to the order of the Court. The possession of *Newcastle* house, which was never sequestered, he directed to be delivered to Lord *Harley*, and the goods to be removed, unless Lord *Pelham* agreed to their being delivered over to Lord *Harley* on his giving security; and by consent of both sides to save expense, directed the sequestrators to be discharged out of the three great houses of *Welbeck*, *Nottingham Castle*, and *Boscover*, and one person to be placed in each, by the appointment of the

Master, to take care of the goods sequestered. The evidence-room in *Welbeck*, was by consent to be locked up without inspection, and a key delivered to each party.

Serjeant *Pratt*, and Sir *Peter King*, for Lord *Harley*, cited the case of one *Riddleston*, in *B. R.*, who, upon an erroneous judgment in ejectment, took out an *hab. fac. possessionem*, and extended it as to part, and for the rest only shewed it to the tenants, and by that means obliged them to attorn : the judgment being set aside, the Court awarded restitution of what he had got under the *hab. fac. possessionem* ; he restored those lands where the writ had been executed only, pretending that the tenants attorned voluntarily in the rest ; but the Court compelled him to make an entire restitution, and committed him for his contempt.

Serjeant *Pratt* said that in all cases where the process of the Court was misused to obtain another end than that for which it issued, though that end were otherwise in itself lawful, it was a contempt of the Court, and the course of the law always put things again *in statu quo* ; and he instanced in the case where a man makes use of the process of the Court at *Westminster*, to bring a man within the process of an inferior Court or jurisdiction, that he may serve him with process of that inferior Court.—From Mr. *Cox's* notes, Lord *Colchester's* MSS.

Lord *Pelham v. Duchess of Newcastle.*

Sequestration for non-production of deeds, discharged on payment of costs, the party having been examined, and denied knowledge of them.

After a sequestration had issued against the Defendant by order of the House of Lords, for not complying with the order of the Court, by which she was directed to set forth the deed of 1693, *in hæc verba*, or deliver an attested copy of it, and refer to that in the answer. The sequestrators were forcibly turned out of possession of *Powis House*, and the day before they were to be restored to the possession of it, the Duchess left the two deeds of *January* 1693, in a cupboard in her closet, of which she made an entry in her pocket book, and some time after applied by petition for leave to search the House, which was granted, but to be in the presence of the Master and the Plaintiff. The solicitor *Dummer* (who with auditor *Harly* were the only persons privy to the Duchess's having left the deeds there) was seen in the house and in that closet, after he was told by the Duchess where the deeds were left, and before the public search in the presence of the Master. At that search no deeds could be found, nor were they afterwards. The Duchess disclosed this matter by a further answer, and set forth three abstracts of them, which she insisted was all she could do. She afterwards submitted to be examined upon oath, which she was, and denied her being privy to their being removed, or knowing what was become of them.

*Dummer*, and several others, were examined in open court, but no light could be got from them. The Court, upon examination, was of opinion that they were taken away by somebody with a design to serve the Duchess ; but however afterwards, upon the Duchess producing the abstracts, and submitting to be bound by them, and bringing before a Master a settlement made by her of the *Cavendish* estate to different uses, after the order for sequestration, she having done all now in her power to obey the order for setting forth the deed, though, when it was pronounced and for a long time, she had had the deeds in her custody, the Court discharged the sequestration upon her paying costs, and making a promissory affidavit to produce and discover the deeds, if ever she should discover any thing of them.

Lord *Chancellor* seemed to say that he could not have discharged the sequestration, if the counsel for Lord *Pelham* had not closed with the Duchess's offer to be examined upon oath, and so put the matter into a different method of inquiry.—Lord *Colchester's* MSS.

The Marquess of *Caermarthen*, executor of the Duke of *Leeds*, his grandfather, and *Whitehead*, Plaintiffs *v.* Richard *Hawson*, Defendant. In *Scacc. Mich.* 4 *Geo.* 2, [1730].

Whether a sequestration after decree, is determined by the death of the Defendant ; and Whether copyhold lands are subject to sequestration, *Quære.*

The Plaintiff's bill set forth a sequestration against the Defendant's father, *Rd. Hawson*, for £136, 1s. 4½d., on 23d *January* 1702. The commissioners returned

that they had sequestered, to the use of the Duke, a messuage, orchard, and garden, in *Kirby Moor*, of which *Whitehead* was then in possession, and of which *Rd. Hawson* was then seized in fee, or for a long term of years; and thereupon an order was made, 23d April 1733, that the tenant should pay to the Duke, or to whom he should appoint, the growing rents. The tenant being served with the order attorned, and on the 20th June 1703, the Duke assigned the premises to *Whitehead*, to hold till the decree performed, with a letter of attorney to act as the sequestrators might have done, and receive the rents. *Hawson* neither paid the Duke or the Plaintiff, *Whitehead*, nor had made any satisfaction, and died 1719, intestate and insolvent, the Defendant being his son and heir, who pretending the land to be copyhold, got admitted, and threatened to bring ejectments; so the Plaintiffs pray a revivor of the sequestration and proceeding, and an injunction to quiet *Whitehead's* possession.

*Philip Ward's* argument. The first question is, whether copyhold lands are sequestrable? It is laid down *per* Lord *Nottingham*, Chancellor, in *Coulston v. Gardiner*, *Hill*. 32 & 33 Car. 2; 2 Chan. Cases, 76 (3 Swans. 279), that copyholds may be sequestered; it is true they are not extendible at common law, or by the stat. *West*. 2, c. 18; but that is no reason why a Court of Equity may not do it, which has *potestatem extraordinariam et absolutam*. Courts of Equity have always had power over copyholds, as by the year-books appears; for they can compel lords to admit their tenants.

2d. It was long doubted whether a Court of Equity could sequester after a decree. The first that was granted was in Lord *Coventry's* time, *Sir Thomas Read's* case. (*North*, life of Lord Keeper *Guilford*, see 2 Swans. 73.) Since that time there have been innumerable instances in Chancery; *Hide v. Pett*, 1666, affirmed in parliament.\*

In *curia scacc.* in the case of *Guavas v. Fountain*, it was granted after a decree upon great consideration, 14th June 1687, and has ever since been used without hesitation. (Note: This suit appears to be connected with the great case of *Cook v. Fountain*, a note of which will be inserted in the appendix to the present volume [3 Swans. 585].)

The doubt at the time with the Court was on a sequestration after a decree, for that they said was in the nature of an execution, and that at common law was not leviable till *West*. 2, c. 18; and, therefore, though frequent sequestrations had been before, yet none after a decree; but since then it has been the constant practice of both courts, for otherwise their proceedings would be illusory, if they could not execute them.

The second question is, whether the sequestration determined by the death of the Plaintiff or Defendant? No reason why it should in either case, but suppose it should, surely it may be revived. As to the first I can find no precedent one way or the other.

As to the second, in 1682, *per* Lord *Nottingham*, in the case of *Burdet v. Rockby*, a sequestration in pursuance of a decree, though for a personal duty, shall not determine by the death of the Defendant. 1 Vern. 58. Indeed, *North*, when he was keeper, on a demurrer denied to revive so as to affect the wife's dower. 1 Vern. 118, and would not declare his opinion whether he would revive against the heir; and in 1 Vern. 166, *Paschæ* 1688, he seemed to be of opinion it was not revivable against the heir, and would see precedents; so the point was not determined. But it seems reasonable in this case, there should be an injunction, and the Court would do well to consider and settle the point, which may be as well done here as elsewhere, with less expense and as much authority.

This *Ward* moved the 22d February, and the Court granted an injunction as to the freehold lands, and gave the Defendants leave to proceed in ejectment as to the copyhold; saying they would reserve the determination of this point, whether a sequestration may be revived against the heir of copyhold lands to the hearing of the cause. The difficulties that the Court was under at this time were. 1st. they did not know how they could put the sequestrators in possession, i.e. oblige the lord to admit them; 2dly, if they could, yet they could not deprive the lord of his fine by descent, heriots, &c., on the death of the tenant.

N.B. It seems by the injunction the sequestration as to the freehold land was not determined by the death of the Defendant.—MSS.



\* 1 *Ca. in Cha.* 91, 185 ; 2 *Freem.* 125, 168. The first decree was reversed by the Lords, but the directions accompanying the reversal, in effect reserve the benefit of the sequestration to the Plaintiff, if he should eventually obtain a final decree.

25th November 1667. "Upon hearing of counsel on both parts this day at the bar of this house, upon the petition of *Henry Pettit*, administrator of *Thomas Freeman*, late of *London*, merchant, deceased, against *Laurence Hyde*, complaining of the hard measure he the said petitioner hath, by a decree made in the Court of Chancery, in the year 1661, for £893, 7s. 8d., alleged to be due to the said *Laurence Hyde*, upon an account for brimstone, which decree is grounded upon a certificate of three referees, *videlicet*, Mr. *Reames*, Mr. *Elcock*, and Mr. *Micoe*, all of the said *Laurence Hyde's* own naming ; it appearing to this Court upon the opening of the said cause, that whereas at the first, this matter in question being merchant's accounts, it was referred by the Court of Chancery, with the consent of both parties, to four persons, *videlicet*, Mr. *Rowland Elcock*, Mr. *William Reames*, Mr. *Nicholas Skynner*, and Mr. *Daniel Fairfax*, or any three of them, to hear and finally determine the matters in difference between the said parties ; but if they the said referees could not determine the same, then to certify to the Court of Chancery how they found the same, who certifying two and two apart, the Court of Chancery could ground no order thereon ; and, therefore, in appointing a fifth referee, named Mr. *Micoe*, a person formerly excepted against by the petitioner *Pettit* ; whereupon it being in the power of any three to certify, the two referees formerly named by the Defendant, *Laurence Hyde* and Mr. *Micoe*, certified, without any of the petitioner *Pettit's* referees joining with them ; upon which certificate the decree complained of was grounded ; whereupon the estate of the petitioner *Pettit*, as well copyhold as freehold, was sequestered, and *Laurence Hyde* put into possession thereof, and he committed prisoner to the Fleet, for not obeying the said decree ;

Upon due consideration had of the premises, it is ordered, declared, and adjudged by the lords spiritual and temporal, in parliament assembled, that the said decree be reversed and made void, and the same is hereby reversed and made void ; and that the said *Henry Pettit* be released and discharged of his imprisonment ; and the said sequestration for not obeying the said decree, be taken off and discharged, and *Henry Pettit* put into such possession thereof as he was in before the said sequestration ; for that the cause of the said complaint and grievance of the petitioner did arise from nominating the said Mr. *Micoe* to be a referee : and it is hereby further ordered, declared, and adjudged, that the said cause and proceedings thereupon, and possession of the land of *Henry Pettit*, shall stand in *statu quo*, and as they were before the order of nomination of the said Mr. *Micoe* to be a referee ; and the Lord Keeper of the Great Seal is hereby authorised and required to proceed in the said cause accordingly : and it is hereby further ordered and decreed, that in case, upon the determination of the said cause, a decree shall be made on the behalf of the said *Laurence Hyde*, that the lands and estate of the said petitioner which have been sequestered, shall be liable for satisfaction thereof, as they should have been in case the said decree hereby reversed had stood, and the sequestration had continued : and as to the rest of the petitioner's complaint, their lordships do not think fit to proceed thereupon, the petitioner having a remedy in an ordinary course of law, if there shall appear cause of relief."—(*Lords' Journals*, xiii. 147.)

*Bird v. Littlehales.* 26th February 1743.

See *Coulston v. Gardiner*, 3 *Swans.* 279.—Proceedings under a sequestration for non-performance of a decree, after an assignment by the Defendant for valuable consideration.

In this case Lord Chancellor *Hardwicke* said, that although it was new to him and the register, whether a writ of injunction should follow a sequestration, and after that a writ of assistance, yet upon looking into his manuscripts he found a precedent of such a thing, and was now contented that a writ of assistance should go ; that where the possession of land has been in the Defendant at the time of the decree, and afterwards has been changed, and possession delivered to a third person, in order to avoid or frustrate the decree, though for a personal demand, yet the Court will enforce its sequestration, and oblige the person in possession to come before

the Court, and be examined *pro interesse suo*; such fraudulent conveyances have been made, and if the sequestration was to be checked by that, it would be an execution of no effect. His Lordship made a distinction, that if a bill was brought for land, and the party sells it before decree for a valuable consideration, and afterwards there is a decree for the Plaintiff for the same land, the sequestration will overreach the purchase, though for valuable consideration, because it was made upon a *lis pendens*; much more will such purchase be overturned if made after the decree pronounced: but if a bill is only for a personal demand, and the Defendant sells his land for valuable consideration during the suit, or even after the decree pronounced, it will be out of the reach of a sequestration; but if such purchase was with intent to avoid the decree for the personal demand, the sequestration shall defeat it. Here is an affidavit that this purchase, though after decree, was for money; and, therefore, let the writ of assistance go without charging the possession till the purchaser comes before the Court to be examined *pro interesse suo*; then it will be seen whether the purchase was for money and *bona fide*. MS.

The bill prayed the performance of an agreement by the Defendant, the mortgagor, to pay to the Plaintiff, the assignee of the mortgagee, a sum of £340 for an assignment of the mortgage; the decree directed that the Defendant should pay £340 and interest, and that the Plaintiff should execute a general release, and assign the mortgage to the Defendant. 10th March 1742.—Reg. Lib. 1741, fol. 317.

A sequestration having been issued for non-performance of the decree, and the Defendant refusing to deliver possession of the house mortgaged to the sequestrators. on the 18th of February 1743, it was ordered, "that an injunction do issue against the Defendant, *J. Littlehales*, to enjoin the said Defendant to cause possession of the said house and the premises thereunto belonging to be delivered to the said sequestrators."—Reg. Lib. A. 1742, fol. 177.

26th February 1743. On motion for a writ of assistance, it being alleged by the counsel for the Defendant, that he had assigned the house and goods there for a valuable consideration by deed of the 8th of December 1742, to Mr. *Hughes*, it was ordered that *Hughes* should come in to be examined *pro interesse suo*, unless he showed cause to the contrary on the next seal, and the Defendant was within two days to give to the Plaintiff notice of the place of abode of *Hughes*.—Reg. Lib. A. 1742, fol. 187.

19th March 1743. On affidavit that *Hughes* could not be found to be served with the last order, a writ of assistance was ordered.—Reg. Lib. A. 1743, fol. 235.

#### Hamblyn v. Ley. 18th October 1743.

1 *Dick*, 94, cit. 4 *Ves.* 747. See *Coulston v. Gardiner*, 3 *Swans.* 279.—A conveyance established against a sequestration, and the sequestrators who had obtained possession, ordered to account to the alienee for rents and profits. Another conveyance rescinded, but the alienee declared entitled to be reimbursed from the subsequent rents, the balance of payments for interest, taxes, and repairs.

In this cause on the 6th July 1738, the plaintiff obtained an order for the Defendant *Ley*, to pay the sum of £300 into the bank: on the 13th of July following, *Ley* being seized of an estate in *Devonshire*, by lease and release dated the said 13th July, reciting that the premises were in mortgage for the term of 1000 years, in consideration of a bond given for £600, conveyed the equity of redemption to *Rosdue*, his nephew, in fee. No previous treaty appeared; and *Rosdue*, by virtue of this conveyance, entered, received rent, and paid the interest of the mortgage and land tax, but refused to pay the poor rates, under pretence that he was not yet in possession. On the bond no interest or principal appeared to have been paid: nor did it appear how the bond was conditioned, on what terms payable, or any thing in regard to it, save that it was proved that a bond was given.

On the 9th of December following, after the obtaining of the first order, and before the obtaining the second, the Defendant *Ley* being possessed of a mortgage term of 900 years, under an assignment of some other lands in the same county, at a place called *Swincomb*, in consideration that he stood indebted in 1728 to his two sisters, *Joan* and *Mary Ley*, in the sum of £220, and in consideration of their undertaking to discharge another debt of £180 due on bond in 1729, and another of £40 by bond in the same year, assigned the said mortgage term to his sisters; by virtue of which

they entered, and took up the two bonds of £180 and £40, the first of which they paid off, and for the other they gave a new bond of their own.

On the 6th of *April* 1739, a sequestration issued, by virtue of which both the estates conveyed as above were sequestered. *Rosdne* and *Joan* and *Mary Ley* came in to be examined before the master *pro interesse suo*; and on the Master's report, exceptions were taken by the Plaintiff, and the first question was, whether this conveyance to *Rosdne* could be considered as made *bona fide*, and for a valuable consideration; secondly, whether the conveyance to the examinants, *Joan* and *Mary*, was to be considered as fraudulent?

And in respect to the first, the *Lord Chancellor* [Hardwicke] clearly held that it was not a *bona fide* sale, as there appeared no treaty in the case, no consideration but a bond, which it is odd a man in such distressed circumstances as the Defendant appears to have been in, should part with this estate for, as the mortgagee was not in possession. Had the money been advanced by *Rosdne* by way of mortgage, it would not have defeated the sequestration, if the collusion appeared so strong as to shew the fraudulent intent of *Ley*, as it is admitted it does. The present purchaser as his nephew, in point of evidence and conscience, is equally affected thereby, since in another law such an one is reckoned as conjunct and privy to all transactions.

As to his payment of interest of the mortgages and taxes, no weight can be laid on that, because, supposing him to be only a trustee, it was natural to do as much. A strong circumstance is, that he refused to pay the poor rates, under pretence of not being in possession, at a time when he had in fact the conveyance made to him, and had entered into possession. Upon the whole he is to be considered in no other light than that of a trustee; and as to the objection that he may be liable on account of his bond, he may be relieved as to that in this court; and what he may have paid for interest and taxes, he must be allowed again.

As to the second question, it is, whether the commissioners have a right to present possession under the sequestration against the examinants *Joan* and *Mary Ley*? It is not made part of the exception to the report, that the debt of £220 is in anywise exceptionable; but I must inquire into this in the same manner on the report, as on a bill brought by a subsequent purchaser; and, therefore, as the parties were at liberty to proceed on the report without any exceptions, so they may offer any proof of this sort now if they please. But it is certain, that any person foreseeing a judgment at common law, or a sequestration in this court, may give a preference.

*Note*: the sequestrators had been in possession ever since *April* 1739, and were so at this time; therefore the register was directed to search into former orders, given by the Court, on reports of the Master upon examination of the parties *pro interesse suo*, where the sequestrators have been in possession. On the morrow, the register produced two, but neither much to the purpose. The direction was in the present case as follows; therefore, upon the Master's report, let it be referred to the Master, to take an account of what has been paid by *Rosdne* for interest to the mortgagee, and also for taxes and repairs; and to inquire whether he received any rents and profits from the premises; and if it shall be found that he did, then let what he so paid for interest, taxes, and repairs, be allowed thereout, as far as the same will extend; but if the Master shall find that he received none, or not sufficient to answer what he so paid for interest, &c., then let the commissioners named in the commission of sequestration reimburse the said *Rosdne* the balance of what shall be found to be paid by *Rosdne*, out of the first profits which shall be received by them; and as to the premises mentioned in the second exception, comprised in the conveyance to *Mary* and *Joan Ley*, let the sequestrators deliver the possession of it to the two sisters, who claimed it before the Master, and let the commissioners come to an account for the rents, &c., of the said estate, since the time of their possession, and pay the balance over to the examinants *Joan* and *Mary Ley* (*Walker v. Bell*, 2 *Madd.* 21); and let the Plaintiff be at liberty to apply to the Court touching the surplus over and above what is justly due on the deed of trust mentioned in the Master's report.—Reg. Lib. A. 1742, fol. 722.

*Note*: it appeared, from the case of *Fossett v. Fothergill* (cit. 4 *Ves.* 747), 26th December 1705, where Lord *Cowper* declared the commissioners of sequestration might redeem a mortgage, that this assignment by way of security to the two sisters, was redeemable by the sequestrators; but had it been directed that the exceptant should be at liberty to apply to the Court, touching the redemption of

the premises conveyed by way of security to the two sisters, the sisters would not have been able to have disposed of the said term by way of sale or mortgage; which was agreed, and therefore directed as above. The Chancellor would not divide the deposit, but let the Plaintiff take it.—MS.

*Neale v. Bealing.* 19th January 1744.

See *Ray v. —*, the next case.—Under a sequestration for non-payment of money, the sequestrators may, on a motion with notice (not on a motion of course), be empowered to let real estate.

A motion of course was made for sequestrators to set and let.

The *Lord Chancellor* [Hardwicke].

I cannot allow this without notice to the other side; for though it is a motion of course to obtain liberty for a receiver to set and let, and now most orders are drawn up with such express power in them, yet the reason of both of them is that he is appointed by the Court for the management of the estate; but sequestrators have but precarious or temporary powers to levy a debt, and the sequestration may be taken off to-morrow, or so soon as the demand is discharged.—MSS.

“Upon opening, &c., it was alleged that a commission of sequestration having issued in this cause, against the Defendant *Ann Bealing*, who was the administrator of *Richard Bealing*, deceased, for non-payment of the sum of £235, 1s. 11d. to the Plaintiff, directed to *H. B. &c.*, empowering three or two of them to sequester the rents and profits of the real estate, and also the goods and chattels and personal estate of the said *Ann Bealing*, until she paid the said Plaintiff the said £235, 1s. 11d., cleared her contempt, and the Court made other order to the contrary; that by virtue of the said writ, the said sequestrators have entered upon and are in receipt of the rents and profits of the real estate of the said *Ann Bealing*, which consists of divers messuages or tenements in or near *New Street, Covent Garden*; that some of the tenants of the estate in question have quitted possession, and others have given notice of quitting upon the expiration of their leases, unless they can come to a new agreement; that in regard the sequestrators cannot let the said estate without an order for that purpose, it was therefore prayed that the said sequestrators, three or two of them, may be at liberty to set and let the said estate as there shall be occasion, with the approbation of Mr. *Kynaston*, one, &c., which, upon hearing of Mr. *Green* of counsel for Mr. *H. T.* the mortgagee, and upon reading an affidavit of notice of this motion, is ordered accordingly, 23d March 1744.”—Reg. Lib. B. 1744, fol. 214. (So *Harvey v. Harvey*, 3 Rep. in Cha. 49.)

*Ray v. —*. 7th July 1784.

See *Neale v. Bealing*, the preceding case.—Sequestrators on *mesne process* will not be ordered to make leases.

Mr. *Selwyn* moved that the sequestrators upon *mesne process* might be ordered to make leases of the premises of which they were in possession.

But the *Lord Chancellor* [Thurlow] refused it, and said there never was an order for sequestrators to let and set as receivers.—From Mr. *Romilly's* notes, *Lord Colchester's MSS.*

*Rowley v. Ridley.* 13th January 1784.

2 Dick. 622; 4 Ves. 738–740.—A sequestration to compel answer, may be executed, but no order will be made for the tenants to attorn till the commission is returned.

Bill for discovery, Defendant appeared, but did not put in any answer; Plaintiff went on with process of contempt till he obtained a sequestration. *Mitford* then (18th November 1783), moved, as a motion of course, that the tenants of the estate might attorn to the sequestrators, which the Court granted; but when the register was to draw up the order, he objected to it as irregular, under a notion that a sequestration to compel an answer could not be executed, but that the Plaintiff must go on with his process of contempt, and take the bill *pro confesso*.

*Mitford* moved it again this day. *Lord Chancellor* took till the next day to consider of it.

*Lord Chancellor* [Thurlow]. I do not see any foundation either in the reason of the thing, or in the history of the Court, for supposing that a sequestration to compel

an appearance or answer should not be executed. If it were not, the justice of the Court would be in many cases disappointed. The bill, it is said, might be taken *pro confesso*; but where a bill is filed only for a discovery, as in the present case, it is no advantage to take the bill *pro confesso*. So in a bill for an account, where the decree to be obtained is a decree *ad computandum*, the Plaintiff having it in his power to take a bill *pro confesso*, is no reason why a sequestration should not be executed.

Neither does it appear to me, in the history of this court, or of the exchequer, it has ever been looked upon as impossible that a sequestration on mesne process should be carried into execution. In *Desbrow v. Commie*, which is reported *Bunb.* 272, and 1 *Barn.* 212, but best by *Bunbury*, who was counsel in it, it appears that sequestration on mesne process may be executed. Upon this first point, therefore, I am of opinion that a sequestration, though it issue upon mesne process, is capable of being executed.

This brings me to the second question, namely, how it shall be executed? It has been compared to the case of a receiver appointed by the Court; and upon that idea a motion has been made for the tenants to attorn, which is a special motion; and notice ought to have been given to the tenants. But there is great difference between a sequestration, which is a writ of process, and an order for a receiver, which is an order of the Court. *Tothill*, 13 *El.* Sequestration.

Upon the whole, I think the motion cannot be granted, as being premature; the commission should have been returned before the motion was made. The proper course, I should think, would be, after the commission was returned, to give the tenants notice to pay. However, the present motion cannot be granted till the return appears to the Court upon record.

*Note*: the other cases upon sequestrations which were cited, are *Maynard v. Pomfret*, 3 *Atk.* 468. *Hawkins v. Crook*, 3 *Atk.* 594. *Butler v. Rashfield*, 3 *Atk.* 740. *Davis v. Davis*, 2 *Atk.* 23; see *Wilcocks v. Wilcocks*, *Ambl.* 421.—From *Mr. Romilly's* notes. *Lord Colchester's MSS.*

*Rowley v. Ridley.* 9th December 1785.

See *Attorney General v. The Mayor of Coventry*, 3 *Swans.* 311.—Order for leave to exhibit interrogatories to falsify examination, *pro interesse suo*, obtained by motion of course.

Before the *Lord Chancellor* [Thurlow]. An order having been obtained for the examination of certain persons before the Master *pro interesse suo*, it was now moved for leave to exhibit interrogatories before the Master to falsify their examination; and it was so ordered without notice as of course.—*Mr. Coz's MSS.*

*Cadell v. Smith.* 6th August 1791.

3 *Bro. C. C.* 362.—Sequestrators, upon a decretal order, have the same power to sell as on a final decree.

The case was, an order made upon the Defendant (on reading his answer) to replace stock; process of contempt to sequestration, and the sequestrators seized. A motion was made to empower them to sell.

The *Chancellor* [Thurlow] at the third seal doubted whether this could be done, upon what he considered as an interlocutory order.

But at the fourth seal, *Richards* produced a precedent, and the *Chancellor* agreed the practice to be, that sequestrators on an interlocutory order had equal power to sell as upon a final decree.—*Lord Colchester's MSS.*

On the 19th of November 1670, the House of Lords ordered a reference to the committee of privileges, "to consider of the proceedings in the Court of Chancery, upon sequestration of estates, and what law there is to warrant such proceedings, and to make report thereof unto the House." *Lords' Journals*, xii. 368. On the 18th of March following, the Earl of *Berks* reported that the committee had received some precedents of sequestrations of estates by the Court of Chancery since the 32d year of Queen *Elizabeth*, from the registers of that court: "that their lordships had heard the judges upon the said precedents, and received their opinion thereupon, which is as follows: The opinion of the judges after mentioned, *videlicet*, the lord chief justice of the Common Pleas, Justice *Tirrel*, Baron *Turner*, Justice *Archer*, Justice *Raynsford*, Justice *Moreton*, Justice *Wyld*, Baron *Littleton*, Baron *Wyndham*,

in observance of the order of their lordships, delivered in writing by the said chief justice, with consent of the said other judges. They know no positive law by statute or otherwise, nor any judgment by any court of law, which doth warrant the proceeding by sequestration of real and personal estates for disobeying decrees made in Chancery upon process of subpoena; and they find, by the opinion of some judges in several times in the ancient law reports, that there was no other remedy for disobeying such decrees but imprisonment of the persons disobeying for the contempt; but they find no full resolution by any court of law of that point. They conceive the Court of Chancery, and proceedings therein upon equitable matters, to be very ancient; and that it belongs not to the judges in the King's courts of law, to determine whether any decrees made in Chancery in matters of equity, or the proceeding in equity in execution of such decrees, be unjust, unless such decrees and proceedings be contrary to the statutes or common law. They know not, nor have time to examine, what precedents may be found concerning all the ancient course and custom of proceeding in the Chancery in matters of equity; but are of opinion, that the precedents since 32d of *Elizabeth*, delivered to them by their lordships to consider of, be of so late times, that, without other authority, they alone are not sufficient to prove a custom of sequestering real and personal estates for disobeying the decrees of that court."—Id. 463.

On the 23d of *March*, the House ordered that the farther debate of the report of the committee should be resumed on the 30th inst.; "at which time the judges are to be heard to explain the opinion delivered by them to the committee for privileges concerning this business."—Id. 468.

7th *April*. Upon consideration of the report, the committee were ordered to consider further of this business, and the debate had thereupon, and report their opinions what is fit to be done thereupon unto the house.—Id. 481.

No account has been found of any farther proceedings.

*In Chancery. Anon. July 2d, 1747.*

1 P. W. 306.—The Master cannot inquire into the property in chattels sequestered, without an order.

By the *Lord Chancellor* [Hardwicke]. Where a party's personal estate is taken in sequestration, and a third person claims property in part thereof, the Master cannot inquire into the matter of property, except by an order (on motion), for examining parties and witnesses on interrogatories.—MSS.

The Attorney General v. The Mayor of Coventry.

See *Rowley v. Ridley*, 3 Swans. 308.—Examination *pro interesse suo*, is conclusive if not replied to.

Mr. *Collings* had been examined before the Master *pro interesse*, and by his examination made a title to the thing in question; instead of replying, the Plaintiffs brought the matter before the Court, upon the exception to the report; and it was insisted for *Collings*, and ruled, that they were concluded by the examination, not having replied to it (as they ought to have done, and put him upon the proof of it), as much as if they had set down a cause upon bill and answer. The rule seems to be the same in all examinations before a Master.—From Mr. *Cox's* MSS.

[312] BRANDON v. BRANDON. June 17, 21, July 14, 1819.

[S. C. 2 Wils. Ch. 14. See *Hinckley v. Maclarens*, 1832, 1 My. & K. 31; *Withy v. Mangles*, 1843, 10 Cl. & F. 251.]

Under a marriage settlement, personal estate of the wife was vested in trustees, upon trust to assign £1000 stock to the husband, and in case the wife should die during the life of the husband without issue, to transfer one moiety of the remainder to the husband, and the other to the nearest and next of kin of the wife in equal shares, and the husband covenanted that if the wife should die in her lifetime without leaving issue to survive her 30 days, he would within three months after her decease, transfer £500 stock to the trustees, for the sole use and property of her

nearest and next of kin ; on the death of the wife without issue during her husband's life, her brother was declared entitled to a moiety of the trust fund in exclusion of nephews and nieces ; and the husband having become bankrupt before the death of the wife, his assignees are entitled to his moiety of the trust fund, without deduction of the sum due by virtue of his covenant, which did not create a debt proveable under his commission.

By a settlement dated 23d October 1787, made previously to the marriage of *Abraham Brandon* and *Abigail Brandon* (both of the Jewish religion), reciting among other things, that *Abigail Brandon* was, under the will of her late mother, entitled to a considerable part of her estate and effects, she assigned the same to *Jacob Israel Brandon*, *Gabriel Israel Brandon*, *Raphael Brandon*, and *Daniel Brandon*, upon trust after the solemnization of the marriage, to assign and transfer £1000 3 per Cent. consolidated Bank Annuities, for her marriage portion to *Abraham Brandon*, and to invest the remainder in government securities in their names, and to permit *Abraham Brandon* to receive the dividends for the joint lives of him and *Abigail Brandon*, and after her decease, in case *Abraham Brandon* should survive her, and there should be issue of the marriage, in trust for the children of the marriage in manner therein mentioned ; and in case there should be no issue of the marriage, in trust to transfer one moiety of the trust stock to *Abraham Brandon*, surviving her as aforesaid, and to transfer the other moiety unto the nearest and next of kin of *Abigail Brandon*, in equal shares among them. The settlement then provided that every other sum of money to which *Abigail Brandon* then was or should become entitled, should be paid to the trustees upon the same trusts as the other settled property ; and it contained a covenant on the part of *Abraham Brandon*, that in case *Abigail Brandon* should die after the marriage, in his life time, without leaving issue to survive her 30 days, *Abraham Brandon* should within three months after her decease, transfer and pay over £500 3 per Cent. consolidated Bank Annuities, to the trustees, for the sole [313] use and property of the nearest and next of kin of *Abigail Brandon*.

The sum to which *Abigail Brandon* became entitled under her mother's will, amounted to £2000 3 per Cent. consolidated Bank Annuities, which was transferred by the executors to the trustees of the settlement, who after the marriage paid £1000 Consols, part of it, to *Abraham Brandon*, and retained the remainder in their names upon the trusts of the settlement. In July 1793, *Abraham Brandon* became bankrupt.

Sometime after the marriage, a legacy of £1000 was bequeathed to *Abigail Brandon*, by an uncle, *Jacob Israel Brandon*, and paid by his executors to the trustees, and invested by them in the purchase of stock upon the trusts of the settlement.

*Abigail Brandon* died in February 1805, without issue, leaving her husband, and *Jacob Da Fonseca Brandon*, the Plaintiff, her only brother, surviving her ; she also left several nephews and nieces, the children of two deceased sisters.

The bill was filed by *Jacob Da Fonseca Brandon*, against these nephews and nieces, the trustees of the settlement, the executors of *Jacob Israel Brandon*, and the assignees of *Abraham*, stating that according to the Jewish law, he was the sole, next, and nearest of kin to *Abigail Brandon*, and claiming in that character to be intitled to one moiety of the funds included in the settlements, and also to the sum of £500 covenanted to be paid by *Abraham Brandon* in the event of his wife dying without issue ; the bill prayed that the latter sum might be retained out of *Abraham Brandon's* moiety of the trust fund.

[314] All the parties to the settlement were Jews. The Plaintiff produced the evidence of some Rabbi, that by the Jewish law, on the death of a Jew without issue, leaving a brother and the children of deceased sisters, the whole of his personal property devolves upon the brother, as the next of kin. (*Franks v. Martin*, 1 Eden, 309.)

Sir Arthur Piggot, and Mr. Sidebottom, for the Plaintiff. The phrase "next of kin" is a definite description, denoting the first degree of consanguinity ; to comprehend within it unequal degrees, would be to confound propinquity and representation. The description, known to the law long before the statute of distributions, occurs in stat. 21 H. 8, c. 5, s. 3, and under the provision of that clause, directing the ordinary to grant probate to the widow or next of kin of the deceased, representa-

tion is not admitted, but the grandfather is entitled after brothers, and in preference to uncles or nephews, *Blackborough v. Davis* (12 Mod. 615; 1 P. W. 41: *Ex temp. Holt*, 43; 1 Lord Raym. 684; 1 Salk. 38, 251; *Com.*, 96, 108). Before the statute of distribution (22 & 23 Car. 2, c. 10) no doubt could have been entertained on the effect of a gift to the next of kin; that statute introduced the title by representation, but neither that nor the supplemental statute, 1 Jac. 2, c. 17, vary the import of those terms. The decision in *Worthington v. Statham* (reported as an anonymous case, 1 Madd. 36), is conclusive in the present case; the words in equal degree, neither extending nor restricting the description, next of kin.

[315] The Court resorts to the statute of distribution for a construction of general terms of relationship, only where the terms are so indefinite, that without that construction the gift would be void; *Thomas v. Hole* (*Ca. temp. Talb.* 251), *Whithorne v. Harris* (2 Ves. Sen. 527), *Edger v. Salisbury* (*Amb.* 70), *Brunsdon v. Woodredge* (*Amb.* 507), *Isaac v. Defrier* (*Amb.* 595; 17 Ves. 373, n.), *Green v. Howard* (1 Br. C. C. 31).

The single authority in support of the Defendant's claim, is *Phillips v. Garth* (3 Bro. C. C. 64). But the assertion of Justice Buller, that the stat. 1 Jac. 2, c. 17, has given a new sense to the terms next of kin, is manifestly erroneous; the design of the clause in which those terms occur (s. 6), was merely to restrict the remedies provided by the former stat. 22 & 23 Car. 2, c. 10, to the persons entitled to distribution under that statute, and the terms are employed as descriptive of those persons, though not strictly next of kin; the widow of an intestate is, within the exception of that clause, entitled to distribution; and it is settled that she is not one of her husband's next of kin, *Garrick v. Lord Camden* (14 Ves. 372), *Bailey v. Wright* (18 Ves. 49. 1 Swans. 39). The case of *Phillips v. Garth*, terminated by compromise; and the doctrine there expressed cannot be maintained. *Marsh v. Marsh* (1 Bro. C. C. 293), the observations of Lord Eldon, in *Garrick v. Lord Camden* (14 Ves. 385), and *Smith v. Campbell* (*Coop.* 275); a strong authority for the present Plaintiff.

The express intention of the parties to the settlement, was distribution in equal shares; that intention will be [316] frustrated by the application of the doctrine of representation, a doctrine not found in the Pentateuch.

On the second question, the sum of £500 which the husband covenanted to transfer, ought to be retained out of his share: had he not become bankrupt, the Court would not have compelled the trustees to assign, nor suffered him to possess the fund, without performing his covenant. He is a purchaser, and one of the considerations is his covenant; the wife, therefore, as a vendor, is entitled to a lien for enforcing that covenant. His assignees take his interest, subject to all equities affecting him, and subject therefore to this equitable right to satisfaction for the non-performance of his obligation, whether in the form of lien, or set off, or mutual credit; a present debt payable *in futuro* may be the subject of set off, *Jeffer v. Wood* (2 P. W. 128), *Atkinson v. Elliott* (7 T. R. 378), *Ex parte Boyle* (*Cooke, B. L.* 596).

Mr. Shadwell, for the trustees.

Mr. Wetherell, and Mr. Wyatt, for the nephews and nieces of *Abigail Brandon*. The question must be decided by the law of this country, not by the Jewish law. The parties were domiciled in *England*, the contract was made, and the property is situated here. The case, therefore, presents no *conflictus legum*; the *lex domicilii*, the *lex loci contractus*, and the *lex loci rei sitæ*, are all the same. The law of *England* is the only law in question. *Brodie v. Barry* (2 Ves. & Beames, 127), and many other cases.

[317] In the law of *England*, the terms next of kin are a technical description of a class ascertained by the statutes of distribution; the class of civil, as distinguished from natural kindred, *Phillips v. Garth*. The decision in *Worthington v. Statham*, which is supported by *Wimbles v. Pitcher* (12 Ves. 433), proceeded solely on the words, "in equal degree," which exclude the doctrine of representation.

Mr. Heald, and Mr. Teed, for the assignees of *Abraham Brandon*. The assignees are entitled to a moiety of the trust fund, and no deduction or proof can be made in respect of the bankrupts' covenant. His right to a moiety vested immediately on the death of *Abigail Brandon*; his obligation was contingent, and could not become absolute until three months after that event.

The Master of the Rolls [Sir Wm. Grant]. On the first question, whether the



Plaintiff, the only brother of *Abigail Brandon*, is entitled exclusively, or whether the nephews and nieces have a right to participate, I see no reason for suspending my opinion. The terms of the settlement on which the question arises, are, "nearest and next of kin." They occur twice, and in the first passage they are followed by the words, "in equal shares among them." Those words, however, afford no assistance in resolving the difficulty, since either mode of construction is consistent with a plurality of claimants. The question is, whether the property belongs to the persons who are next of kin, according to the rule and measure established by the statutes of [318] distribution, or to those who are next of kin, according to a more strict and natural sense?

To consider the question without reference to authorities. In the construction of deeds, the first object is to ascertain the meaning of the parties; and if the words are explicit, they must prevail. The words "nearest and next of kin," are perfectly exempt from ambiguity, and in their general sense unquestionably denote the persons nearest in proximity of consanguinity. The present contest is between the brother who undoubtedly answers that description, and persons a degree more remote; and it is to be inquired whether the contest extends the import of the words next of kin? Were this a new case, the words are sufficiently explicit to decide it; the person who without ambiguity answers the description, ought not to be excluded by persons not within the terms.

The argument for the nephews and nieces is, that though not natural next of kin, they are admitted in that character under the statute of distribution. But no evidence exists that the parties intended to refer to the statute. The statute clearly adverts to two classes, next of kin in equal degree, and next of kin by right of representation; not confounding, but expressly distinguishing them. It is true that the phrase next of kin has long acquired a technical sense; and that on a reference to the Master to inquire who are the next of kin of an individual deceased, it is unnecessary to add a direction for including those who claim by representation; and if the import of words has been fixed by a technical rule, that rule should not be infringed. The question therefore is, have the authorities established a rule on this subject?

[319] The case of *Phillips v. Garth* (3 Bro. C. C. 64), is directly in point; and if that case had been followed, I should have been unwilling to contradict it. But it appears that the doctrine of Justice Buller was not approved by Lord Thurlow, and the case ended in a compromise. In *Garrick v. Lord Camden* (14 Ves. 385), the present Lord Chancellor declared that he had always entertained doubts on the doctrine there expressed; and in *Smith v. Campbell* (Coop. 275), the late Master of the Rolls, putting the very case now before the Court, adds, that he should have decided in favour of the brother. That opinion was uttered after a review of all the authorities, and affords the third instance of a judicial disapprobation of the doctrine of Justice Buller.

In many cases indeed, the Court has construed the word "relations," in a will by reference to the statute of distribution; as in *Thomas v. Hole* (Ca. Temp. Talb. 251), *Green v. Howard* (1 Bro. C. C. 31), *Widmore v. Woodroffe* (Amb. 636), *Whithorne v. Harris* (2 Ves. Sen. 527), *Isaac v. Defrier* (Amb. 595; 17 Ves. 373, n.); and in *Edge v. Salisbury*, (1) the words "nearest relations," received the same construction. But it has been properly observed, that this rule of construction is founded in convenience [320] alone; the Court being compelled to reduce words, in their natural sense indefinite, to some practical meaning.

[321] The word "family" has for the same reason received the like construction (*Cruwys v. Colman*, 9 Ves. 319), and with a like exception of the husband and wife, and therefore not precisely conformable to the provisions of the statute.

[322] Notwithstanding this long line of decisions, the late Master of the Rolls, in *Smith v. Campbell*, thought that he was not prevented by authority from construing a [323] gift to "nearest surviving relations," in favour of brothers and sisters, to the exclusion of nephews and nieces. The words of the present instrument are at least equally [324] definite. The same conclusion is supported by *Wimbles v. Pitcher* (12 Ves. 433), and *Worthington v. Statham* (1 Madd. 36).

On the first question, I am therefore of opinion, that the words of the settlement are too explicit and definite to require or admit for their construction reference to

the statute, and that the weight of authority is against the doctrine of *Phillips v. Garth*. The Plaintiff is therefore exclusively entitled to a moiety of the trust fund.

The second question I shall not decide without further consideration, and reference to authorities.

*July 14. The Master of the Rolls.* On the first question in this case, I retain the opinion which I have expressed, that the Plaintiff is exclusively entitled under the words "nearest and next of kin." The question here arises not on an intestacy, but on the construction of a deed; even in a case of intestacy the statute of distribution would afford a rule, since it has been expressly enacted that that statute shall not extend to the [325] estates of *femes covert* (29 *Car. 2, c. 3, s. 25*); and in the division of this property of a *feme covert*, the Court therefore could not resort to the statute as a guide.

The next question which involves more difficulty, is, whether the trustees, or the Plaintiff as their *cestui que trust*, are entitled to deduct the sum of £500 stock due from *Abraham Brandon* under his covenant, from his moiety of the trust fund?

In the event of *Abigail Brandon's* death during the life of her husband without issue, which occurred in *February* 1815, the settlement directs the trustees to transfer a moiety of the trust fund to *Abraham Brandon*; and he, having received £1000 on the marriage, covenanted on the same event of the death of *Abigail Brandon* in the circumstances mentioned, to transfer to the same trustees £500 stock, in trust for her next of kin. *Abraham Brandon* having become bankrupt in 1793, his assignees now claim his moiety of the trust fund; while on the other hand, the Plaintiff and the trustees insist that they are entitled to deduct from that moiety the sum of £500 stock, either on the principle of mutual debt and credit, or of lien, or as having an equitable right to prevent his assignees receiving all that was due to him under the settlement, until they have paid all which, by the same deed, became due from him.

The interest of the bankrupt in the property was at the time of the bankruptcy contingent, and not reduced to certainty until 22 years after that event, by the death of his wife; but that contingent interest, such as it was, and all the bankrupt's right and possibility, was on the bankruptcy transferred to his assignees; they became [326] eventually entitled to it as their absolute property, and the trustees became trustees for them. The fund thus acquired was derived, not from the next of kin of *Abigail Brandon*, but from herself, as a part of her estate purchased by the marriage. On the other hand, the debt claimed by the trustees is due solely on the personal covenant of *Abraham Brandon*, and in no other manner secured. It was, therefore, on his part, substantially a contract with his wife before marriage, in consideration of the marriage and the property derived under it, to pay the sum of £500 stock in a specified event.

The first question is, whether the debt created by this covenant, was provable under the commission against *Abraham Brandon*? Clearly not. The debt had no existence at the date of the bankruptcy; it was then matter of contingency whether any debt would ever arise. Is it then a debt which can be set off under the statute? (5 *Geo. 2, c. 30, s. 28*.) I am of opinion, that it is not. In order to be within the operation of that statute, the debt must not be contingent; it must be a debt subsisting at the time of the bankruptcy. Here no debt existed until more than 20 years after that event. This is not a case of mutual debt and credit; here is no credit in any sense of that term, nor any mutual debt between the same parties. The trust fund, a moiety of which was given to the husband, moved from the wife; there is no mutual debt or credit with her; but her nominee or next of kin, who made no advance and entered into no contract, was eventually to become entitled to the sum in question.

Is there then any equity for charging this debt upon the fund? I think not. No one is liable to pay this debt but the bankrupt. It is his debt, arising since his [327] bankruptcy, and not provable under his commission. There is no ground for charging his debt on a fund belonging to others. The trust fund is vested in his assignees, and they are not, by any statute or equity, subject to the payment of this sum.

If there is any injustice in the case, it arises from the omission in the settlement to create a lien on the fund for this contingent debt, but no lien can be here raised by implication, nor is there any equity for charging the property of others with

the debt of the bankrupt. To set off one against the other, would be to confound distinct rights.

For these reasons I am of opinion that the claims cannot be blended. The sum due from *Abraham Brandon*, can neither be proved under his commission, nor deducted from the sum due to his assignees under the settlement.

"His honor doth declare that the Plaintiff, as the sole next of kin of *Abigail Brandon*, deceased, is, under the settlement and will above mentioned, entitled to one moiety of the said several funds, and the accumulations thereof, since the decease of the said *Abigail Brandon*, until the transfer; and that the Defendant, *Abraham Brandon*, having become entitled in like manner to the other moiety thereof, the Defendants his assignees are entitled to such moiety; and it is ordered that it be referred to Mr. *Stephen* one, &c., to tax, as between solicitor and client, all parties their costs of this suit," &c.—Reg. Lib. B. 1818, fol. 2052–2054.

(1) *Amb.* 70. See in addition to the cases cited, *Carr v. Bedford*, 2 *Rep. in Cha.* 77. *Griffith v. Jones*, 2 *Rep. in Cha.* 179; 2 *Freem.* 96. *Jones v. Beale*, 2 *Vern.* 381; *Anon.* 1 *P. W.* 327. *Roach v. Hammond*, *Prec. in Cha.* 401. *Attorney General v. Buckland*, cited *Amb.* 71; 1 *Ves. Sen.* 231. *Harding v. Glyn*, 1 *Atk.* 469. *Bennett v. Honeywood*, *Amb.* 708. *Supple v. Lowson*, *Amb.* 729. *Rayner v. Mowbray*, 3 *Bro. C. C.* 234. *Stamp v. Cooke*, 1 *Cox*, 234. *Masters v. Hooper*, 4 *Bro. C. C.* 207. *Hands v. Hands*, 1 *T. R.* 437, n. *Devisme v. Mellish*, 5 *Ves.* 529. *Mahon v. Savage*, 1 *Schoales & Lefr.* 111. *Pope v. Whitcombe*, 3 *Mer.* 689.

The following case is imperfectly reported, *Amb.* 397.

*Crosley v. Clare.* In *Chancery.* 8th–10th April 1761.

Under a devise to the descendants of *F. I.*, in a certain district, grandchildren and great grandchildren take *per capita*.

*Edward Ince*, by his will dated in 1754, devised his estate at *Chilton Park*, in *Buckinghamshire*, worth about £250 *per annum*, to *A.* for life, and then to *B.* for life, and after their several deceases, he gave and devised the said estate to the descendants of his uncle, *Francis Ince*, now living in or about *Seven Oaks*, in *Kent*, or hereafter living any where else, to be sold, and the money equally between them, share and share alike; and in another part of his will, among other pecuniary legacies, he bequeathed £4000 to be equally divided among the descendants of his uncle, *Francis Ince*, &c., exactly as in the former bequest. It appeared by proof in the cause, that the testator had desired one Mr. *Burroughs*, a clergyman, to go into *Kent*, and inquire what relations the testator had there, the testator having kept up little or no correspondence with them; and that Mr. *B.* drew out a pedigree of all the descendants from the testator's uncle, *Francis Ince*, who were living at the time he made the inquiry, and that such pedigree was in the testator's custody at his death. It appeared, likewise, that at the time of making the will, there was one of the three daughters of the said *Francis Ince* living, who was the only person then living of the first line, but that she died before the testator; that there were several children of her, and of each of her sisters living at that time, who were grandchildren of *Francis Ince*, and formed the second line; that there were several of those children who at that time had children, which were the great grandchildren of the said *Francis Ince*, and formed the third line; as many of whom as were living, when Mr. *B.* made his inquiry and drew out the pedigree, were named in it, but one of such great grandchildren happened to be born after drawing out the pedigree, but before the date of the will; that there was one great great grandchild who stood upon the fourth line, but that she was born after the date of the will, though before the death of the testator, and before his signing two codicils which were written in his own hand, and declared to be part of his will, and were made only to increase some legacies he had given by his will.

The bill was brought by the third line, the great grandchildren of *Francis Ince*, against the executors and trustees, and against the second line, the grandchildren, and the fourth line, the great great grandchild, insisting that the Plaintiffs were entitled as descendants of *Francis Ince*, living at the time of making the testator *Edward Ince's* will, equally with the grandchildren of the second line; and insisting

that the great great grandchild was entitled to no share, as she was not born till after the date of the will.

The Defendants set up different claims in exclusion of each other, but all the grandchildren agreed in this, that neither the Plaintiffs, the great grandchildren, nor Defendant, the great great grandchild, were entitled to any part. The Defendant, the great great grandchild, insisted that she was entitled as descendant of *Francis Ince*, living at the death of the testator, though not born at the time of making the will; and it was urged that the codicil, which was executed after her birth, being declared to be a part of the will, this amounted to a republication of the will, and so she was at that time a descendant of *Francis Ince*, then living. It appeared that some of the Plaintiffs lived 15 miles from *Seven Oaks*, others 10, and that all the rest lived in the town of *Seven Oaks*; and it was urged that the first lived at too remote a distance, but his honour paid no regard to that objection, the words being in or about *Seven Oaks*.

If the second line alone were to take, and to take *per capita*, it would be divided into four parts; if the second and third, then into 17ths, and if the great great grandchild was let in, then into 18ths.

There was a point of evidence debated, *viz.* Whether the pedigree taken by Mr. *Burroughs*, since dead, and found among the testator's papers, should be admitted to explain what was meant by the word descendants. His honour was of opinion it ought not; no, not even if it had been made out by the attorney, who was afterwards directed to prepare the will in consequence of it; for that would be in some measure to permit the attorney to make or vary the will by his evidence, which is never to be allowed; nor can parol evidence be received, except in cases where the devise would otherwise be void for uncertainty, or where it is merely to rebut an equity or resulting trust. (*Goodinge v. Goodinge*, 2 Ves. Sen. 231.)

After the claims of the several parties had been spoken to, his honour interrupted Mr. Attorney, who was going to reply, and proceeded to pronounce his opinion immediately. He observed that this was not a question merely upon the word descendants at large, but even if it had, that he should have been of opinion it extended to the Plaintiffs; but here not only the word descendants is made use of, but it is confined to such as resided within a certain district. Independent of this circumstance, it is true that the word descendants may be understood in a very different sense; and therefore, if it is said A. has such a manor, &c., to him and his descendants, there it is understood to mean heirs, but if to A. and his descendants equally to be divided between them, *Simul et Semel*, and not separately, there it comprehends all. Consider it, first, if it had been descendants generally, second, as it is, in the present case, to descendants living in or about *Seven Oaks*.

1st, There is a wide difference between the word "relations," which is *genus generalissimum*, and comprehends ancestors; secondly, descendants; and thirdly, collaterals; and the word "descendants," which includes only the second and the third; and, therefore, in the cases cited, where the courts have restrained it to the next of kin, or those who would be entitled under the statute of distributions, it has been where it was to relations generally, which is a term of such unbounded latitude, that the courts have been obliged to introduce this rule in order to effectuate the bequest, which would otherwise be void, as it would be impossible to find out all a man's relations; and, therefore, the rule being introduced from necessity, *ut res magis valeat quam pereat*, it applies to none but like cases; therefore, where the word relations has been qualified by restraining it to particular objects, as my poor relations, it has extended to all that were poor, though they stood in different degrees.

The word descendants, is itself restrictive enough to prevent the inconvenience which the general term relations might occasion. The descendants of a man may in most cases be easily traced; but here it is descendants living at a particular place, which is still more restrained, and cannot leave the executor in any doubt, or put him under any difficulty to trace them. The cases cited, *Counden v. Clarke* (Hob. 29), and *Chapman's case* (Dyer, 333), and the doctrine in *Co. Lit.* 10 b, are all governed by the same principle, that where the devise of land is to a man's heirs or family, &c., there it shall go to the heir, because otherwise void for uncertainty; but if it had been to the nearest relations equally to be divided, a brother and sister, I should think, they being in equal degree, would both take.

As to the objection that this construction will split the estate into so many shares,

that they will be frittered to almost nothing, that can have no weight, as the testator does not appear to have had a predilection for any particular persons. Besides from what appears of the circumstances of the family, the shares will be very considerable to persons in their low situations.

As to the fourth line, the great great grandchild, she appears to have been born out of due time ; therefore decree to the second and third line in equal 17th shares.—MSS.

[328] MATTHEWS v. PAUL. *Rolls. July 3, 4, 28, 1819.*

[S. C. 2 Wils. Ch. 64. See *Stanhope v. Collingwood*, 1867, L. R. 4 Eq. 292. Observed upon, *Domville v. Winnington*, 1884, 26 Ch. D. 383.]

Under a will directing the transfer of stock among all the children of the testatrix's daughter, except an eldest son ; a second son having become the eldest living by the death of his elder brother, who survived the testatrix, is not entitled to a share, although an estate limited to his elder brother, did not descend to him.

*Ann Matthews*, by her will, dated the 31st July 1801, among other things gave to trustees, all the bank stock of which she should be possessed at the time of her decease, in trust to pay the dividends to the separate use of her daughter *Mary*, the wife of *John Paul Paul*, for her life ; and after her decease, to *John Paul Paul* for his life ; and after his decease, " upon trust that they, the said trustees, do, and shall assign and transfer all such stock unto, and among all and every the children of my said daughter, if more than one (except an eldest son) equally, share and share alike ; and if but one, then the whole to such one or only child ; the same to be vested interests and transferrable at their, his, or her ages or age of twenty-one years ; and in the mean time, and until such children or child shall attain such age, from time to time to invest and improve their respective share or shares of the dividends of such stock for such children or child's future benefit and advantage ; and in case any such children or child shall die under the said age, leaving any children or child lawfully begotten, then the shares or share of every such child so dying to go unto or among such their, his, or her children in like manner as above mentioned ; otherwise to go to the survivors or survivor of the children of my said daughter, and to be transferable in like manner as their original share thereof ; and in case my said daughter shall leave no children or child at her decease, or leaving such, they shall all die under the said age of twenty-one years without children as aforesaid, then upon trust that they, the said trustees do, and shall assign and transfer all [329] such stock unto such person and persons, and for such uses, &c., as she, my said daughter (notwithstanding any coverture) by any deed, &c., shall give, direct, limit, or appoint the same ; and in default of such gift, direction, &c., then in trust to assign and transfer the same unto my aforesaid nephew, *Walter Matthews*, his executors, &c., for his and their own use."

The testatrix then gave to the same trustees, all the share and interest she should have at the time of her decease in the 5 *per cent.* bank annuities, 1797 (commonly called *Loyalty*), and in the imperial terminable annuities ; " In trust to stand possessed of all such annuities, and to receive the dividends or interest thereof from time to time as the same shall become due and payable ; and thereupon to lay out and invest the same in the purchase of 5 *per cent.* annuities, 1797, or such other stocks or funds as they shall think fit, being government security, in their names, and so in like manner from time to time, to lay out and invest all the dividends or interests to be received thereon ; so as all such stocks or funds do thereby accumulate until the expiration of the term for payment of the imperial annuities ; and thereupon to assign and transfer all such stocks or funds, as well original as accumulated, unto and among all and every the children of my said daughter, if more than one (except an eldest son), equally, share and share alike ; and if but one, then the whole to such one or only child, the same to be vested interests and transferable, and the dividends or interest thereof applied at such time or times, and in such manner, and with the like power of appointment by my said daughter, as is hereinbefore mentioned and directed of and concerning the bank stock hereinbefore given in trust for the benefit of the children of my said daughter ; and in default of my said daughter making any such gift, di-[330]-rection, limitation, or appointment thereof, in trust to assign

and transfer the same unto my said nephew, *Walter Matthews*, his executors, &c., to and for his, and their own use."

The testatrix made three codicils to her will, by the second of which, dated the 9th of *March* 1802, she devised to the same trustees, the fee simple of certain estates upon trust, for the separate use of her daughter *Mary Paul*, for her life; and after her decease, "upon trust to stand possessed, as well of the said estate and premises, as also of the rents and profits thereof in the meantime, to and for the use, benefit, and behoof, of *Walter Matthews Paul*, second son of my said daughter *Mary Paul*, his heirs and assigns for ever, and to convey the same to him upon his attaining the age of twenty-one years; but if my said grandson, *Walter Matthews Paul*, should happen to die before he attains the said age, then my said trustees are also to stand possessed thereof, in trust to, and for all and every other the children of my said daughter who shall live to attain the age of twenty-one years, if more than one (except an eldest son), their heirs and assigns, share and share alike, as tenants in common, and not as joint tenants; and if there should be but one child, then in trust for such one only child, his or her heirs and assigns for ever, and to convey the same to them, him, or her accordingly; and in case my said daughter should leave no children or child living at her decease, or leaving such, they should all die under the said age of twenty-one years, then upon this further trust, and it shall be lawful for my said daughter, notwithstanding her coverture, by any deed or writing, &c., or by her last will, &c., to give the same estate or any part thereof, unto such person, &c.; and in default of such gift, &c., to stand [331] possessed thereof for the sole use and benefit of my said daughter, her heirs and assigns for ever.

By the third codicil, dated 30th *June* 1804, reciting that, since the making of her will, she had become possessed of a share in the 5 *per cent.* bank annuities, commonly called Navy annuities, the testatrix bequeathed to the same trustees the share which she then had in the said 5 *per cent.* annuities, and such other share as she should have in them at the time of her decease, upon the same trusts as were declared in her will of the 5 *per cent.* bank annuities, called Loyalty, and the Imperial terminable annuities.

The testatrix died in *December* 1805, being possessed of £7000 bank stock, £500 imperial annuities, and £4300 5 *per cent.* navy annuities, but not of any stock in the 5 *per cent.* bank annuities, 1797.

*John Paul Paul*, and *Mary* his wife, survived the testatrix, and had at the time of her death two sons and three daughters living, *Mary Paul*, *John Paul*, *Walter Matthews Paul*, *Ann Paul*, and *Harriet Paul*. *John Paul* the eldest son died in *October* 1817, having attained the age of twenty-one years. *Walter Matthews Paul* attained that age in *February* 1818. *Mary Paul*, who was the eldest child, had also attained that age, and was married to *M. B. Napier*, and by a settlement made subsequent to her marriage, her interest in the funds bequeathed by the testatrix was assigned to trustees upon certain trusts for the benefit of herself and her husband, and their children.

The trustees, under the will, from time to time invested the dividends which became due upon the imperial annuities in the purchase of 5 *per cent.* annuities, and [332] the time for the payment of the imperial annuities having arrived in 1819, a bill was filed by them against *Walter Matthews Paul*, Mr. and Mrs. *Napier*, their children, and the trustees of their settlement, and *Ann Paul* and *Harriet Paul*, for the purpose of having the rights in the several funds ascertained.

*John Paul*, the eldest son, was tenant in tail of a considerable estate, which, on his death, did not descend to his brother *Walter Matthews Paul*, but was devised by him, after suffering a recovery, to his father.

Mr. *Agar* and Mr. *Rose* for the Defendant *W. M. Paul*. The Defendant is not an eldest, but by the death of his elder brother has become an only son. In construing the words elder and younger, the Court has proceeded on the principle, that all are to be considered as younger children except the son who actually takes the family estate and becomes the head of the family. *Duke v. Doidge* (2 *Ves. Sen.* 203). *Lord Teynham v. Webb* (2 *Ves. Sen.* 198). It is for this reason that an eldest daughter is permitted to take as a younger child, *Beale v. Beale* (1 *P. Wms.* 244). *Henceage v. Hunloke* (2 *Atk.* 456). A younger son can incur no forfeiture of his rights in that character under a settlement, by the mere death of an elder brother, unless the estate, the title to which alone excluded the elder from the benefits conferred on the

of her children, descends to the younger son. Nor is even the rule so limited applicable to provisions made by any one not a parent, or in *loco parentis*, *Hall v. Heuer* (*Amb.* 203 ; 10 *Ves.* 174). The bequest here is by a grandmother in the life of the father.

[333] The shares to which the children were entitled have vested at the death of the testatrix, the time of payment not being annexed to the substance of the gift. *Monkhouse v. Holme* (1 *Bro. C. C.* 298). At least they must have vested when the eldest daughter attained twenty-one in the lifetime of *John Paul*. The share of *Walter Matthews Paul* was therefore vested in him prior to the death of his brother, and could not by that event be divested. *Graham v. Lord Londonderry* (cited 2 *Ves. Sen.* 199), *Driver v. Frank* (3 *M. & S.* 25 ; 6 *Pri.* 41). In *Trafford v. Ashton* (2 *Vern.* 660), a second son was allowed to take, although not born till after the death of the eldest.

Mr. *Wilbraham*, Mr. *Hart*, and Mr. *Williams*, for the other Defendants. Most of the former cases have applied to persons who, at the time of executing the will, were not *in esse*, and who therefore could only be described generally. Here all the children were alive at the time the testatrix made her will, and if she had meant to exclude the eldest son *John* in particular, she would have named him as she has named *Walter* in the codicil, or have called him the eldest son. She has, on the contrary, used the expression, "an eldest son"; *i.e.* any eldest son, or the son who at the time of distribution shall be eldest. It is a description which, till that time, is uncertain and fluctuating.

When the elder brother died, the time of division was not arrived, and *Walter* was then under age; his share therefore could not have been vested, and when he attained twenty-one he was the eldest. But the time of vesting is not very material; for the principle is, that he who claims as younger son, must sustain that character when he applies for payment. In *Lord Teynham v. Webb*, Lord *Hardwicke's* attention was called to the time of vesting; he would not say it did not vest, but took the middle course of considering a condition of continuing a younger son to be annexed to the gift. The same rule was acted on in *Chadwick v. Doleman* (2 *Vern.* 528) and *Savage v. Carroll* (1 *Ball & Beat.* 265).

The *Master of the Rolls*. The cases where this rule has been adopted have arisen on gifts by parents, or persons in *loco parentis*. In general, the estate passing to the eldest son has been in the power of the persons making the provision for the younger children, and the same instrument has comprised the estate and the provision. Has the rule ever been applied to portions given by a stranger, who merely contemplated the chance of property descending to the eldest son, as representative of the family?

§ Arguments for the Defendants resumed. It is difficult to define exactly what is meant by standing in *loco parentis*. In *Teynham v. Webb*, the appointment was made by a grandmother, and Lord *Hardwicke* said he should construe it as if it had been in a marriage settlement.

The cases of *Godfrey v. Davis* (6 *Ves.* 43), *Lady Lincoln v. Pelham* (10 *Ves.* 166), *Bowles v. Bowles* (10 *Ves.* 177), *Radcliffe v. Buckley* (10 *Ves.* 195), *Cook v. Arnham* (3 *P. W.* 283), are authorities in favour of the younger children.

[335] Mr. *Whitmark* for the trustees.

July 28. The *Master of the Rolls* [Sir Wm. Grant]. The questions in this case arise on the claim made by the Defendant *Walter Matthews Paul*, to a fourth-part of the funds, which pass by the will, insisting that though he is now become the only son, and may therefore be said to be the eldest, yet that as he was at the date of the will, and at the death of the testatrix, the second son, he is entitled to a share as a younger child. On the other side, it is contended that he is excluded, by the fact of having become, whatever he might once have been, the eldest son.

The fund which the Court is now required to distribute consists of the Imperial Annuities, and the 5 *per cent.* Stock, belonging to the testatrix; the latter disposed of by the codicil; the former by the will. They are to be transferred at the expiration of the term for payment of the Imperial Annuities, which occurred in *May* last; and by the express declaration of the will, the fund was then to be transferred to all the children of *Mary Paul*, except an eldest son. There is therefore an express exclusion of any person sustaining the character of an eldest son; and the trustees are forbid to assign any part to him. It is observable that the distribution of the property is to be

effected at a future time ; part at the death of the survivor of the father and mother, and part at the termination of the annuities, about eighteen years from the date of the will. There is thus a prospective direction to divide the property among the children, with an express exclusion of an eldest son.

[336] The only fact then requisite to be ascertained for the true construction of the will, is the period at which the phrase "an eldest son" is to be applied to this family—a phrase capable of a change in its application by circumstances ; and the individuals to take or to be excluded being identified, not by name, but by character. The persons to take are the children of the daughter ; the person to be excluded, is he who bears the character of an eldest son. The single question, at what period is that character to be ascertained ?

For that purpose three different times may be proposed ; the date of the will, the death of the testatrix, and the time when the fund is directed to be distributed. Without adverting to the numerous cases that have been cited, all which I have read, a few clear principles deducible from them will enable the Court to resolve this case ; the fact being indisputable that *Walter Matthews Paul*, though now the eldest son, was not always such.

First, on principle, is the phrase to be applied only to the person who was eldest son at the date of the will ? If so, it was personal to that individual. The testatrix was conversant with the state of the family ; in one codicil, she makes a gift to *Walter Matthews Paul nominatim*, as the second son, and must have known, therefore, that he had an elder brother living ; if her intention was for any reason to exclude that elder brother *John* personally, there was no difficulty in identifying him by name ; far from that, the testatrix has not even used the words "the eldest son," which might have been more descriptive of an individual than in her view, but purposely adopts an expression of indeterminate meaning, "an eldest son." The expression is several times repeated, and seems anxiously to mark an [337] intention to exclude, not a particular individual, but any individual who sustains a particular character. In the same manner, she describes the children of her daughter, not by name, but by character ; their father and mother being then living, and the distribution of the fund being postponed till after their death in one case, and till the expiration of eighteen years in the other it was impossible that she, could fail to advert to a variety of events which might change the number of the children, and the relation of younger and elder among them. The anxious adoption of this indefinite expression, "an eldest son," shews that she referred, not to an individual, but to a character, and to any one who sustains it. It is impossible, therefore, to say that the words are not in their nature future, or that she meant to confine the terms of exclusion to the eldest son at the date of the will. In the same codicil, which describes *Walter Matthews Paul* as the second son, she disposes of the property in case of his dying before twenty-one, to the children of her daughter, except an eldest son ; this disposition expressly refers to the event of his death ; and it is evident therefore that the testatrix contemplated a future state of circumstances, and did not limit her expressions to the present state of the family. On no principle can the terms be confined to the date of the will. The fund being distributable at a future time, on general reasoning, every child coming into existence before the period of distribution would be entitled ; to that period, and not to the date of the will, must be applied the words entitling those who take ; to the same period must be applied the terms of exclusion. Both classes of expressions refer to future events.

The second period proposed is the death of the testatrix ; and it is contended, on the part of the Defendant [338] *Walter Matthews Paul*, that at that time the property vested in interest, though not in enjoyment, in all the children except the eldest son ; and that *Walter Matthews Paul*, not being then the eldest son, was not excluded, but his share vested, and was not subject to be devested. This question depends on the construction of the words in the latter clause, declaring that the interests given to the children shall be vested interests, and transferable at twenty-one. One construction proposed is to distinguish the clause which declares the interests vested, from that which directs that they shall be transferable. The other construction considers them as one sentence. It is necessary to examine the context, for determining whether the age of twenty-one years is to be applied to both the antecedent parts, or only to the transfer. It has been said, it was the



intention of the testatrix that all the children should take vested interests at her death, and that the shares of any dying after that event were transmissible to their representatives; but such a construction is directly contradictory to that clause of the will which directs that the shares of children dying under twenty-one, shall go to their children, if they have any, if not, to the survivors. The shares then could not be vested in the children, since in the event of death before a certain period they are expressly given to others. There is a farther direction, that if the daughter shall die leaving no child, or all the children shall die under twenty-one without children, the stock shall be transferred according to the appointment of the daughter. It is impossible to declare the shares vested, without negating these clauses of the will which dispose of them as not vested, expressly providing for every possible case. It has been argued that the shares must be considered vested, because it would otherwise have been unnecessary to insert these clauses of ulterior disposition, which were designed to prevent a child from [339] making a testamentary gift before twenty-one, which would have disappointed the intention of the testatrix; but such a disposition was equally necessary in the event of there being no gift. The evident object is to preserve the shares of any who might die entire to their children or to the survivors. The clauses are consistent with the supposition that the shares were not vested, but wholly inconsistent with the opposite construction. It is clear from the immediate words, and from the context, that the shares could not vest till one, at least, of the children, attained twenty-one.

These considerations dispose of the question as to the second period. What, indeed, should induce the testatrix to select the time of her death for determining who was to be excluded as an elder son? None were to take at that time. Her purpose was, for some reason, to exclude the person who sustained the character of eldest son, from participating in her bounty. The period of distribution, therefore, must be that to which the exclusion refers. The Court cannot indulge in conjectures what her reason might have been; the probability is, that the eldest son was otherwise provided for; but I think it unnecessary to consider that point. Whatever her reason was, it applied generally to exclude an eldest son from the division; and the period for ascertaining the individual who sustained that character, was the period of that distribution from the benefit of which it was a cause of exclusion. In all cases of legacies, payable to a class of persons at a future period, the constant rule has been, that all persons coming into *esse* and answering the description at the period of distribution, shall take; and the same rule must be applied to persons excluded. There cannot be one time for ascertaining the class of those who are to take, and another for ascertaining the character which [340] excludes. This rule of referring to the future period of distribution being established by a long series of authorities, the Court must adopt that period, and not alter the state of the will, or the death of the testatrix, unless expressly appointed as the time of distribution. In the present case, the period is fixed beyond doubt, the trustees are directed to suffer the funds to accumulate until the termination of the imperial annuities; that time arrived in *May* 1819; and that is the period to be regarded for ascertaining the individuals excluded: there is no doubt that *Walter Matthews Paul* then sustained the character of an eldest son; and if the trustees were now to assign any part to him, they would act in direct contradiction to the terms of the will.

It is not necessary to refer to former cases; some of which have proceeded much further than this; as *Chadwick v. Doleman* (2 Vern. 528), an excessively strong case; for there, though an appointment had been in favour of an individual by name, that individual having become an eldest son was excluded; the lord keeper declaring that the appointment was upon a tacit or implied condition of not becoming the eldest son. The same doctrine of a tacit condition has been recognized in *Savage v. Carroll* (1 Ball & Beat. 265), *Lord Teynham v. Webb* (2 Ves. 198), *Hall v. Hewer* (Amb. 203), *Lady Lincoln v. Pelham* (10 Ves. 166), and *Bowles v. Bowles* (Id. 177). If, therefore, the shares had vested, the vesting would have been *sub modo* only, subject to be divested, and under the condition of not becoming an eldest son.

On both principles, then, I think that *Walter Matthews Paul* is excluded from a share; first, on the general [341] ground, first, that the testatrix looked forward, to a future period, for the classes of those who were to take or to be excluded, and

that, at that period, this Defendant sustains the character which excludes, and could not be admitted without contradicting the will; secondly, because, even had the words been more favourable for the argument that he takes a vested interest, yet that a tacit condition was annexed to the gift divesting it, in the event of the character of exclusion devolving on one in whom it had vested.

Cases of hardship may be put both ways. Undoubtedly on this construction, a younger son becoming elder, may be excluded from the provision made for younger children without being otherwise provided for. On the other hand, he might, as elder son, take the principal estate, and as younger, share the portions of his sisters. But, without considering imaginary cases, the Court must proceed on general principles. The present is one of the strongest cases that has occurred against the claim of the second son; the use of the indefinite article necessarily refers the description to a future period.

Declare that the Defendant, *Walter Matthews Paul*, is not entitled to any part of the £7000 bank stock, and £4300 5 *per cent.* navy annuities, and the 5 *per cent.* annuities purchased with the produce of the imperial annuities.

[342] WHITE v. LISLE. July 8, 15, 1819; July 8, 11, 13, 1820.

New trial of an issue on the validity of a modus. Two new trials having been ordered for misdirection, and the verdict on the third trial, as in the two former, being in favour of the Defendant, the Plaintiff was ordered to pay the costs of the applications in equity (except those of the first application to the *Lord Chancellor*), and the costs of the last trial at law.

The facts of this case appear in the report of the application to the *Vice-Chancellor* for a new trial. 4 *Madd.* 214. The motion having been refused by his honour, was renewed before the *Lord Chancellor*.

Mr. *Wetherell*, Mr. *A. Moore*, Mr. *Heald*, and Mr. *Dowdeswell*, in support of the motion.

Evidence of reputation of the boundaries of the farm ought not to have been rejected.—The question to be decided is, whether by approvement or annexation of part of the common, the boundaries of the farm have not been enlarged? and amounts to the question, what were the boundaries of the common? On that question reputation is evidence. *Webb v. Petts* (*Noy*. 44. See 2 *Ro. Abr.* 186, *pl.* 5), *Stransham v. Cullington* (*Cro. El.* 228), *Congley v. Hall* (2 *Rolle*, 125), *Weeks v. Sparke* (1 *M. & S.* 679).

The lease of 1703 ought not to have been received in evidence. A modus cannot be proved by evidence of a real composition. *Ward v. Shepherd* (3 *Pri.* 608).

The *Lord Chancellor*. The lease appears to prove nothing on the question of boundaries; the engagement is to pay what is due for the lands demised, or some part thereof, and affords no proof for what lands the sum paid is due. Nothing in that lease authorises the conclusion that any one acre is tithe free.

[343] Argument for the motion resumed. In the judge's charge the documentary evidence was not sufficiently insisted on. There is no case of a farm modus for part of a farm.

Mr. *Trower*, Mr. *Gaselee*, and Mr. *Tinney* against the motion. The principle of this application is opposed by numerous authorities: *Buller's N. P.* 195. *Clarkson v. Woodhouse* (5 *T. R.* 412, *n.*), *Stanley v. White* (14 *East*, 332), *Stockwell v. Terry* (1 *Ves. Sen.* 118), *Reed v. Jackson* (1 *East*, 355), *Richards v. Evans* (1 *Ves. Sen.* 39), *O'Connor v. Cook* (8 *Ves.* 535), *Manby v. Curtis* (1 *Pri.* 225), *Bullen v. Michel* (2 *Pri.* 399, 424), *Hardcastle v. Slater* (*Amb.* 41; 3 *Atk.* 245), *Chapman v. Smith* (2 *Ves. Sen.* 506, 515), *Atkins v. Lord Willoughby de Broke* (2 *Anstr.* 397), *Drake v. Smith* (5 *Pri.* 369; *Dan.* 104), *Clothier v. Chapman* (14 *East*, 331, *n.*).

The authority cited of *Webb v. Petts* has no analogy to the present case. The question there arose on an application for a prohibition to the Ecclesiastical Court under the statute 2 & 3 *Ed.* 6, *c.* 13, *s.* 14; proceedings in which the Courts, considering the penalties imposed on failure of proof, found it necessary to be satisfied with slender evidence of the suggestion, that deprived the Ecclesiastical Court of jurisdiction. *Anon.* (*Noy*. 28), *Austin v. Pigot* (*Cro. El.* 736).

The *Lord Chancellor* [Eldon]. The point now to be decided is, whether the question [344] on the liability of this farm has been so satisfactorily investigated on the trial of the issue directed by this Court, that the bill should be dismissed on payment of the sum of £4, leaving the parties to a future contest, if the incumbent thinks fit to file a new bill, or whether, regard being had to the manner of the trial, the Court should require a farther discussion of the question ?

The Plaintiff seeks to recover tithes in kind from a farm called *Wootton Farm*, containing 763 acres, and situate in the parishes of *Wootton*, *Whippingham*, and *Arretton* : the defence alleged is a farm modus of £4, payable annually at *Michaelmas*, covering that part of the farm (consisting of 632 acres), which is situate in the parish of *Wootton* ; the rest of the farm pays tithes in kind : the subject in question is the validity of the modus.

I recollect no case in which parties have succeeded in establishing a modus, in lieu of all tithes, for part of a farm ; but on principle I think that no solid objection can be offered to such a modus. It was perfectly competent for those whose contract would sustain a modus to contract in that form, before the reign of *Richard the First* ; this farm being situated in three parishes, the tithe-owner of one parish might contract for a payment in lieu of tithes, of so much of the farm as lies in that parish, although the tithe owner of the other parish might not concur. Though new in *specie*, therefore, the question is not so new in principle as to raise an objection to the issue directed.

This modus is stated as a farm modus.—Courts of equity undoubtedly have a right to decide in the first instance, if they think proper, the question of fact as well as the question of law ; but a long course of deci-[345]-sion has established it as matter of sound judicial discretion to send the question of a farm modus to a jury : and that is the constant course. Considering the difference between the question of a farm modus, and the simple question, what was the value of money, or any particular article, at the time when legal memory commences, there is evidently more discretion in sending to trial by jury the question of a farm modus than any other modus ; but while it is clear, as I think, that though evidence is improperly received or rejected, the Court will not, for that reason alone, direct a new trial ; yet I am of opinion that it abstains from directing a new trial of questions of this kind, only where it is satisfied that the question has been so dealt with, that if the evidence rejected had been received, or the evidence received had been rejected, and the verdict had been different, the Court would have been dissatisfied with the trial : but the Court, when it establishes as a rule of sound judicial discretion, that these questions shall be sent to trial by jury, instead of being tried by its own authority, is bound to see that the jury has satisfactorily tried them.

It is the habit of this Court, in ordering an issue, to direct, that, if the substance of the issue is found, but with some special circumstances which may be material in measuring the extent of relief to be given on further directions, that matter should be indorsed on the *postea*. The *Vice-Chancellor* has, with great propriety, inserted such a direction, in this instance, and the judge on the trial seems to have comprehended the purpose of it.

In order to determine whether the past trial is, in this case, satisfactory, it becomes necessary to state, with some particularity, what evidence has been received and what rejected.

[346] The testimony of *Robert Knight* shows, that a farm of 400 acres paid £60 a year for tithes, while 632 acres, part of *Wootton* farm, paid only £4 ; he states, that that sum was paid as a composition, meaning, without doubt, a real composition. The evidence thus far establishes the fact, that no one ever heard of payment of tithes in kind for these premises ; and that in 1785, in 1801, and in 1806, the incumbent of the parish gave receipts for the sum of £4 as a modus ; and there is evidence, therefore, of payment of a modus, in round numbers, during forty years.

In this stage of the evidence is produced a counterpart of a lease dated in 1703 ; and the judge's report states, that notwithstanding an objection taken, he admitted it as evidence of reputation, but of reputation of what, he has not stated. That lease, an instrument executed between the owner of the land and his tenant, contains a covenant by the landlord to pay taxes, &c. " except the yearly composition, modus, or pension of £4 *per annum* to the minister of *Wootton*." The question on this instrument, if properly admitted in evidence, is, whether its effect has been duly brought

before the jury ; and if improperly admitted, whether the jury gave more weight to it than they ought to have given ?

In *Bullen v. Michel* (2 Pri. 399) the House of Lords clearly approved the opinion of the majority of the judges in the Court of Exchequer, that an occupier of lands sued for tithes, cannot insist upon a pecuniary payment as a modus, and at the same time a real composition, which are widely different :—a modus may, perhaps, originate in a real composition, but must be proved to have existed from the time of legal memory ; a real composition [347] may have been made within that time, by an agreement with the parson, under the sanction of the ordinary, before the restraining statute. (13 *Eliz. c. 10.*) The Courts have held, that a Defendant insisting on a real composition, must produce evidence of the actual existence of the deed at some time, and that it is not sufficient to show non-payment merely as evidence of the loss of such a deed ; allowing such evidence, every real composition might be turned into a modus. (*Knight v. Halsey*, 2 Bos. & Pull. 172, and the authorities there cited.) Recollecting that doctrine, it remains to consider, in reference to this instrument, whether, consistently with it, the payment could be nothing but a modus, or whether it might not be a real composition or a pension.

If this instrument was properly admitted in evidence, but proper observations were not made on it to the jury, or if it was improperly admitted in evidence, and must have had great weight with the jury, in either view there is reason for a new trial ; and it may, therefore, not be necessary to express an opinion on the propriety or impropriety of its admission. I should have thought it my duty to state it to the jury, even if the weakest of all evidence ; it was extremely material to know the opinion of the owner of the estate and the tenant, on this payment ; and the lease acquires great force from the subsequent receipts of the rector. It ought, therefore, to have been particularly presented to the attention of the jury, in its strength or weakness, first, by itself, and afterwards in connection with the other instruments. It might have been properly observed, that the instrument determines nothing on the nature of the payment, whether a modus, a composition real, or pension ; but leaves those points in total uncertainty.

[348] In the view which I take of the case, it is not my duty to express an opinion on the effect of receiving the evidence of reputation : there are cases in which it is material to know the particular nature of the evidence ;—for instance, when it is conceded that evidence of reputation would be admissible to prove the boundaries of a common, may not the boundaries of a farm be proved, not immediately by reputation, but by approximation ; that is, proving by reputation the boundaries of the common, which coincide with the boundaries of the farm ? Suppose a parochial modus extending over, not the whole of a parish, but the whole with the exception of farm A. ; then in order to ascertain what is covered by the modus, evidence by reputation is given of what constitutes A., not directly, but indirectly, by showing what constitutes B., to which such evidence is applicable. But I lay this out of consideration, and should not decide the general question without requesting the judge to state the particular evidence.

There are two grounds on which I think that the parties cannot complain, if the court, before it gives farther directions, requires a new investigation. I should wish that some communication may be made by the counsel engaged on both sides here, of the doctrines established in this court and the Exchequer relative to tithes and real compositions ; and I have often endeavoured to impress the expediency, when issues are directed by this court, of employing in consultation some counsel who had been concerned in the case here.

The ground on which I proceed in directing a new trial is this, that I think that with respect to the question, whether this payment has been made as a modus, the case has not been satisfactorily tried, and that unless we are to say that all this documentary evidence [349] is hereafter to be repudiated in all other courts, sufficient has not been said on it to lead the jury to a right conclusion.

The directions given on the hearing of the case, for the trial of the issue, were, in my opinion, quite right, not merely considering this as a question of farm modus, but because, having regard to the pleadings, no other issue could, as I think, have been directed. Looking at the lease, I could not have refused to the occupier the benefit of a trial whether this was a modus ; that instrument would have induced much doubt in my mind, whether the payment was a modus, a pension, or a com-

position ; but I could not have granted an issue to try whether it was a composition ; it would have been absurd to direct an issue whether this was a composition real, because, if the parties could not produce evidence to support a composition real they must have failed, though on other grounds entitled to succeed. Nothing appears to induce me to think that this was a pension, much less, that a pension and a composition are nearly synonymous, which the jury seems to have been told. A pension is widely different both from a composition real and from a modus : the parson of a parish may be entitled to a pension from lands, to the tithe of which he never had a claim. A pension, that is, a charge, may be due for lands tithe free, and cannot be treated as a payment in respect of tithes. In many cases, within my own experience, when parties have claimed exemption by composition real, the courts have, for the reason before-mentioned, rejected evidence of a modus.

The trial has failed for this reason : it is impossible not to see that the judge considered the lease as [350] conclusive evidence that the payment was a modus. The judge calls the attention of the jury to that instrument, as giving to this payment the character of pension, or modus, or real composition ; but he tells them that a composition is a temporary agreement, and that a pension and composition are the same thing. The jury ought to have been told, that in the lease of 1703 the payment is called a modus, pension, or composition ; a receipt in 1785 describes it as a modus, but in 1703 the parties have shown that they know not whether it is a modus, a composition, or a pension. Recollecting then this uncertainty, that a composition real requires peculiar evidence, and that although enough may not appear to sustain the payment as a composition, yet if the parties were dealing with each other as if it were a composition, it cannot be a modus, and if dealing as for a modus it cannot be a pension ; the jury should have been instructed that they were to determine the character of this payment, which is subject to so much uncertainty.

The documentary evidence is certainly inconsistent, and admits many reasonable objections to the credit of each instrument ; but the practice of our courts, for many centuries, has been absurd, if, by reason of such inconsistency, these documents are not to obtain much more credit than was allowed to them on this trial.

This case has not been tried, and I think it better to exclude the possibility of filing another bill, by directing a new trial, reserving the costs of the former.

For the following note of the further proceedings in this cause the editor is indebted to Mr. *Walker*.

[351] Upon the second trial which took place at the *Winchester* summer assizes, before *Wood, B.*, a verdict was again found for the Defendant (the Plaintiff at law). In addition to the evidence on the former trial, a receipt was produced, dated in 1783. in which the rector, Mr. *Walton*, acknowledged the payment of the £4 without calling it a modus.

Mr. *Wetherell* and Mr. *A. Moore*, now moved for a new trial, (1) on the ground of misdirection of the judge as to the nature and weight of the evidence. The objections were, first, that he had stated to the jury, that the ancient documentary evidence was entitled to little or no weight, and that more stress had been laid on the modern evidence than was fairly due to it ; that the attention of the jury ought to have been directed, not only more particularly to the general character of the ancient evidence, but also to the combined effect of it, which in this case, from its uniformity for a period unusually long, was almost decisive in favour of the rector. Secondly, that he had treated the words, yearly composition, in the lease of 1703, as meaning real composition, and that the possibility of their meaning a temporary one, and the doubts which that construction must necessarily raise, as to the nature of the payment, were never presented to the mind of the jury. Thirdly, that no observation had been made on the omission of the word modus in the receipt of 1783 ; and, fourthly, that the [352] *Romney March* cases (2 *Ves. Sen.* 506) which were mentioned by the judge to the jury, ought not to have been alluded to.

Mr. *Trower*, Mr. *Gaselee*, and Mr. *Tinney* opposed the motion ; and contended that the judge, in substance, had stated that the ancient documents (to which he had adverted in detail, although it must be admitted by every one that little reliance could be placed on them) were clearly evidence ; but, secondly, that they were not conclusive evidence, and that the jury were to give such weight to them as they might think proper. The only thing, it was argued, strictly to be inferred from the lease was, that the payment was a permanent one, and as it could not be a pension.

the question, whether it was a real composition or a modus, being uncertain, was properly left to the jury : the names in the lease were inserted as words of course, and, as evidence, were therefore not of much importance, and the observations which were made by this court on the motion for the second trial were brought before the jury by the Defendant's counsel.

*July 13th.* The Lord Chancellor [Eldon]. I shall not again enter into a statement of the reasons which induced me to grant a new trial in this cause, after the issue was tried before Mr. Justice Park, particularly as other points were then raised, which were not entered into upon the second trial. The only question now, as I understand, is, whether this payment of £4 is a modus ? The evidence represents that word to have been occasionally used, when the payment was made ; but the first receipt produced for the sum in question is dated in 1783 ; that receipt ascertains £4 to be the amount paid, but there is no expression in it which ascertains [353] the nature of the payment. In 1785 there is a receipt which not only mentions the sum of £4, but mentions it as being a modus. It has been argued, that the learned judge who tried this issue ought to have remarked to the jury, that the receipt of 1783 did not contain the word modus. It does appear to me that if I had tried the cause, I should have mentioned that fact, but I should have accompanied it with this observation, that if there was any hesitation in giving the name of modus to this payment in 1783, it had been overcome in 1785, as that name is given to it in the receipts of that and subsequent years. But the circumstances which it appears to me ought to have been particularly called to the attention of the jury is, the names by which this payment is designated in 1703. It appears that the patronage of the living and the ownership of the estate had long continued in the same family ; and a lease dated in 1703 is produced, by which the land-owner lets the farm to a farmer, who undertakes to pay all out-goings, except the yearly composition, modus, or pension of £4 per annum to the minister of Wootton. The learned judge, in his summing up, speaks not only of real, but also of yearly compositions ; the former subject he treats as it should be treated. This issue being to ascertain whether it was a modus or not, the fact of its being a real composition would be fatal to the Plaintiff's case ; but the judge seems to say, that it is incumbent on the Defendant to have proved that ; this could hardly be expected from him, as, if it were afterwards set up as a real composition he would endeavour to establish the contrary ; perhaps, however, no observation of much importance in favour of the Plaintiff could have been made on this point, except that it might have been a real composition, regard being had to the uncertainty whether it was a modus or not. The judge, on the other hand, speaks of a temporary [354] composition ; but then he treats it, as it seems to me, without sufficiently distinguishing between that which is a composition, in the exclusive sense of the word, and a modus : the fair way of putting it would have been to have given an opinion as to the meaning of the words in the deed ; the jury should have been told whether the judge thought yearly composition and modus meant the same or different things ; if in legal construction they meant the same, that would be favourable to the Plaintiff's case ; but if yearly composition meant, as it generally does, a temporary composition, as contra-distinguished from a modus, that would be strong evidence that this payment was not a modus, or, at least, that the land-owner, in 1703, could not undertake to say which it was. If such were the meaning of the word, it ought also to have been observed to the jury, that before 1703 there was no receipt in the possession of the landowner describing it as a modus, and from that time to 1785 there is no such receipt in the possession of the family ; and the fair way then of putting it to the jury would have been to have said, if you should have been of opinion, if this had been tried in 1785, that this payment was not a modus, the question you will now have to determine is, whether the transactions subsequent to 1785 so bear down all the observations that can be made on the antecedent evidence, that you can take upon yourselves to say, that that which has been denominated a modus since 1785, was and ought to have been so denominated before.

With respect to the written documents which were produced, I am ready to admit, that that species of evidence is open to very strong observations on the other side, but I cannot agree that no observation is to be made for it. The value of such documents is to be estimated by the particular circumstances of each case [355] in which they are produced. With respect to the taxation, the inquisition, and so on,

the parties were interested in representing the property to be taxed at as low a rate as could be believed ; but the question is, whether they could venture, and that for a series of years, to put it at a rate so far remote from what was the real value, as they have done, if this £4 is a valid modus. And I cannot help thinking, I speak with deference, that it is not right to state to a jury some very remarkable instances in which former juries have found a modus valid, without stating those in which other juries have not ventured to go the same length as those who have pronounced the verdict in the one or two cases referred to. Upon these grounds, provided the Plaintiff, in this suit, will undertake to give the occupier no further trouble should this verdict be against him, I think that a new trial ought to be granted.

The Plaintiff, *Richard Walton White*, by his counsel, undertaking that if, upon a new trial of the said issue, the jury should find a verdict against him, he should be finally concluded by such verdict, as to the matters in question in these causes, it was ordered that the parties should proceed to a new trial of the said issue, at the next *Winchester* assizes ; and it was ordered, that the Defendant, *S. M. Phillips*, should be the Plaintiff at law, and the Plaintiff *R. W. White*, should be the Defendant at law ; and if any of the witnesses, examined upon the former trials, should be proved to the satisfaction of the Court, at the time of such new trial, to be dead, or in such a state of health as not to be capable of attending, then the judge's notes of the testimony of such witnesses were to be read at the said new trial ; and the costs of the former trial were reserved, until after the new trial ; and either of the parties was to be at [356] liberty to read the depositions taken in the cause, at the trial of the issue, in case it should appear to the satisfaction of the court, that such witnesses, or either of them, were dead, or in such a state of health as not to be capable of attending.

A new trial accordingly took place before *Graham, B.*, at the following *Winchester* Summer assizes, when a verdict was returned, for the third time, in favour of the Defendant, *Susan March Phillips*, the Plaintiff at law.

16th August 1821. " His Lordship doth order, that the Plaintiff's bill do stand dismissed out of this court ; and it is ordered that the Plaintiff do pay unto the Defendant, *Susan March Phillips*, the costs of these suits, including the costs of a motion for a new trial, before the *Vice-Chancellor*, and also the several applications made by the Plaintiff to the *Lord Chancellor*, except the costs of the first application for a new trial before the *Lord Chancellor* ; and also the costs of the last trial at law : such costs to be taxed by the said master, *Sir John Simeon, bart.*, to whom these causes stand referred. And it ordered that the petition of appeal lodged by the Plaintiff against the decree, do stand dismissed, and that the sum of ten pounds, deposited with the register, on setting down the cause to be heard on the said petition of appeal, be paid to the Defendants." Reg. Lib. B. 1821, fol. 277.

(1) The Plaintiff was also desirous that the form of the issue should be changed, but the *Lord Chancellor* was of opinion that no order to that effect could be made on a motion for a new trial ; and that the propriety of the form of the issue could be questioned only on an appeal from the decree by which it was directed. A petition of appeal was accordingly presented, and heard at the same time with the motion.

### [357] CURRE v. BOWYER. July 31, 1818.

The christian name of one of the Defendants having been mistaken in the title to interrogatories and depositions, an order was made for correcting that error, and reswearing the witnesses.

*William Giles*, a Defendant in this cause, having been erroneously named *Edward Giles* in the title of the interrogatories exhibited for the examination of witnesses on behalf of the Defendant *Edward Bowyer*, the *Vice-Chancellor*, on the 13th of July 1818, ordered that the Defendant *Bowyer* might be at liberty to alter the christian name of the Defendant *Giles*, in the title of the interrogatories, from *Edward* to *William*. Reg. Lib. A. 1817, fol. 1392.

It afterwards appearing that the error extended to the title of the depositions which had been taken under [358] a commission then in execution for the examination of witnesses, a motion was made on behalf of the Defendant *Bowyer*, that he might

be permitted to alter the christian name of the Defendant *Giles* in the titles of the different sets of original and cross interrogatories exhibited for the examination of witnesses on the part of the Defendant *Bowyer*, and also in the title or titles of the depositions, if any, taken thereon.

Mr. *Mascall* for the motion.

Mr. *Agar*, against the motion, objected, that after the alteration, perjury could not be assigned on the depositions; and cited *White v. Taylor* (2 Vern. 435; 1 Eq. Ca. Ab. 30, pl. 7).

The Lord Chancellor [Eldon]. The witnesses must be all re-sworn after the title of the interrogatories has been rectified, and the Defendant *Bowyer* must pay all the costs. It is a point of nicety; but I will go the utmost length, consistent with the safety of the proceedings, to relieve a mere mistake.

The following order was made: "His Lordship doth order that the commissioners named in the commission for the examination of witnesses issued in this cause, be at liberty to alter the christian name of the said Defendant *Giles* from *Edward* to *William*, in the titles of the several sets of original and cross interrogatories exhibited under the said commission; and also that the examiner be at liberty to make the same alteration in the title or titles of the interrogatories filed in the cause in his office, in which the said Defendant is named *Edward Giles*; and it is ordered that the said commis-[359]-sioners, and the said examiner respectively, be also at liberty, in the depositions already taken upon such respective interrogatories, to alter the name of *Edward Giles* to that of *William Giles*, and afterwards to re-swear such of the respective witnesses who have been examined on the present interrogatories, as are willing to be re-sworn to the truth of the depositions so altered; and it is ordered that the said commissioners and examiner do certify to this court, which of the several witnesses have been so re-sworn to the truth of the respective depositions so altered; and it is ordered, that the said Defendant *Edward Bowyer* do, previous to such alteration being made as aforesaid, pay unto the said Plaintiff the costs and reasonable charges which have been incurred by him with respect to the examination of witnesses on the said interrogatories, and also the expenses of making such alteration as aforesaid, together with the costs of this application; such costs and charges to be taxed, &c.; and it is ordered, that the order obtained in this cause, dated the 13th day of *July* instant, be discharged." Reg. Lib. A. 1817, fol. 1608.

HARCOURT v. RAMSBOTTOM. Aug. 12, 1818.

[For subsequent proceedings (1820) see 1 Jac. & W. 505.]

An order obtained, after exceptions to the answer allowed, for entering *nunc pro tunc*. an order to dissolve an injunction absolutely for want of cause shewn to the contrary, is not irregular; nor is the Plaintiff entitled to continue or revive the injunction.

On the 13th of *May* 1817, the Plaintiff obtained the common injunction for want of answer. Reg. Lib. A. 1816, fol. 956.

On the 5th of *August* 1817, the following order was made for dissolving the injunction: "Whereas by an order dated the 19th day of *July* 1718, it was ordered [360] that the injunction granted in this cause, until answer and other order to the contrary, should be dissolved, unless the plaintiff, his clerk in court having notice thereof, should on the 28th day of *July* 1817, shew unto the Court good cause to the contrary, which time for shewing cause stood enlarged to this day; now upon motion this day made unto this Court, by Sir *Samuel Romilly* and Mr. *Roupel* of counsel for the Defendant, it was alleged that due notice had been given of the said order, as by affidavit appears, and no cause having been shewn to the contrary thereof, during the sitting of the Court, it is, at the rising thereof, ordered that the injunction do stand absolutely dissolved." Reg. Lib. A. 1817, fol. 2127.

On the 24th of *November* 1817, it was ordered, that the Defendant's clerk in Court do accept the exceptions to the sufficiency of the Defendant's answer, as if the same had come in in time. Reg. Lib. A. 1817, fol. 31.

On the 20th of *December* 1817, the usual reference of the answer and exceptions was made to the Master, to certify whether the answer was sufficient. Reg. Lib. A. 1817, fol. 320.



On the 22d of *July* 1818, on the motion of Mr. *Roupel*, of counsel for the Defendants, it was ordered, that the order made in this cause, on the 5th day of *August* 1817, which has been drawn up, but omitted to be entered within the time limited by the rules of this Court, be entered *nunc pro tunc*, and thereof notice is to be given forthwith. Reg. Lib. A. 1817, fol. 1639.

After the 5th of *August* 1817, fifty-six exceptions were taken to the answer of the Defendants; on the 30th of *June* 1818, the Master certified that he had allowed [361] thirty of the exceptions; and on the 11th of *July*, an order was obtained for leave to amend the bill, and that the Defendants might answer the amendments and the exceptions at the same time.

*Aug. 12.* A motion was now made, on behalf of the Plaintiff, to discharge the order of the 22d of *July* 1818, and to continue or revive the injunction.

Mr. *Bell*, Mr. *Montagu*, and Mr. *Phillimore* in support of the motion. Exceptions to the answer having been filed and allowed, if the order dissolving the injunction were now entered, it would contain a false allegation; namely, that no cause is shewn against dissolving the injunction, while exceptions to the answer are pending. The Plaintiff may shew exceptions for cause after failing on the merits, as he may shew cause on the merits after exceptions over-ruled. *Gilb. For. Rom.* 97. An order not entered and served is a nullity.

Sir *Samuel Romilly* against the motion. At the time appointed for shewing cause against dissolving the injunction, cause was shewn, but not sufficient, and insufficient cause being considered as no cause, the order according to the usual form contains a recital to that effect. By the established practice, the Plaintiff is put to his election to shew exceptions or merits against dissolving the injunction; and failing on the merits, he cannot afterwards shew exceptions. In this instance, the time for shewing cause is enlarged, which amounts to a waiver of shewing exceptions. The mere omission to enter the order when it was made, is no ground for discharging it; after the time within which the registrar enters an order without the direction of [362] the Court is elapsed, an order may be obtained for that purpose by motion of course, and is clearly not irregular.

The *Lord Chancellor* [Eldon]. This is a case of great consequence to the practice of the Court.

An answer having been filed, the Defendant moves to dissolve the injunction which had been obtained for want of answer, on the allegation that he has put in a sufficient answer: when the time comes for shewing cause against dissolving the injunction, it is for the Plaintiff to decide whether he will give credit to that allegation. If not, he must shew exceptions for cause; and he has no other course, except an undertaking to shew cause on the merits at the next seal. If he makes that undertaking, I apprehend that he has no right afterwards to shew exceptions for cause; (1) and, if he fails on the merits, the injunction is dissolved.

[363] I will not say, that where a plaintiff has failed on merits, there may not, on the answer to exceptions, afterwards appear a case in which he may be entitled to an injunction on the merits; but then he must come to revive the injunction, shewing that the answer to the exceptions has established a case, which, if he had had it before, would have entitled him to an injunction.

[364] I will, therefore, not undertake to pronounce an opinion that the answer to exceptions may not supply a case of merits; but the Court is extremely anxious to oblige the Plaintiff to rest at once on exceptions or merits; if he were permitted to vacillate, such hardship would ensue, as this Court cannot allow.

Unless I mention the case again the injunction may be considered as dissolved.

*Aug. 14.* The *Lord Chancellor* intimated that he retained the opinion which he had expressed, and that the order pronounced on the 28th of *July* might be given out.

(1) *Pinheiro v. Porter.*

The First Seal after *Michaelmas*, 12 *Geo.* 2, 1738.—After enlargement of the time for shewing cause against dissolving an injunction, the Plaintiff cannot shew exceptions for cause.

It was moved in this case to enlarge the day for shewing cause why the injunction should not be dissolved upon the coming in of the Defendant's answer; to which Lord *Hardwicke* (Chancellor) said, "You must then take the answer as it is, and you

cannot come after and shew exceptions for cause"; upon which the Plaintiff's counsel urged, that the Defendants were in contempt for not answering in time, and had not cleared their contempt by paying the costs, and therefore produced the attachment, and moved upon that; but it was held that the Defendants might clear their contempt in court, by paying the costs there, which they offering to do by their solicitor, this was overruled. It was then said for the Plaintiffs, that they had the whole day to shew cause, and they would prepare exceptions, which it was agreed they might do, but they agreeing afterwards to take the answer as it is the day for shewing cause was enlarged to the third seal.—Mr. Coxe's MSS. 7th Nov. 1738, common injunction for want of answer.—Reg. Lib. B. 1738, fol. 56. The register has been examined without success for a subsequent entry in this cause.

*Peyto v. Hudson.* 12th March, 27 Geo. 2.

2 Madd. 355, n.—Where exceptions are shewn for cause against dissolving an injunction, and the answer is reported sufficient, the injunction cannot be revived on the merits disclosed in that answer.

The bill in this case was for an injunction, &c., and the Defendant not having answered in time, the common injunction went upon an attachment, and the answer being come in, the usual order was made to dissolve the injunction, unless cause, and thereupon the Plaintiff having taken exceptions to the answer, the exceptions were shewn as cause against dissolving the injunction, but according to the course of the court, the order was for the Plaintiff to procure a report of the answer, being insufficient in four days, or otherwise the injunction to be dissolved without further motion (Reg. Lib. B. 1753, fol. 179); and the Master being attended upon the answer, he reported it to be sufficient, and thereupon the Defendant took out execution upon his judgment at law, and the Plaintiff, to prevent its being executed upon his goods, paid the money into the hands of the sheriff, and moved the Court of Chancery at the next seal after, upon the merits of the case, that the injunction might be revived and continued to the hearing, and that the money paid into the hands of the sheriff might be returned to the Plaintiff. But the Lord Chancellor said, he never knew the Court revive such an injunction after execution executed; and that as the Plaintiff had relied upon the answers being insufficient, which were found otherwise, he was too late now to move upon the merits; and therefore refused to make any order; but said, the Plaintiff might, if he thought proper, proceed in his cause to get a decree.—Mr. Coxe's MSS.

[365] ABEL WHITEHOUSE, ABRAHAM WHITEHOUSE, and WILLIAM WHITEHOUSE, Plaintiffs; JOSEPH PARTRIDGE, THOMAS PRICE, and EDWARD FISHER, Defendants. (1) Aug. 15, 17, 1818.

[See *Sobey v. Sobey*, 1873, L. R. 15 Eq. 203; *Colverson v. Bloomfield*, 1885, 29 Ch. D. 343.

An injunction to restrain an extent having been granted by the Vice-Chancellor upon terms of paying the money in question into a banking-house within a month. the Lord Chancellor, on the motion of the Defendant, and evidence of threats of the Plaintiff to leave the kingdom, refused a writ of *ne exeat regno*, but ordered that the injunction should be dissolved, unless the money was paid within three days; and intimated a doubt of the jurisdiction of the Court to enjoin against an extent.

On the 2d of July 1818, an application for an injunction was made to the Vice-Chancellor, supported by an affidavit of the plaintiff, William Whitehouse, in substance as follows.

[366] In May 1811, the Plaintiffs, who carried on the business of nail and iron-mongers at West Bromwich, in the county of Stafford, in co-partnership, obtained from the com-[367]-missioners appointed by statute 51 G. 3, c. 15, a loan of exchequer bills to the amount of £5000, of which sum they, in pursuance of a previous agreement, ad-[368]-vanced £1400 to the Defendant, Partridge, and conformably to the provisions of the act, the Plaintiffs executed their joint and several bond to his majesty, [369] his heirs and successors, in the sum of £10,000, conditioned

for the payment of £5000 by instalments, and *Partridge*, together with *J. Round*, *W. H. Easturell*, and *J. Hatchly*, as the sureties of the Plaintiffs, in like manner became jointly and severally bound to his majesty, his heirs, and successors, as sureties for the Plaintiffs, for the due payment of the loan of £5000; *Partridge* becoming bound in the penal sum of £4000 as surety for £2000, and the other parties respectively, in the sum of £2000, as sureties for the three several sums of £1000 each.

The Plaintiffs paid the first two instalments on the bond, amounting to £2500 with interest to the 12th of *July* 1812, and under the statute 52 *G. 3, c. 137*, the time for the repayment of the remaining instalments [370] was, with the consent of the sureties, enlarged, one-third, amounting to £833, 6s. 8d., being made payable on the 1st of *February*, and the other two-thirds respectively, on the 1st of *April* and the 1st of *August* 1813; and on the 29th of *July* 1812, the Plaintiffs and their sureties entered into bonds for the payment of the last mentioned several sums and interest.

On the 4th of *February* 1813, a commission of bankruptcy was issued against the Plaintiffs, under which they were declared bankrupts, and the Defendants, *Price* and *Fisher*, were chosen assignees; and in *October* 1815, the Plaintiffs obtained their certificate.

At the time of the bankruptcy the whole of the last mentioned instalments was due, and *Partridge* had not paid to the Plaintiffs the sum of £1400, his proportion of the loan, but was then indebted to them in the sum of £1344, 8s. 2d., on account thereof, and under the provision in the first act (51 *Geo. 3, c. 15, s. 48*), entitling the commissioners in the event of any person who should have given bond in respect of an advance of exchequer bills becoming bankrupt, to payment in preference to every other creditor, the commissioners by *Wm. Holden*, their secretary, obtained on the 23d of *March* 1813, an order from the *Lord Chancellor*, that the assignees should, out of the estate of the plaintiffs, in preference to the other creditors, pay to the cashier of the bank of *England* the sum of £2500 remaining due on the said bond with interest. Under that order £1108, 11s. 10d., being all the assets in the hands of the assignees, were paid by them in part of the £2500; £1000 were paid by *Round*, and £621, 17s. 8d., being the balance for principal and interest, the commissioners under a process of or in the nature of an extent issued by them for that purpose, [371] levied from the estate and effects of *Partridge*, together with the costs of the levy, and other costs amounting in the whole, with the sum of £621, 17s. 8d. to £749, 13s. 10d., and the whole of the debt due to the commissioners in respect of the said loan was thus satisfied and paid. The Plaintiffs insisted that, in such payments *Partridge* had paid and satisfied only that portion of the loan which it was incumbent on him to pay, or as in the nature of a principal, and in exoneration of the Plaintiffs, inasmuch as the sum of £1400, part of the said loan, had been actually advanced to *Partridge* immediately after it was obtained, and he was, at the date of the bankruptcy, indebted to the estate of the Plaintiffs in the sum of £1344, 8s. 2d., being an amount considerably exceeding the sum obtained from him by the commissioners under the levy; and that the debt from *Partridge* to the Plaintiffs was part of their estate and effects, within the meaning and operation of the order obtained by *Holden*.

The Plaintiffs having obtained their certificate, and recommenced business on their separate accounts, *Partridge* demanded from them the repayment of the sum of £749, 3s. 10d., and threatened to obtain from the commissioners their warrant or process of extent for the recovery thereof, under the provision in the act (51 *Geo. 3, c. 15, s. 43*), giving to sureties the benefit of the process of extent against the principal debtor or obligor for recovering the sums paid by them; the Plaintiffs insisting that *Partridge* was not a surety within the meaning of the act, but that on the contrary, that portion of the loan which he received and had not accounted for, would have been assets applicable to the payment of the order obtained by *Holden*.

[372] The assignees were willing, if necessary, that the monies received by *Partridge* and remaining in his hands, should be applied in payment of the order, and had given notice to him, that in his account with them as their agent, they were ready to allow to him the sums paid under the extent against the debt due to the Plaintiff's estate.

The affidavit further stated, that *Partridge* was on other accounts indebted to the estate of the Plaintiffs, and had, since the bankruptcy, received various sums as the agent of the assignees, to an amount exceeding the sum of £749, 3s. 10d.; that the Plaintiffs were established in business, and rising in credit, and any proceedings under the suit or process of extent, or in the nature of that process on the part of *Partridge*, would produce their immediate and irreparable ruin.

Mr. *Rose* in support of the motion. The *Vice-Chancellor* made the following order: "It was therefore prayed that the said Defendant, *J. Partridge*, might be restrained by injunction from applying for, or obtaining, any extent, or writ, warrant, or process of, or in the nature of, an extent, in respect of his said alleged debt or demand against the said Plaintiffs, and from enforcing or executing any extent, or any writ, warrant, or process of, or in the nature of, an extent, or other legal proceedings against the said Plaintiffs, or from in any manner molesting them, either as to their persons or property in respect of his said alleged demand: which, upon hearing the said affidavit, and the six clerks' certificate, is ordered accordingly, until answer or further order." Reg. Lib. B. 1817, fol. 1217.

On the 7th of *August* 1818, a motion was made before the *Vice-Chancellor*. to dissolve the injunction. The [373] motion was supported by an affidavit of the Defendant *Partridge*, stating, that he executed the bonds at the request, and solely for the accommodation of the Plaintiffs; that in *January* 1813, £749, 13s. 10d. being due to the commissioners, an extent was issued against *Partridge*, under which £1156, 12s. 4½d. were levied by the sheriff from his goods; and £120, 19s. being paid by the sheriff for rent and taxes due from *Partridge*, the remaining £1035. 13s. 4½d. were retained by him; and after deducting his costs and charges attending the execution of the writ, he paid £749, 13s. 10d. to the account of the commissioners; and *Partridge* denied, that it was ever agreed that he should have, or that he ever in effect had, one-fourth, or any part of the loan.

The *Vice-Chancellor* refused to dissolve the injunction until *Partridge* had answered the bill, but ordered that the plaintiffs should be at liberty to pay the sum of £621, 17s. 8d. into the banking-house of Messrs. *Childs* and Co., in the joint names of *J. B.* and *J. A.*, solicitors for the Plaintiffs, and the Defendant *Partridge*; and thereupon it was ordered that the injunction should be continued until hearing or farther order; and in case the £621, 17s. 8d. should not be paid in, within a month, that the injunction should be dissolved; and in case it should be paid in, the Defendant *Partridge*, on putting in his answer, should be at liberty to apply to dissolve the injunction.

*Aug. 15.* The *Vice-Chancellor's* Court being closed for the vacation, a motion was now made before the *Lord Chancellor*, on behalf of the Defendant *Partridge*, for a writ of *ne exeat regno* against the Plaintiff *William Whitehouse*, or that the order of the 2d of *July* might be discharged, and the injunction dissolved.

[374] In support of the motion, was read an affidavit of the Defendant *Partridge*, stating, that the sum of £621, 17s. 8d. had not yet been paid in, and that *William Whitehouse*, whom the affidavit represented as the only one of the Plaintiffs of ability to pay that sum, or any part of it, had formed a fraudulent scheme for evading the payment, and intended to dispose of his property and quit the kingdom; and some declarations and acts indicating that intention were specified.

Sir *Samuel Romilly* and Mr. *Phillimore* for the motion. The injunction having restrained the Defendant's proceedings at law, the solvent Plaintiff intends to take advantage of that delay to go abroad with the money of the Defendant in his hands. The facts detailed in the affidavit evince that intention. A Defendant in such circumstances, may obtain a writ of *ne exeat regno* without filing a bill. The Plaintiffs are not entitled to the injunction. An extent is certainly a summary proceeding, but it is not the practice of the Court of Chancery to grant an injunction in every case of extent.

The *Lord Chancellor* [Eldon]. The Defendant represents himself to have paid £700 as surety for the amount of exchequer bills advanced to the plaintiffs, and to be therefore entitled to the crown process for compelling repayment; and the bill seeks to restrain those proceedings. Assuming that an injunction might be granted, still, according to the rules and practice of the Court, its interposition must be governed by the circumstances of the case. The *Vice-Chancellor* thinking that the money ought to be paid into court, allowed for that purpose a month.

which, if there is no apprehension of the party going abroad, is a reasonable time ; but if there is an affidavit of declarations and [375] threats that he will go abroad, I should pay no regard to an affidavit denying that intention. Evidence of a threat is that on which the Court acts, notwithstanding denial (*Amsinck v. Barklay*, 8 Ves. 594 ; *Jones v. Alephsin*, 16 Ves. 470) ; and reasonably ; because one who designs to leave the kingdom for the purpose of defrauding his creditors, will not scruple to deny that design.

If the Court, having granted time for payment of money, is satisfied before the time arrives that the party is going abroad to prevent payment of the money, it will undoubtedly interpose ; whether by issuing a writ of *ne exeat regno*, or by dissolving the injunction, unless immediate payment is made, may be a question.

An objection to the motion for dissolving the injunction is, that it asks a reversal of the *Vice-Chancellor's* order ; and an objection to the application for a writ of *ne exeat regno* is, that the sum of money which it seeks to secure, though due, is not yet payable ; but if between the date of an order for an injunction, and payment of money into court at a future time, and the arrival of that time, there is a substantial threat that the party who ought to pay will go abroad, the practice of the Court is to order him to pay the money *instantly*, or to dissolve the injunction.

In this case there certainly should be no injunction without securing the money. Let notice of motion be given.

Aug. 17. Notice having been given, the motion was now renewed.

Mr. *Phillimore* for the motion.

[376] Mr. *Wetherel* and Mr. *Rose*, against the motion, cited *Etches v. Lance* (7 Ves. 417), and *Jones v. Alephsin* (16 Ves. 470).

The *Lord Chancellor* [Eldon]. The question is, whether, an order having been made for an injunction and payment of money into Court within a month, there is reason to believe that the party intends to take advantage of that order for the purpose of defeating it ?

I recollect no instance of injunction against an extent ; but without entering into that general question, I should have felt a great difficulty in issuing this injunction, unless the money had been secured. The crown has the process of extent against all debtors, and happens not to be bound by that equity which binds every other creditor to make use of his securities for those who are secondarily liable to pay, against those who are liable primarily. (2)

The present case discovers the inconvenience which must ensue if one department of the Court before which motions are heard rises, while the other continues to sit. I cannot re-hear the case.

I must take this to be a decision of the *Vice-Chancellor*, that an injunction may be issued against an extent, and that it was fit that the money should in this instance be brought into court ; it must be understood, [377] therefore, that in his opinion there was at least so much doubt on the question of principal and surety that the money ought to be secured, and that the undertaking of the assignees to allow a set-off if any thing should be eventually found due, was not sufficient to dispense with that security. An order is therefore made for payment of the money ; and the single question now is, whether I shall interfere, when the party at whose instance the order was made is so dealing with it as to defeat it ?

I have no hesitation in saying that if I had granted this injunction, I should have ordered payment of the money into court. I apprehend that it was part of the system under which these loans were obtained, that persons becoming sureties, if the crown did not choose to employ the prompt remedies provided by the acts of parliament, should themselves be entitled to resort to them.

When the application was made for a writ of *ne exeat regno*, I was much struck by the difficulties which presented themselves. The writ can be issued only on an equitable debt, with the single exception, I think, of a balance of account, on which an action may be maintained (*Note* : And of arrears of alimony decreed, *Dawson v. Dawson*, 7 Ves. 173, and many other cases) ; and it can be issued only on an equitable debt then due and payable. I recollect a scandalous instance of advantage taken of that rule ; a creditor having given time to his debtor from the 1st of *January* to the 1st of *July*, in the last week in *June* the debtor thought proper to attempt to leave the kingdom ; and on great consideration this court decided that it could not grant the writ. (See 6 Ves. 284 ; 7 Ves. 174 ; 14 Ves. 261.) If,

therefore, the *Vice-Chancellor* [378] has thought proper to render the debt no longer demandable at law until there should be disobedience to his order, and that order renders it not demandable in equity before the end of a month, there would be great difficulty in extending this high prerogative writ, which has been already extended far enough, to embrace this case.

I shall, therefore, consider the application as made not for a writ of *ne exeat regno*, but for an order that the money which was to have been paid within a month, may be secured by earlier payment, or that the injunction may be dissolved. On the present occasion I must take the order of the *Vice-Chancellor* to be right, for I am not now called on to re-hear it.

It is obvious that there is a degree of inconvenience very unintentionally introduced by the circumstance of both courts not continuing their sittings. The business of these departments of the court cannot be carried on, unless an opportunity is afforded to the suitors of conveniently stating to each the difficulties that occur in the execution of its orders; and there ought therefore to be some reasonable interval between the last day of the sittings, and the departure of the person holding them. I cannot attempt to set right the order of the *Vice-Chancellor*, but must consider it to be correct; recollecting, however, that it is an order which assumes that this court may grant an injunction against an individual whom the legislature has authorised to sue out an extent, by giving to him that remedy which the crown itself would have had, and, in the first instance, would have taken, against persons who as among themselves should be considered as primarily liable; and so far I may venture to say it is a very delicate question whether an injunction should be issued. Assuming the [379] propriety of the *Vice-Chancellor's* order for an injunction and payment of the money into court at the time specified, the question is, whether the subsequent affidavit satisfies me that the Plaintiffs should not now be allowed for that payment a time so long as that granted, and, as I must take it, properly granted, in the first instance?

The Court ought to feel no inclination to extend the application of the high prerogative writ of *ne exeat regno*; I think that it has been granted on grounds which ought not to be enlarged by subsequent decisions. If men will not take from their debtors security enabling them to proceed at law, they must abide by the consequences.

I am clearly of opinion that the present circumstances of this case require more prompt payment. Let the injunction be dissolved, unless the money is paid into the banking-house on the 20th of this month; and if not being then paid, it is afterwards raised by virtue of the extent, I think that it becomes me to show so much respect for the order of the *Vice-Chancellor* as to direct that it shall in that case also be secured.

"His Lordship doth order that the Plaintiffs, on or before the 20th day of August instant, pay the sum of £621, 17s. 8d., into the banking-house of Messrs. Childs and Co., Temple Bar, London, to the joint account of J. B. and J. A., &c.; and in default of the plaintiffs paying the said sum of £621, 17s. 8d. into the said banking-house as aforesaid by the time aforesaid, it is ordered that the injunction granted in this cause to restrain the Defendant J. Partridge from applying for or obtaining any extent, &c., be dissolved without farther motion; and the Defendant J. Partridge is in that case to be at [380] liberty to proceed under the extent for the said sum of £621, 17s. 8d., or for so much thereof as shall not have previously been so paid into the said banking-house; and it is ordered that the Defendant J. Partridge forthwith pay what he shall recover under such extent into the said banking-house, to the said joint account of J. B. and J. A." Reg. Lib. B. 1817, fol. 1620.

(1) Mackintosh v. Ogilvie. 10th March 1747.

Dick. 119; 4 T. R. 193, n.—A creditor of a bankrupt residing in England, having, upon sentences obtained since the bankruptcy, proceeded by process from the courts in Scotland to recover sums due to the bankrupt's estate there, to an amount much beyond his own debt, was, upon evidence of his intention to quit the kingdom, restrained by writ of *ne exeat regno*.

This was a motion to discharge a writ of *ne exeat regno*. The Plaintiffs were assignees of a bankrupt, the Defendant a creditor, who, before bankruptcy, had made

arrestments in *Scotland* on debts due to the bankrupt from persons there, and on affidavit of his getting the money into his hands, the writ was ordered. He now moved to discharge the order, upon a supposition that he had a right to proceed by arrestment.

The Lord Chancellor [Hardwicke]. The Defendant had not obtained sentence before the bankruptcy; it is then like a subsequent foreign attachment by the custom of *London*. Would this Court suffer a creditor to obtain priority by such an attachment only, if no sentence was pronounced before the bankruptcy? Certainly not. The true way is for the Defendant to give security, if the Court of Session will not regard the right of the assignees. I cannot grant an injunction or prohibition to the Court of Session, but I will certainly restrain the party. I will not permit a creditor here to gain such a priority, to pass by the commission of bankruptcy, go into *Scotland* or *Holland*, where arrestments are suffered, and arrest debts there, &c., to obtain a preference, and evade the laws of bankruptcy here. That is the nature of the present case. The Defendant endeavours to procure an entire satisfaction by another law over effects there. If I discharged the writ, he might go out of the kingdom, and evade all account here. If the Defendant were not going abroad I would do nothing; but as he is, I shall not discharge this writ without security to abide the event of the cause.—MS.

The facts of the case on which the writ was issued, appear from the entry of the order for that purpose in the Register, 24th February 1747. "Upon consideration this day had by the right honourable the Lord High Chancellor, &c., of the humble petition of the Plaintiffs, shewing that a commission of bankrupt issued against *John Aberdeen*, late of *London*, merchant, bearing date the 29th day of September 1746, and he was thereupon found a bankrupt, and the Plaintiffs (together with one *Jeremiah Cape*, since deceased), were chosen assignees of his estate and effects; that the said bankrupt, before his bankruptcy, having dealt considerably into *Scotland*, there was due to him in that country at the time of issuing the said commission, upwards of £700, for the better recovering and getting in the same, the Plaintiffs, together with the said *J. C.*, granted their power of attorney to a merchant in *Scotland*; that on their agent's applying to the several debtors in that country for payment of the debts due from them to the bankrupt's estate, they severally informed him that they would readily pay, but that the Defendant, *Thomas Ogilvie*, a merchant, residing in *London*, pretending to be a large creditor of the said bankrupt, had sent down orders to his agent in *Scotland*, to arrest in the hands of the debtors all the debts due to the said *J. Aberdeen* the bankrupt, in *Scotland*, which he had accordingly done, and that they could not pay till those arrestments were removed; that the Plaintiffs have lately received information from their said agent in *Scotland*, that the said Defendant, *T. Ogilvie*, had proceeded on the said arrestments in the courts of justice in that country, and although the Plaintiffs by their agent had made a defence, and insisted on the said commission of bankruptcy and assignment, yet the said Defendant, *T. Ogilvie*, so far prevailed as to obtain decreets or sentences for the payment to him of the money so arrested, and some of them had already been obliged to pay their debts to the said Defendant, *Ogilvie's* agent, and the others of them would soon be obliged to do the same, although there appears to the Plaintiffs to be due to the said Defendant, *T. Ogilvie*, only £31, 2s. 9d., from the bankrupt; that the said Defendant, *Ogilvie*, who has resided some years in *London*, and traded as a merchant there, is now fitting out a ship to go on a voyage to *Guinea* and the *West Indies*, and intends very soon to proceed in her himself, whereby the Plaintiffs will be prevented from recovering the monies the said Defendant's agent has already received on the said arrestments in *Scotland*, and the other monies which the said Defendant's said agent will receive on that account, as by affidavit appeared; that the said *Aberdeen's* creditors will, by such contrivances, be defeated of a very great part of the said bankrupt's estate, which, they hope, ought to go and be divided proportionably among the creditors who have or shall come in, in due time, and prove their debts under the said commission; that the Plaintiffs have filed their bill against the said Defendant, *T. Ogilvie*, as by the six clerks' certificate appears; it is ordered that a writ of *ne exeat regno* do issue against the said Defendant, *T. Ogilvie*, until he shall fully answer the Plaintiff's bill, or this Court make further order to the contrary; and the same

is to be marked for the sum of £300, and to that end the said writ is to be indorsed in words at length, and not in figures."—Reg. Lib. B. 1747, fol. 167.

*Sealy v. Laird. At the Rolls. 10th January 1792.*

A writ of *ne exeat regno* was granted in respect of a debt for which the Plaintiff had made himself liable, on the Defendant's account, but which he had not yet paid.

The Defendant was an *English* merchant established at *Malaga*; the Plaintiff acted as his agent and correspondent in *England* for several years, and was, by agreement, allowed a commission on all the orders he procured to be sent to the Defendant from *England*. In the course of these dealings between the Plaintiff and Defendant, the Plaintiff, by the Defendant's direction, chartered a ship for the Defendant, on a voyage from *London* to *Malaga*, and thence to *Bremen*. In the charter-party which the Plaintiff executed, he was stated to be the agent of the Defendant. After the voyage had been performed, the owner of the ship brought an action of covenant against the Plaintiff, upon the charter-party, and recovered a verdict for £800, which was £200 less than he had at first demanded, and the Plaintiff being unable immediately to pay the £800, an agreement was entered into between the owner of the ship and the Plaintiff, that he should pay the £800 by instalments of £50 a year, without interest, and that the judgment should stand as a security for payment of the instalment. The Plaintiff had not yet paid any of the instalments, but the Defendant coming to *England*, and being about shortly to return to *Malaga*, the Plaintiff filed his bill for an account of all dealings and transactions between them, and prayed, that in taking the account he might be allowed £791, 5s. 6d., in respect of the said bond so entered into by him; and that the Defendant might be restrained by a writ of *ne exeat regno* from going out of the kingdom.

Upon an *ex parte* petition to Sir R. P. Arden, Master of the Rolls, supported by an affidavit, stating all the above facts, and that the Defendant was indebted to the Plaintiff in £30, upon the balance of accounts, independently of what was due in respect of the bond entered into by him, and in £791, 5s. 6d., in respect of the bond, in manner before mentioned; His Honor, after much consideration, made an order for a writ of *ne exeat regno*, and directed it to be indorsed with the sum of £791, 5s. 6d.

After his Honor had made the order, he stopped it in the hands of the register, and after some days directed him to deliver it out.—From Mr. Romilly's notes. Lord Colchester's MSS.

10th January 1792. "His Honor doth order, that a writ of *ne exeat regno* do issue against the said Defendant, until he shall fully answer the Plaintiff's bill, and this Court make other order to the contrary; and it is further ordered that such writ be marked in the sum of £791, 5s. 6d. in words at length, and not in figures." Reg. Lib. B. 1792, fol. 35.

(2) The *Attorney-General v. Resby, Hardr.* 378, the eighth chapter of *Magna Charta* having received a restrictive construction; but the surety, after satisfaction of the debt of the crown, becomes entitled to the crown process against the principal. *Anon. Savile*, 30, pl. 72. *The King v. Bennett*, 1 *Wightw.* 1.

*Ex parte CHADWIN, in re CHADWIN. Aug. 1, 1817; Aug. 18, 1818.*

[See *Baker v. Farmer*, 1867–68, L. R. 4 Eq. 389; L. R. 3 Ch. 543.]

A testator having directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest £400 in trust for his wife for life in bar of dower, and after her death for W. C.; and upon farther trust, out of the residue of the money, to invest £100 in trust for J. R. for life, and after his death for his children; and upon farther trust to pay other sums to persons named; and having bequeathed the residue of his estate to W. C.; and the only acting executor having made no investment on the trusts of the will, but having paid interest on the two sums of £400 to the respective legatees, and applied the assets to his own use, and afterwards become bankrupt;



it was held, that by that dealing the two legatees had waived whatever priority the will might have given to them; and the dividends payable on the whole sum proved under the commission against the executor in respect of the testator's estate, was divided among the pecuniary legatees and the residuary legatee, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each.

*William Roe*, by his will dated the 11th of *January* 1804, and duly executed to pass real estates, after directing that all just debts, and funeral and testamentary expenses, should be paid out of his real and personal estate, devised and bequeathed to *George Chadwin*, his brother-in-law, and *Thomas Dakin*, all his real and personal estate to them, their heirs, &c., upon trust to sell, with a direction that their receipts should be sufficient discharges; and upon farther trust, and he directed his trustees in the first place, to place out at interest the sum of £400, on mortgage or government security, the interest to be paid to the testator's widow half-yearly during her life, in bar of dower; and immediately after her decease he bequeathed the said sum to his nephew *William Chadwin*; and upon farther trust, out [381] of the residue of the money to arise from the sale of his estate and effects, to discharge all his debts, funeral and testamentary expenses, and the expenses of the trust, and subject thereto, on trust to place out at interest the farther sum of £400 upon mortgage or government security; the annual interest to be paid to his brother *John Roe* during his life, and immediately after his decease, the said sum to be called in and divided among the children of *John Roe* equally; and on farther trust out of the residue of the money to arise from the sale, to pay to each of the testator's nephews £100, and to each of his nieces £50, when they should attain twenty-one; and the residue of his estate he gave to his nephew *William Chadwin*, and appointed *George Chadwin* and *Thomas Dakin* executors.

*Dakin* having renounced probate, the will was proved in *March* 1804, by *George Chadwin*, who sold the testator's estates, and paid his debts and funeral and testamentary expenses; and instead of investing the residue according to the trusts of the will, employed it in trade, and in the purchase of a real estate for his own benefit. Interest on the sum of £400 was paid to the testator's widow to the 25th of *March* 1812, and interest on the like sum was paid to the testator's brother *John Roe* to the same time; and two of the testator's nieces received the legacies bequeathed to them.

In *July* 1811, a commission of bankrupt was issued against *George Chadwin* the executor.

Soon after the bankruptcy, *William Chadwin*, the nephew and residuary legatee of the testator, presented a petition, on which an order, dated the 15th of *April* 1813, was made, directing a reference to the commissioners to take an account of the assets of the testator [382] possessed by the bankrupt, and how he had applied and disposed thereof, and what remained due from him on account thereof at the time of the bankruptcy, and the petitioner was to be at liberty to prove such sum as should be found due upon the account directed; and it was ordered that the assignees should pay the respective dividends which should be declared upon the amount of such proof (the amount of such respective dividends so to be paid from time to time, to be verified by affidavit) into the Bank, with the privity of the *Accountant-General* of the Court of Chancery, in trust in this matter, to be placed to the account of the personal estate of the testator, subject to farther order; with liberty for the petitioner and all other parties interested under the said testator's will, to apply as they should be advised; and it was ordered that the costs of the application should be paid to the petitioner.

By virtue of this order the petitioner proved a debt of £3185, 5s. 11d. under the commission; and two dividends thereon, amounting to £1313, 18s. 7d., were paid into the Bank.

*William Chadwin* then presented another petition, stating that the testator's widow and her second husband had assigned to him her interest in the sum of £400; that the testator's brother *John Roe* was still living, having four children, three of whom were infants; that *Thomas Roe*, another brother of the testator, was also living, having one child, an infant; that the petitioner was the eldest son of *Elizabeth Chadwin*, the sister of the testator, who had five other children, the testator having no other brother or sister; and that the petitioner had thus become entitled to the

present interest in the whole of the legacy of £400, and also to the legacy of £100 as one of the testator's nephews, and [383] to all the residue of the testator's estate after payment of his debts and legacies; and submitting that the legacy of £400 was by the will a primary charge on the produce of the sale of the testator's estates, and that the petitioner was entitled to be paid the same in full, out of the sum of £1313, 18s. 7d.

The petition prayed, a declaration that the petitioner was entitled to be paid the legacy of £400, with interest, from the 25th of March 1812, in full, and payment thereof, out of the sum of £1313, 18s. 7d., and an account of what was due to him for principal and interest, and payment of the residue of that sum among the petitioner and the other legatees, according to their several priorities, in part satisfaction of their legacies; or, if the *Lord Chancellor* should be of opinion that the petitioner was not entitled to be paid the sum of £400 in full, then that an account might be taken of the clear amount of the testator's estate at the time of his death, and of the amount of the clear residue that would have remained of that estate, after paying all his debts, funeral and testamentary expenses and legacies, if the same had in fact been paid, and that the several legacies given by the will, and the amount of the said residue, might be ordered to abate proportionally; and that the sum of £1313, 18s. 7d. might be apportioned among the petitioner and the several other legatees, in proportion to the amount of their several legacies, and of the said residue.

The Master, on another petition by the same petitioner, having reported that all the debts of the testator were paid, in March 1817 *William Chadwin* presented a farther petition, praying the confirmation of that report, and that the original petition might be farther heard.

[384] The case was argued by Sir *Samuel Romilly* and Mr. *Stephen*, Mr. *Horne*, and Mr. *Rose*.

The cases cited were, *Dyose v. Dyose* (1 P. W. 305), *Fonnereau v. Poyntz* (1 Bro. C. C. 472), and *Humphreys v. Humphreys* (2 Cox, 184).

Aug. 18, 1818. The *Lord Chancellor* [Eldon]. This petition prays payment, not out of the testator's estate, but out of dividends declared on the amount due to the testator's estate from the party who has become bankrupt, and claims a proportionate abatement among the pecuniary legatees and the residuary legatee.

The first part of this petition, which prays that the legacy of £400, the entire interest in which the petitioner has acquired by assignment from the testator's widow, may be paid in full, preferably to all the other legacies, is founded on the passage in the will, directing the trustees, "in the first place," to invest that sum; and on the expressions which precede the subsequent bequests, "upon further trust, out of the residue of the money," to pay debts and funeral and testamentary expenses, and "subject thereto and on trust," to invest other sums; and it was insisted in the argument, that these expressions manifest an anxiety in the testator, that the sum to be invested for the benefit of his wife should have priority even over the payment of his debts. Each legacy in succession is given out of the residue; which, it has been properly contended, means what remains after the prior application of the fund.

Under the ulterior bequests infants are interested, [385] and a considerable question arises how far their rights can be bound by an order on a petition in the bankruptcy of the executor; such an arrangement may be beneficial to them, but it appears to me that it can hardly be said that the Court can so bind them. The question, whether by reason of the deficiency of the estate, not only the pecuniary legatees should abate among themselves, but a computation should be made of what would be coming to the residuary legatee, and he should be considered on the footing of a pecuniary legatee to that amount, and an abatement be made among them all, is extremely difficult, and ought to be made the subject of a bill, did not the small amount of the fund render it advisable to obtain a decision in this way, rather than to institute a suit, which would absorb the estate.

If there had been assets for payment of all the legacies, no question could have arisen; the residuary legatee could not in that character have objected to the payment of the antecedent legacies, but must have been content with whatever might happen to be the residue, and while there was sufficient to satisfy the pecuniary legacies, there would have been no reason for discussing their priorities.

A question might have arisen involving no consideration of the consequences

of the *devastavit* which has been committed. Supposing the testator's estate insufficient to satisfy all the legacies, the question would then have been, the funds left by the testator not being adequate to pay all that he intended to be paid, did he intend that the first-mentioned sum of £400 should be paid in priority to all the rest, and each of the successive legacies in priority to those which follow it? But the case which I have supposed differs entirely from [386] the present, assuming an estate unaffected by *devastavit*, and to be distributed according to the effect of the testator's will; whereas, in the events that have occurred, the executor instead of applying himself to the due administration of the testator's estate, paying the legacies according to their priorities, if there were priorities, and making proper investments, paid interest to the testator's widow, and to one of his brothers: and that sort of transaction introduces another question not touched by any prior decision, whether the legatees have not so dealt with this executor in regard to their respective legacies, as to have made him their debtor for each respectively; and whether the proper proof under the commission would not have been, not one entire proof, but subdivided proof for the respective legacies?

Assuming that in this case the latter ingredient is not to be regarded, the Court is to consider what the law is where, there being both pecuniary legatees without priorities among themselves, and a residuary legatee, and by reason of the *devastavit* of the executor, the estate having become insufficient to pay all the pecuniary legacies, the residuary legatee insists that the estate at the death of the testator being sufficient, and there then being a residue of £2000 or £3000, he is entitled to rank as a legatee of that sum, and to represent that the executor being a debtor to the aggregate body of legatees, he is to be considered a creditor for the residue?

In the first case cited, *Dyose v. Dyose* (1 P. W. 305), Lord Cowper in the instance of deficiency by a *devastavit*, held that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the [387] death of the testator left a residue; and that the wreck of the estate which could be recovered after the *devastavit*, was divisible not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

That case came under the consideration of Lord Thurlow in *Fonnereau v. Poyntz* (1 Bro. C. C. 472, see p. 478), where the principal question related to the admissibility of parol evidence; and adverting to the argument which had been deduced from Lord Cowper's decision, Lord Thurlow declared that he could not agree to the law of that case, and deprecated the doctrine, that whenever a testator gives a residue he is to be understood as intending to leave a residue.

In *Humphreys v. Humphreys* (2 Cox, 184) Lord Thurlow did not content himself with expressing disapprobation of the doctrine in *Dyose v. Dyose*, but seems to me to have decided against it; for in that case the residue had been diminished, not by the act of the executor after the death of the testator, but by the act of the testator alone; and Lord Thurlow remarks, that if the inference there attempted to be drawn from Lord Cowper's decree were correct, the inquiry into the state of the assets should have referred to the date of the will, and not to the death of the testator.

Lord Thurlow may, therefore, be considered as having condemned the decision in *Dyose v. Dyose* (Note: Lord Thurlow's condemnation of that case has been approved by Sir William Grant, *Page v. Leapingwell*, 18 Ves. 466); and [388] if there were no question in the present case but this, whether the residuary legatee can come in competition with the pecuniary legatees, Lord Thurlow's authority would be opposed to the claim of the residuary legatee.

A case in which after the death of the testator, the executor deals with the property as he thinks fit, there being no accession to that dealing on the part of those for whom he is trustee, is widely different from the present case, in which those who might every day have made demands on the executor, have dealt with him as a person having in his hands so much of their money, and have from time to time received from him interest on various sums to which they are respectively entitled. Such transactions give rise to a question which requires much consideration, whether the legatees have not thereby made the executor severally their debtor. If the testator's widow, whom the petitioner by her assignment represents, had required the executor in the first place to separate the £400 from the bulk of the assets, and

invest it in a mortgage, and that course had been adopted, no question could have arisen between the first legatee and the rest, on the effect of the *devastavit*. Instead of that, the executor is permitted by the widow and the other legatees, to retain the legacies, paying interest for them ; and the question then arises, whether, supposing Lord *Thurlow* right, these supervening circumstances in the conduct of the respective legatees vary the case, and lay a ground for the doctrine of *Dyose v. Dyose*, not on the reasoning there suggested, but on the principle that the widow and the adult legatee having received interest on their legacies, and the residuary legatee having been entitled to receive the fruits of his legacy, if there were any, a mixed case exists, which renders it reasonable to declare that this sum of £1300 shall be divided among the legatees, as the £3000 would have [389] been divisible if the executor were solvent ? Whether it is not most just to hold that there is an end of the will as to priorities, and that arrangements having been made by all the legatees, the fund in the hands of the executors is applicable for the benefit of all according to those arrangements, as they may be considered to have rendered the executor the debtor of each of the legatees separately ?

After anxious and frequent consideration, I know no better view of this case. If the parties are content with it, I venture to say that it is for the benefit of the infants that it should be so considered ; but if the parties are not content, I ought not to be satisfied, feeling that this is as difficult a case as I ever had to deal with ; and I must put them to file a bill.

Mr. *Cullen* (*Amicus Curiae*) observed, that the proof represented the testator's estate, and that the total was augmented by the amount to which the residuary legatee was entitled.

The *Lord Chancellor* [Eldon]. I am of opinion that the residuary legatee ought to be considered a creditor for the amount of residue at the death of the testator. This view of the case admits him on a principle different from that adopted in *Dyose v. Dyose*, and excludes him from priority in respect of the £400.

The following order was made :

I do order that it be referred to Master *Stephen*, the master to whom this matter has already been referred, to ascertain the amount of the clear residue that would have remained of the testator's real and personal estate, [390] after paying all his debts, funeral and testamentary expenses, and legacies, if the same had in fact been paid ; and I do declare that the several legacies given in and by the said testator's will, or such of them as have not been paid, and the amount of the said residue, ought to abate proportionally ; and I do order, that the said Master do apportion the residue of the sum of £1313, 18s. 7d. now standing in the books of the Governor and Company of the Bank of *England*, in the name of the *Accountant-General* of the Court of Chancery, to the credit of this matter, the account of the personal estate of the testator *Wm. Roe*, after payment of the costs hereinafter directed to be taxed, among the petitioners *Wm. Chadwin*, *Thos. Roe*, *John Roe* an infant, *George Roe* an infant, and *Ann Roe* an infant, children of the testator's brother, *John Roe* ; and between *Elizabeth Roe* an infant, daughter of the testator's brother, *Thos. Roe* ; and between *George Chadwin*, *Elias Chadwin*, and *Betty Chadwin*, three of the children of the testator's sister, *Elizabeth Chadwin*, according and in proportion to the amount of their said several legacies and interest, including the aforesaid legacy of £400, the interest whereof is given for the said testator's widow, and afterwards assigned to the petitioner *Wm. Chadwin* as aforesaid, and of the residue and interest of the testator's estate and effects ; and that what the said Master shall certify to be the proportion of the petitioner, *Wm. Chadwin*, be paid to him ; and let what the Master shall certify to be the proportion in respect of the interest of the legacy of £400, given to the testator's brother, *John Roe*, for life, be paid to him ; and let the proportion of the principal thereof be carried over to an account, to be called the account of the said *John Roe* and his children, and be laid out in the purchase of Bank 3 per cent. annuities, and the dividends paid to the said *John Roe* during his life, with liberty to apply [391] upon the death of the said *John Roe* ; and let the proportion of each of them, the said *Wm. Chadwin*, *Thos. Roe*, *Elias Chadwin*, and *Betty Chadwin*, be paid to them respectively by the said *Accountant-General*, out of the residue of the said sum of £1313, 18s. 7d., after payment of the costs hereinafter directed to be taxed : and I do order that what the said Master shall certify to be the proportion of each of them, the said *John Roe*, *George Roe*, *Ann Roe*, and *Elizabeth*

*Roe*, the infants, of the residue of the said sum of £1313, 18s. 7d. as aforesaid, be carried over by the said *Accountant-General* to their respective accounts; and let the same, when so carried over, be laid out in the purchase of Bank 3 *per cent.* annuities; and I do order that it be referred to the said Master to tax, as between solicitor and client, the petitioner's costs which were directed to be paid to him by the order of the 15th day of April 1813, in his said petition mentioned, and also the petitioner's costs of and relating to this matter, and incident thereto; and let the said Master, in like manner, tax the costs of the other legatees, of and relating to this matter, and incident thereto; and let such costs, when so taxed and ascertained, be paid by the *Accountant-General*, out of the said sum of £1313, 18s. 7d. to the solicitors for the respective parties, that is to say, &c.; and for the purposes aforesaid, the said *Accountant-General* is to draw upon the Bank, &c., with liberty for the several parties to apply to me in this matter as they shall be advised; and this, my order, is to be drawn up and entered with the register of the Court of Chancery.—Orders in Bankruptcy, 147, fol. 236–242.

[392] *Ex parte* SOUTH, in the matter of Row. Aug. 17, 1818.

A trader having given to a creditor an order on the executor of her debtor to pay the debt to the creditor, and the executor having received the order, and retained it until the assets of the testator should enable him to pay simple contract debts, and the trader having become bankrupt before payment, the creditor was declared entitled to receive the amount of the order from the executor, notwithstanding a subsequent arrest of the trader.

*George Alderson* and *Thomas Alderson*, being creditors of *Jane Row* for goods sold and delivered to the amount of £528, and *Jane Row* being a creditor of the estate of *John Fish*, deceased, for work done principally with the materials sold to her by *G. and T. Alderson*, she, in order to satisfy part of her debt, gave to them her draft on *F. Klein*, Esq., the acting executor of *Fish*, in the form following: "£417, 6s. Sunbury, 5th August 1813. Please pay Messrs. *G. and T. Alderson*, or order, £417, 6s. as part of the amount due to me for plumber's work done for the late *John Fish*, Esq.—To *F. Klein*, Esq., Lower Tooting, Surry."

The draft was immediately presented to *Klein* by the solicitors of *G. and T. Alderson*, but *Klein* not being prepared with assets to discharge the simple contract debts of the testator, could not accept it payable at any certain period, but retained it to be paid when there should be funds of the testator applicable to the payment of debts of that class.

In consequence of the delay in the payment of the draft, *G. and T. Alderson* afterwards arrested *Jane Row* for the amount of their debt.

On the 17th of November 1814, a commission of bankruptcy was issued against *Jane Row*, and on the 17th of December 1814, *Thomas Alderson* proved a debt of £530, 13s. 6d. under the commission; stating in his deposition that he held the draft as a security; and *Thos. Alderson* and *James South* were elected assignees.

[393] *Klein* having declined to pay the draft without the *Chance'lor's* order, the *Vice-Chancellor*, on the petition of *G. and T. Alderson*, ordered that the sum of £417, 6s., the money due from *Klein* on account of the estate of *Fish*, might be paid to or on account of *G. and T. Alderson*, their proof of debt being reduced *pro tanto*. (*Ex parte Alderson*, 1 Madd. 53.)

*James South*, the other assignee, being dissatisfied with this order, presented a petition of rehearing, insisting that the £417, 6s. ought to be paid to the assignees as part of the general estate of *Jane Row*.

The case having been argued before the commencement of the present year, the *Lord Chancellor* now gave judgment.

The *Lord Chancellor* [Eldon]. It has been decided in bankruptcy, that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him; on the other hand this doctrine has been brought into doubt, by some decisions in the courts of law, who require that the party receiving the order should in some way enter into a contract. (See *Israel v. Douglas*, 1 H. Bl. 239. *Legh v. Legh*, 1 B. & P. 447. *Tallock v. Harris*, 3 T. R. 180.) That has been the course of their decisions, but is certainly not the doctrine of this Court.

In this case the executor of the debtor, instead of returning the draft to the persons who presented it, retains it, with a declaration that he cannot then accept it payable at any particular time, but that it shall be paid whenever the state of the testator's assets enables [394] him to pay simple contract debts, and that in the mean time he will hold it as a charge. I am of opinion that the *Vice-Chancellor* was right in considering this not as an absolute, but as a conditional acceptance of the order; for this document, though not in the form of a bill of exchange, is rather an order for payment of money than any thing else; and I think that the act of the executor in holding the order until the assets should enable him to make payment, is such an acknowledgment as takes this case out of the decisions in the Court of King's Bench, supposing them such as I have represented.

Then it is said that the *Aldersons* waived the benefit of their security. After full consideration, I think that the *Vice-Chancellor* was right also on this point. This draft was given as a security; the executor retained it in his hands as a charge on the assets, but could not apply the assets in payment until they were in a state to be properly so applicable; whether they would ever be so applicable was a question; in all events the time was not yet arrived; and the debt, therefore, could not be considered as in any way discharged, nor the other remedies of the creditors affected, except that if they resorted to those remedies, the executor would be liable to pay to them so much only as remained unsatisfied. The arrest itself was no waiver: had it been accompanied by an agreement to make no farther demand on the assets, the effect might be different; but if it proceeded no farther than arrest, and there was no other consideration, I think that would not be sufficient.

The order of the *Vice-Chancellor* is therefore right.

Petition dismissed.—Orders in Bankruptcy, 147, fol. 227, 228.

[395] BARRITT v. BARRITT. Nov. 6, 7, 1818.

Attachments issued for want of answer, after intimation that they would be sealed at the next private seal, and notice of a petition presented for an order for farther time, set aside for irregularity, due diligence having been used to obtain the order, but without costs, no communication having been made of circumstances which occasioned delay.

The first order for time to answer obtained by the Defendants having expired on the 23d of *August*, on the 27th of that month the Plaintiff's clerk in court sent to the Defendant's clerk in court a note intimating that he had peremptory orders to attach at the first private seal. On the following day the Defendant's solicitor left a note with the clerk in court of the Plaintiff, purporting that they would obtain an order for farther time; and on the 29th of *August*, a petition for three weeks farther time was presented to the *Master of the Rolls*, and notice of its presentment given to the Plaintiff's solicitors. The petition was answered and returned on the 3d of *September*, and an order was bespoken from the registrar's office, and after applications on the 7th and 8th, which were not successful by reason of the absence from town of one of the officers, was obtained on the 15th of *September*, and having been entered on the next day, was served on the Plaintiff's solicitors.

On the 5th of *September*, attachments for want of answer were issued against the Defendants, and executed on the 12th.

A motion was now made that the attachments might be set aside for irregularity, and that the Plaintiff's solicitor might be ordered to pay the costs.

Mr. *Hart* for the motion.

Sir *Arthur Piggott* and Mr. *Spence* against the motion.

[396] The *Lord Chancellor*. The first order for time having expired, the Defendant became subject to an attachment; but it is clear, that, according to the established practice, if an attachment is not issued before a second order for time has been obtained, it is too late to complain of that contempt, which may be said to have existed between the expiration of the first order and the date of the second. I go farther, and say, that if the Plaintiff, from courtesy, declines to issue an attachment, intimates to the Defendant that an attachment will be issued unless he obtains another order, he puts it on the Defendant to take measures for obtaining the order, and cannot complain unless he fails to obtain it in due time.

These remarks dispose of the question of irregularity. On the question of costs, much will depend on the *bona fides* with which the parties acted, in insisting that due diligence had not been used for obtaining a farther order.

Nov. 7. The Lord Chancellor [Eldon]. The Plaintiff having filed a bill for relief, the Defendant obtained an order for time, which expired on the 23d of August, and on that day, according to my understanding of the practice, it was competent for the Plaintiff to obtain an attachment against him for want of an answer. Without in all respects condemning what is called the courtesy of the Court, I cannot help thinking, that it sometimes occasions more expense than it saves. According to this courtesy a paper was handed to the Defendant, intimating that an attachment would be sealed against him at the next private seal: on the opening of this case it was represented that the notice contained the words [397] "unless an order is obtained for farther time;" that representation is found to be erroneous; but I consider the error immaterial, because a notice of this kind is neither more nor less than an intimation that an attachment will be issued if the parties can issue it, which means, unless in the interval an order is obtained; for after an order the attachment cannot be issued. The consequence is, that the person giving this notice must be understood as intimating his intention not to issue an attachment if an order is obtained for time; and, therefore, that he will not apply for it if due diligence is used to obtain the order.

On the 28th of August notice was given to the Plaintiff's clerk in court that the Defendant would obtain an order for farther time; on the following day a petition for three weeks farther time was presented to the Master of the Rolls, and there can be no doubt that, on that petition, the order, which was matter of right, would be obtained; on the same day, the Plaintiff's clerk in court was informed that the petition had been presented; on the 5th of September attachments were issued. The Plaintiff, therefore, obtained the attachments after he had received notice of a petition on which, of course, an order would be obtained that would prevent their being issued; and if they had been executed forthwith, without doubt the Court would have set them aside as issued against good faith.

I think that the question of costs depends almost entirely on this view of the case; whether, after the answer of the Master of the Rolls to the petition had been obtained, on the 3d of September, it was incumbent on the person who obtained it to give intimation to the Plaintiff's clerk in court, that he had done what on the 29th of August he had promised to do; or whether, on the [398] other hand, it was the duty of the Plaintiff's agent to make inquiry. Before the attachments were executed the Plaintiff waited from the 29th of August to the 16th of September, without a word of intimation what had been done. If one party, therefore, was too hasty in issuing the attachments, the other failed in not informing him of the circumstances which occasioned delay in obtaining an order, without a due application for which the attachments might be properly issued. The attachments must be set aside for irregularity, but without costs.

"His Lordship doth order that the said attachments be set aside for irregularity." Reg. Lib. A. 1818, fol. 306.

*Ex parte* PARTRIDGE and OTHERS. Nov. 7, 1818.

Order directing taxation of a solicitor's bill for business done in the court of great sessions discharged, the Court not assuming jurisdiction for that purpose alone.

On the 21st of March 1817, the Master of the Rolls ordered (in the ordinary form of a reference for taxation), "that it should be referred to Mr. Campbell, one, &c., to tax the bill of Charles Brown, of Cardiff, in the county of Glamorgan, gentleman, attorney at law, and one of the solicitors of this court; and in order thereto the said parties were to produce before the said Master, upon oath, all books, papers, writings, and vouchers in their custody or power, relating thereto, or any of the items or charges therein, and were to be examined upon interrogatories, as the said Master should direct, who was to make unto both sides all just allowances; and the said parties were, according to their submission, to pay to Charles Brown what should be reported due to them on such taxation; and thereupon, or in case it should appear that the said Charles Brown [399] was overpaid, he was to deliver up to the said parties, upon oath, all books, papers, writings, and vouchers in his custody or

power, belonging to the said parties, and was to refund such overplus ; and it was ordered, that all proceedings at law against the said parties, touching the said bill of fees and disbursements, should be staid, until after the said Master should have made his report."

On the 7th of *June* 1817, a motion was made before the *Lord Chancellor*, to discharge the order of the *Master of the Rolls*. The facts of the case, and the argument on the application, appear in Mr. *Merivale's* report. (2 *Mer.* 500.)

On this day the case was again mentioned by Mr. *Blake* for the solicitor.

The *Lord Chancellor* [*Eldon*]. This Court does not tax the bill of a solicitor for business done in the court of great sessions ; but if the solicitor, having possession of papers which this Court orders him to deliver up, is entitled to a lien on those papers for business done in the court of great sessions, taxation is then directed, as incidental to the jurisdiction for compelling delivery of the papers. That distinction reconciles the cases.

The order must be discharged.

Order discharged. Reg. Lib. B. 1818, fol. 266.

[400] GORDON v. GORDON.(1) *Dec.* 17, 1816 ; *Dec.* 11, 1817 ; *June* 23, *July* 1, 8, *Nov.* 9, 10, 13, 1818 ; *Jan.* 18, *Feb.* 27, *June* 29, *July* 27, *Aug.* 16, 1819 ; *June* 26, 1821.

[See *Hotchkis v. Dickson*, 1820, 2 Bli. 348 ; *Nelthorpe v. Holgate*, 1844, 1 Coll. 217 ; *Smith v. Pincombe*, 1852, 3 Mac. & G. 659 ; *Smith v. Mogford*, 1873, 21 W. R. 473 ; *Maynard v. Eaton*, 1874, L. R. 9 Ch. 420, n. ; *Fane v. Fane*, 1875, L. R. 20 Eq. 708. On point as to directing issue (3 Swans. 468), see *Malone v. Malone*, 1841, 8 Cl. & F. 179.]

An agreement between two brothers, the younger of whom disputed the legitimacy of the elder, for a division of the family estates, rescinded after a lapse of nineteen years ; the legitimacy of the elder being established on the trial of an issue directed, and the younger brother having been apprized at the time of the agreement of a private ceremony of marriage which had passed between their parents, and not having communicated that fact to the elder, and not possessing a legal power. on the supposition of the elder brother's illegitimacy, to secure to him the benefits stipulated in the agreement.

The bill, filed on the 28th of *April* 1809, stated, that Colonel *Harry Gordon*, late of the island of *Grenada*, being seised of some plantations in that island, and in *America*, some of which were charged with a mortgage for £5550 and interest, by his will, dated the 1st of *April* 1776, devised all his said plantations to his son *Peter Gordon*, since deceased, and his heirs male, and gave to each of his three sons, namely, the Plaintiff *Harry Gordon*, his second son *Adam Gordon*, the Defendant *James Gordon*, and his daughter *Hannah*, certain pecuniary legacies ; and if *Peter Gordon* should [401] die without heirs male, he gave his estates, so charged, to his younger sons and their heirs male successively, the elder claiming before the younger, with ulterior [402] remainders ; and charged his estates with an annuity of £300 to his wife *Hannah*, and appointed her, and his nephew *James Gordon*, since deceased, executrix and [403] executor. By a codicil dated the 7th of *December* 1782, reciting that he had two children by *Margaret O'Hara*, and that she was then pregnant, and expressing his de-[404]-sire that his two natural children should be provided for. the testator bequeathed his whole estates, both real and personal, to six persons (including *Margaret O'Hara*), [405] named as executors of his codicil, for the purpose of paying the legacies and annuities given by the will and codicil.

[406] The bill further stated, that the testator died on the 7th of *August* 1787, leaving his widow, and his children named in his will surviving, and that his widow and [407] *Margaret O'Hara* proved his will and codicil ; that some time after his death it was discovered that the testator had made another will, bearing date on board the [408] *Grenada* packet, on her passage from *Grenada* to *London*, the 5th of *August* 1787, and thereby declared that his son *Peter Gordon* should be his sole heir, and appointed [409] him, together with *Benjamin Boddington* and *Thos. Boddington*, of *London*, his nephew, *James Gordon*, and *James Gordon* the son of his nephew, executors ; and [410] bequeathed £2000 to the plaintiff, and to each of his children,



*James, Adam, and Hannah*, to be paid by *Peter Gordon* within two years after the testator's death, with interest ; and declared *Peter Gordon* his residuary legatee.

[411] The bill then stated, that *Peter Gordon* died in *October 1787* without issue and intestate, and upon his death the Plaintiff, who was thereby become heir at law of his [412] father, proved his father's will in *America*, and began to receive the rents of his estates ; but very shortly afterwards the Defendant, *James Gordon*, claimed the [413] estates, alleging that he was the real heir at law of the testator, by reason that both *Peter Gordon* and the Plaintiff were illegitimate, and not born after the [414] testator and his wife were married ; and he represented to the Plaintiff that he was provided with evidence to prove the Plaintiff's illegitimacy ; and the [415] Plaintiff, in consequence of such assertions, and having seen a certificate of a public solemnization of a marriage between his father and mother subsequent to his birth, [416] and previous to that of the Defendant, *James Gordon*, was induced to believe his alleged illegitimacy ; and under that impression, and in order to end the differences subsisting between him and *James Gordon*, who threatened legally to assert his claim, and solely under that persuasion, and without any consideration, articles of agreement were executed by the Plaintiff and the De-[417]fendant, *James Gordon*, dated the 31st of *March 1790*, whereby, after reciting a mortgage of the estates of the testator to *Boddington* and *Bettesworth* for £5559, and [418] the wills and codicil of the testator, and the death of him and of *Peter Gordon*, it was agreed that the Plaintiff should continue in possession of the estates in *Grenada*, [419] and should, in consideration thereof, pay out of the profits the cultivation and management thereof, and the interest of the £5559, and should also pay to [420] Messrs. *Boddington* and *Bettesworth* £1040, then due from the Defendant, *James Gordon*, to them, and to *James Gordon* or his assigns an annuity of £400 for five [421] years, and in case *James Gordon* should be living at the end of five years, an annuity of £300 during *James Gordon's* life ; and it was also agreed that at the ex-[422]piration of ten years the Plaintiff should pay to the Defendant *James Gordon* £4500, and in the mean time secure the same in manner therein mentioned.

[423] The bill further stated that, in pursuance of the agreement, the Plaintiff paid to *James Gordon* the annuity until *January 1808*, and £500 part of the £4500, and [424] interest on the remainder ; and also paid the debt of £1040 to *Boddington* and *Bettesworth* ; that the mortgage debt of £5559 was afterwards paid by Messrs. [425] *Lang, Turin, and Co.*, of *London*, who had in consequence a considerable claim on the estates, for securing the amount of which the Plaintiff conveyed [426] them to Messrs. *Arnold and Co.* of *Grenada*, in trust for sale, if the Plaintiff should make default in reducing the mortgage debt ; and that the produce of the [427] estates becoming insufficient to discharge the mortgage debt, the mortgagees, in *March 1808*, entered into possession of the estates.

[428] The bill proceeded to state, that upon the death of the Plaintiff's father, the Plaintiff became entitled to certain estates in *America*, to which the Defendant *James* [429] *Gordon* also laid claim on the ground of the Plaintiff's illegitimacy, and the Plaintiff under that impression was prevailed upon to enter into another agreement ; and [430] articles for that purpose were executed between the Plaintiff and the Defendant *James Gordon*, dated the 10th of *February 1805*, whereby, after reciting that the [431] testator was possessed of or entitled to certain lands and tenements in *Pennsylvania*, and also to about 5000 acres of land in *Vermont*, it was agreed that if the Plaintiff [432] should recover possession of the estates, he should sell them, and give notice thereof to *James Gordon*, and pay to him one-fourth of the money produced by the sale ; [433] and also, within twenty-four months after the same should be recovered, the farther sum of £63.

[434] The bill then stated that the Plaintiff had recently discovered that a private marriage between his father and mother took place in *America*, long previous [435] to the birth of *Peter Gordon* ; and charging that the Defendants, *James Gordon* and *R. B. Fisher*, and *S. Bourke* (to whom *James Gordon* had assigned some [436] portion of his interest under the agreements with the Plaintiff), had lately commenced an action in the Court of Session in *Scotland* against the Plaintiff, for the remainder of the sum of £4500 ; that the Plaintiff's father and mother were privately married in *America*, by a chaplain of the army, and that it was merely in consequence of a wish expressed by the friends of the Plaintiff's mother that they were afterwards publicly married ; [437] and that in the register of the church of

*Christ Church and St. Peter's in Philadelphia*, the Plaintiff's baptism is registered thus, "Harry Gordon, son of Captain [438] *Harry Gordon* and *Hannah* his wife, born the 4th of *October* 1761"; prayed that the agreements might be declared void, and be delivered up to be cancelled; an [439] account, and repayment by *James Gordon* of the sums paid by the Plaintiff under the agreement; and an injunction.

[440] The Defendant *James Gordon* by his answer, claiming to be the eldest legitimate son of Colonel *Gordon*, stated that in 1785, Colonel *Gordon*, when at *Portsmouth* previous to a voyage to *Grenada*, wrote, with his own hand, an instrument, being a will or draft of a will, containing, among others, the following clauses: "First, [442] to my children by my wife *Hannah*, whom I married before the birth of my third son called *James*;" and, "seeing by the marriage of my said wife *Hannah* she [443] becomes entitled to a third interest of the value and price of the money arising from the sale of my estates above mentioned, my will is that the third be ap[444]-plied in the purchase of stock in the 3 per cents. as above ordered, and the interest and yearly profits accruing from the said stock to be paid to my said trustees [445] for the behoof of my said wife *Hannah* during her life: and my will is, that the said principal money of a third part of the price of the sale of my said estates be divided [446] at the death of my said wife among all my children by her my said wife, legitimate and illegitimate, according to the above described proportions."

[447] The Defendant also stated, that he understood and believed, and had no doubt to be able to prove, that Colonel *Gordon* and his wife had been married at *Wilmingon* in *America*, in *May* 1763, which was after the birth of the Plaintiff, and before the birth of the Defendant; and that the Defendant did not know or believe [449] it to be true, though lately asserted by the Plaintiff, that a private marriage was celebrated between Colonel *Gordon* and his wife, in *America*, sometime before the birth of *Peter Gordon* and the Plaintiff, that is to say, so long ago as the year 1755.

[450] On the part of the Plaintiff, *Benjamin West*, Esquire, deposed, that while he lived in *America*, he knew *Hannah Gordon*, then *Hannah Meredith*, for many years; that in or about 1760, being about to depart from *America* for *Italy*, he went to the house of his father for the purpose of taking leave of his family and friends, and on that occasion he inquired of his brother, who was much attached to *Hannah Meredith*, where she then was, and was informed by him that she was then in *Philadelphia*, and married or about to be married to a Mr. *Gordon*; and the deponent was inclined to think, as far as his recollection assisted him, that his brother then told him that *Hannah Meredith* was married to a British officer of the name of *Gordon*; that about eighteen or twenty years after the deponent left *America*. Colonel *Gordon* and *Hannah* his wife were introduced to him in *London*, where they had lately arrived, as man and wife, and remained in habits of intimacy with the deponent until they left *London*; that they had several children with them, one of which, he believed, was the Plaintiff; and the deponent and his wife, and a respectable quaker, received Colonel and *Hannah Gordon* as man and wife, and their children as legitimate children; and none of the children was in any manner treated as illegitimate; that the deponent had never, till lately, heard that any of them were considered as illegitimate; and that neither himself nor his wife would have had any acquaintance with Colonel and *Hannah Gordon*, if they had not been fully persuaded that they were married, and that all their children were legitimate; and that the deponent's wife, a native of *Philadelphia*, frequently stated that Colonel *Gordon* and *Hannah Gordon* (when *Hannah Meredith*) were much respected in *America*.

Other witnesses testified the reception of Colonel and [451] *Hannah Gordon* as husband and wife, and of all their children as legitimate.

The reverend Dr. *Hogg* deposed, that he became preceptor to Colonel *Gordon's* family in 1773 or 1774, and was confidentially acquainted with Colonel *Gordon* from that time; that Colonel and *Hannah Gordon* began to cohabit together as husband and wife in 1756 or 1757, as the deponent had reason to believe from having heard so from the mother of Colonel *Gordon*, and others of the family; that he believed them to have been married before the birth of their eldest son, and had no suspicion of any of the children being illegitimate; that *Hannah Gordon* was a woman of the strictest virtue, deeply impressed with religious principles; that Colonel *Gordon* on different occasions informed the deponent that he had been privately married

to his wife before the birth of *Peter Gordon*; and that the reason of the privacy of the marriage was his fear of his brother, Judge *Gordon*, on whom he then had considerable dependence, and who had recommended to him to marry otherwise; that Colonel *Gordon* died in *England*, immediately after landing from the *West Indies*, when the deponent accompanied *James Gordon* to *London* with a view to assist at the funeral, but it was over before their arrival; and on that occasion the deponent was present when *James Gordon* opened the trunks of Colonel *Gordon*, *James Gordon* having the keys in his possession, and no persons being present but him and the deponent; that the deponent proposed that more persons should be called into witness the opening of the trunks, but *James Gordon* said it was unnecessary; that the trunk which contained Colonel *Gordon's* papers appeared to have been previously opened, the ropes being closely tied about it, and without a seal; that *James Gordon* took out, among other papers, and shewed to the deponent, a paper appearing [452] to have been a will of Colonel *Gordon* (but the subscription was torn off), dated in 1776, and containing a general destination of his property, first to his eldest son *Peter Gordon*, and then to his other sons in succession, burdened with bequests to his wife *Hannah Gordon* and to their younger children; that *James Gordon* then, for the first time, mentioned that his brothers *Peter* and *Harry* were illegitimate, that he had a title to his father's *West India* property, and was determined to take possession of it; that the deponent, then for the first time, mentioned to *James Gordon* the circumstance of his father's private marriage, which the deponent told him would be a bar to his claim, to which *James Gordon* replied the private marriage was of no consequence as the succession would be regulated by the public declaration of marriage; that as the deponent never entered into private matters with his pupils, he had never before thought it proper to mention the private marriage to *James Gordon*, nor did he mention it at all to the Plaintiff, conceiving that the agreement made in 1790 had ended all disputes between them; that the Plaintiff at the time of his father's death was in the *East Indies*, where he had been about twelve years, and he returned to this country only in 1789.

Miss *Gordon*, the sister of the Plaintiff, and of *James Gordon*, deposed, that she had been told by her mother that her parents began to live together as husband and wife just after the defeat of General *Braddock*, in 1755, or 1756; and that she never entertained any doubt of the legitimacy of all her brothers, or heard her father mention any private or public marriage between him and his wife, or any discussion on the subject; that on the return of *James Gordon* to *Scotland* (where his mother and the deponent then resided), about three weeks after his father's death, he asked his mother for [453] leave to see her papers, and having obtained access to them, destroyed several, much against her will, and took others away with him; and the deponent saw him burn several: that in 1808, *James Gordon* threatening to take out a warrant against the Plaintiff, the deponent asked her mother how she could have had children before marriage? To which her mother answered, that she had not had children before marriage, for that she had been privately married before she had any, but that *James Gordon* had told her that the private marriage was of no avail; that her mother also on this occasion told her that she had been privately married by a military chaplain; that there were present Dr. *Adair*, an army physician, Mr. *Edwards*, her brother-in-law, and Miss *Peake*, and that she was so married in her own house in *Third Street*, in *Philadelphia*; that at the time of this communication her mother did not know of any difference between the Plaintiff and *James Gordon*, it having been purposely kept secret from her; that her mother told her that the marriage was private lest it might displease Judge *Gordon*, the brother of her husband; and that she had informed *James Gordon* of her private marriage after his return from *London*, and that he had desired her, and made her promise, not to mention it to any one, as it was not a legal marriage; that after learning the present dispute, and that the marriage was legal, she frequently said that had she known it to be legal she would have disclosed it long before, and on her death-bed, in 1811, she declared the Plaintiff to be her eldest lawful son.

General *Adam Gordon*, brother of the Plaintiff and *James Gordon*, deposed, that the first intimation he had of any doubt or question on the legitimacy of the Plaintiff, was in 1788, when the deponent was with his regiment in *Grenada*, and *James Gordon* arrived there to [454] possess himself of his father's estate, of which the deponent was in possession, on behalf of the Plaintiff; that *James Gordon* then claimed the

estate as lawful heir, insisting that the Plaintiff was illegitimate; but the deponent refused to part with the estate until the Plaintiff should come from the *East Indies*, and told *James Gordon* that he knew their father and mother were privately married before the public marriage, and that such marriage was good in the eyes of God and man; that *James Gordon* made a proposal to the deponent that they should sell the property under his management, and divide the proceeds between them, as the Plaintiff had the estate in *Scotland*, and must have made money in the *East Indies*; but the deponent rejected the proposal with indignation; that *James Gordon* shortly after returned to *England*, and the deponent continued in the management of the estate until 1791, when the Plaintiff arrived in *Grenada*; that the deponent then saw the Plaintiff for the first time during eighteen years, and never informed him of the private marriage of their father and mother, understanding that matters had been amicably settled between him and *James Gordon*; that the Plaintiff's mother told the deponent that after the death of Colonel *Gordon*, *James Gordon* had taken from her several papers which she considered of consequence, and she complained much of his having done so, and said she was sure he meant to make some bad use of them.

On the part of the Defendant, *Harriet Dunlop* deposed, that her mother was in some way related to Colonel *Gordon*, and that she had frequently heard her mother say that *Hannah Gordon* had a child or children by Colonel *Gordon* before their marriage.

Another witness deposed, that in the action commenced in *Scotland* by *James Gordon* against the Plain-[455]-tiff, the counsel of the Plaintiff alleged that no marriage had been celebrated between the father and mother of the parties, but that their marriage had been constituted by their living as man and wife, and being *habite and repute* so; and it was not till the 26th of *March* 1809, that an allegation was made of a private marriage between them in 1755.

The following letter from Mrs. *Gordon* to the Plaintiff, dated the 30th of *January* 1789, was read in evidence, on his behalf: "My Dear *Harry*, I am happy that *James* and you understand one another by this time; you distress me much to think I am not to be made acquainted with all that regards you and him, as I am the only survivor whom you have to blame; and could I atone with my life for it; and you are the innocent victim. I am afraid *James* has lost sight of all affection, or what can make him agreeable to an honourable man. God forgive him; and, my dear *Harry*, I hope you will forgive me for entailing slavery upon you and yours. I may say, with *Eve*, 'Curse me not, my son.' I must say, I erred not from the rules of honour in what I did, nor deviated from the path of virtue. Had I no child but *James*, I would publish to the world my life, and I am confident I shall be excused; but he has none, and none shall I ask of him; he has done his worst. May God forgive him! Take care of your health, for from you my support is to come, and your dear sister. We think *James* has dealt hardly with us. You cannot think we are happy when you wish to keep a thing that concerns you from me; that would distress me. I am well acquainted with sorrow, I can submit to all; let me only partake with you, and that will be my greatest comfort. I have not a secret that your sister does not know, and would you wish she should keep yours from me? That hurts me, my dear *Harry*."

[456] At the hearing of the cause before Sir *William Grant*, Master of the Rolls, on the 17th of *December* 1816, his Honor observed, that in the agreement between the Plaintiff and Defendant it was stated, that the Plaintiff was born before the actual marriage of his father with his mother, and that he entered into the agreement with the belief of his illegitimacy; but that it appeared, by the testimony of General *Gordon* and Dr. *Hogg*, that the Defendant was acquainted with a private marriage of his father and mother before the birth of the Plaintiff, and there was no proof that the Defendant, at the time of making the agreement, communicated that circumstance to the Plaintiff; the Defendant thus taking advantage of his own knowledge of it, and of the Plaintiff's ignorance. (*Ex relatione*.)

17th *December* 1816. "His Honor doth order, that the parties do proceed to trial at law in his majesty's Court of Common Pleas, at the sittings after next *Trinity* term, on the following issue, viz. Whether the Plaintiff is the legitimate son of Colonel *Harry Gordon* in the pleadings mentioned; and the Plaintiff in this court is to be the Plaintiff at law, and the Defendant in this Court is to be Defendant at law, who is forthwith to name an attorney, accept a declaration, appear and plead to issue; and it is ordered, that it be referred to Mr. *Campbell*, one. &c., to settle the issue in case the parties differ; and his Honor doth reserve the

consideration of all farther directions, and of the costs of this suit, until after the trial of such issue ; and either of the parties is to be at liberty to apply to this court, as there shall be occasion."—Reg. Lib. A. 1817, fol. 387.

The preceding order was, on a rehearing, affirmed by the *Master of the Rolls* ; and it was ordered, that the [457] issue should be tried at the sittings after the next term. 11th December 1817.—Reg. Lib. A. 1817, fol. 402.

An order having been pronounced, that the deposition of Mrs. Gordon should be read at the trial (1 Swans. 166), on the 27th February 1818 the issue was tried, and the jury returned a verdict in favor of the Plaintiff's legitimacy.

June 23, July 1, 8, 1818. An application on behalf of the Defendant was made to the *Master of the Rolls* for a new trial, and refused. The following cases were cited ; *Standen v. Edwards* (1 Ves. Jun. 133), *The Warden and Minor Canons of St. Paul's v. Morris* (9 Ves. 155). *Pemberton v. Pemberton* (13 Ves. 290), *Dalrymple v. Dalrymple* (reported by Dr. Dodson, and 2 Hagg. 54).

Nov. 9, 10, 13. The case coming on for farther directions, was argued by Mr. Wingfield, Mr. Heald, and Mr. Perkins, for the Plaintiff, and by Mr. Hart, Mr. Roupell, and Mr. Rose, for the Defendant. The substance of the arguments appears in the farther proceedings.

Jan. 18, 1819. The Lord Chancellor [Eldon]. During my long indisposition I have considered this case with much attention, and I have informed myself fully of the view which the late *Master of the Rolls* took when he directed that it should be sent to an issue. Unquestionably he looked no further than this, I speak [458] from his own authority, that if the jury upon the issue found for the illegitimacy of the Plaintiff, there was an end of the case ; but he had not considered what was to be the effect of a verdict of legitimacy.

It appears that Colonel *Harry Gordon* died in the year 1787, seized of an estate in the island of *Grenada*, and having a claim also upon certain property situated in the United States of *America*, but which claim had not at that time been matured into a title. On his death a dispute arose in his family, which of his sons was the eldest legitimate son ; the present Plaintiff, Mr. *Harry Gordon*, was his second son, legitimate or illegitimate ; and he had an elder son of the name of *Peter*. The deceased Colonel *Harry Gordon* had made several wills, but by his last will he left the whole of his property, real and personal, subject to certain legacies, to his son *Peter*, constituting him generally his heir and executor. It is insisted by Mr. *James Gordon*, the present Defendant and third son of Colonel *Harry Gordon*, that his father and mother were not married at the time when *Peter Gordon* was born, or at the time when *Harry Gordon*, the present Plaintiff, was born ; and that, consequently, *James* was the eldest legitimate son. If such was the case, *Peter*, who became entitled to the property under the will of his father, being on that supposition illegitimate, and having died intestate, and without children, neither of his brothers could be his heir, but the title to the estates would become vested in the crown. It happened, however, that at the time of *Peter's* death, some gentlemen well known in the city, of the name of *Boddington*, had a mortgage upon the *Grenada* estate ; and a question therefore would arise whether the legal estate being in the mortgagees, the equity of redemption of which *Peter Gordon* died seized would escheat to the crown, or whether the mortgagees [459] would be entitled to hold the property against the crown, the family of the *Gordons*, and all the rest of the world ? It appears that, under the circumstances, the mortgagees very liberally agreed not to take advantage of their legal right, in case they had a legal right against the family ; but that if the claim of the crown should not prevail, they would hold the property for those who were entitled to redeem it.

The first agreement could not have taken place without great investigation of the state of the family and the situation of the property. It happens, however, that the persons engaged in preparing that agreement, and who must have been instructed on all these facts, have not been examined.

It is represented, that on that occasion, *James Gordon*, the third son, assuming to be the eldest legitimate son, insisted that the marriage between his father and mother took place after the birth of *Harry* and *Peter*, whom, consequently, he stated to be illegitimate ; and that he was the representative of the family. Now, even on that statement, *James Gordon* could have only a claim of favor upon either the crown or the mortgagees of the *Grenada* estate, to be preferred to an illegitimate son ; although

as this was a *Scottish* family, domiciled in *America*, the law of *Scotland*, by which children born before marriage become legitimate when marriage afterwards takes place between their parents, may, perhaps, have produced some question. If *Peter* was the heir of the family, the Plaintiff was entitled to the *Grenada* estate, and if he gives up that estate, it must be for some valuable consideration ; but if it is supposed that *Peter* was illegitimate, the title to the *Grenada* estate, after the death of *Peter*, was not in *James Gor-[460]-don*, but in the crown, or in the mortgagees ; it did not depend on *James* to give *Harry* a title to that estate, but on the mortgagees or the crown. I am at a loss, therefore, to conceive what consideration passed from *James Gordon* at the time of the agreement respecting that estate.

It appears, that about the year 1788, General *Adam Gordon* was in possession of the *Grenada* estate, as the agent of *Peter* ; and he states in his evidence, which I have examined with great attention, that *James*, in the year 1788, came to the island of *Grenada* previously to the agreement of 1790, and insisted that *James* was entitled to the possession of the estate, and desired that General *Gordon* would give it up to him. This request on the part of *James*, grounded upon his assertion of the illegitimacy of *Peter* and *Harry*, was received with great indignation by General *Gordon*, who expressed his opinion of that request, and of the individual who made it, in terms which there is no occasion to repeat ; and General *Gordon* then told *James Gordon*, that there had been a private marriage between his father and mother previous to the birth of *Peter*, and, consequently, previous to the birth of *Harry*, and that such private marriage was a good marriage, notwithstanding there had been a subsequent public marriage ; the first marriage ceremony having been privately performed in order to keep the circumstance a secret from Judge *Gordon*, who had other views for Mr. *Harry Gordon's* establishment. In conclusion, General *Gordon* declared that he held the estate in trust for *Harry*, and that he would not give up the possession.

I advert particularly to this conversation in the year 1788, on account of the subsequent agreement with respect to the *American* property, which did not take [461] place until the year 1805, seventeen years after the period at which, as General *Gordon* states in his deposition, he being in possession of the *Grenada* estate as agent of *Peter*, treated the younger brother in the manner that has been described ; and yet General *Gordon* states that he never informed his principal of the transaction, nor ever mentioned this conversation, which occurred in the year 1788, until the other agreement with respect to the *American* property had taken place in the year 1805. This is certainly a very extraordinary circumstance ; it amounts almost to an improbability. There is, besides, among the papers in this case, a deed executed in 1788, to which General *Gordon* is himself a party, and in which he mortgages thirteen negroes to Messrs. *Boddington*, and the equity of redemption is expressly reserved to the legitimate or illegitimate children of Colonel *Gordon* ; an acknowledgment, as it seems, by General *Gordon*, that there were children of both classes, legitimate and illegitimate.

The present bill is filed in the year 1809, four years after the agreement relative to the *American* property, and twenty-one years after the agreement relative to the *Granada* estate ; and the whole effect of the bill, as I collect, is this : after adverting to the mortgage on the *Grenada* estate, the bill states in *ipsisismis verbis* the register of the birth of *Harry Gordon*, in which he is called the son of Captain *Harry Gordon*, and of *Hannah Gordon*, described as his wife ; and not containing one word of spoliation of papers, it proceeds to state, that the Plaintiff being led to believe, but without saying by whom, that he was not the legitimate son of his father, and being confirmed in that belief by the assertion of *James Gordon*, executed the deed of the year 1790 ; and that he had no knowledge of the private marriage until after the agreement in 1805.

[462] In the course of this case the publication of the depositions *de bene esse* of the mother, Mrs. *Gordon*, who was still alive, was at first refused, and that question coming again before the *Master of the Rolls*, his honor permitted the publication ; and on appeal I approved that decision ; and I then expressed my opinion that if the Plaintiff chose to have the examination read, in other words, if he chose to have his mother examined as a witness, it would be extremely difficult both on the trial of the issue, and at the hearing of the cause, to receive the evidence of witnesses who spoke to the declarations made by the mother : for although it is clear that on questions of pedigree, if a parent is dead, evidence may be given

of his declarations on the subject of the pedigree, and witnesses may be called to prove these declarations, yet it would be difficult to find any case in which witnesses were permitted to prove such declarations when the parent in question was living, and was personally examined. I therefore wish to know how far those witnesses were heard upon the trial of the issue, as to the declaration of a woman who was herself a witness.

In the view of the case which I now take, much of that evidence which went before the jury must necessarily be considered upon the hearing for further directions ; and it must be considered with strict attention to the law of the Court, which says, that a man shall not be at liberty to prove upon a trial any thing he may think fit ; that he is at liberty to prove only that which is put in issue. Now here is a great deal said about spoliation of papers, of which not a word is to be found in the bill or in the answer.

Supposing the question cleared from the difficulty about evidence, I have Sir *William Grant's* authority to say, [463] that his view of the case in directing the issue, went no further than this, that if the illegitimacy was found, there was an end of the matter ; but he had not considered what was to happen in the other event, if the legitimacy was found. The case will now come to be discussed on two points ; first, supposing all imposition out of the question, whether it is a case in which, upon the principles that guide the conduct of a court of equity, relief can be granted ? and, secondly, whether, if there are any passages in the several depositions imputing imposition, there are in the bill any allegations, or in the answer any admissions, of imposition as a ground for relief ?

Of the cases which have been quoted, *Stapilton v. Stapilton* (1 Atk. 2), and *Cann v. Cann* (1 P. W. 723), there is no necessity for me to say more, than that they fully establish a principle of which I can have no doubt, that where family agreements have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a court of equity will not disturb the quiet, which is the consequence of that agreement ; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a court of equity would have a very great difficulty in permitting such a contract to bind the parties.

In the present case it is for the Court to consider, first, whether the pleadings have sufficiently put in issue the fact of imposition ? and, secondly, if they have, in what the imposition consists ? I suppose the most prominent mode of putting the fact of imposition is this : [464] that *James Gordon* knew that there had been a marriage *de facto* ; not that he knew the marriage was a legal marriage, but that a ceremony of marriage, whether valid or not, had been performed previous to the public marriage, and previous to the birth of *Harry* ; that *James Gordon* was aware of this fact, and knew that *Harry* was not aware of it, and kept from him the knowledge of that fact. It was his duty to communicate the fact of the private marriage ; and if *Harry* knowing it, had decided for himself that the ceremony was not valid, and treating it as not a marriage *de jure*, had chosen to enter into the contract, there would have been no ground for the suggestion of imposition, unless on evidence of spoliation of papers, of which I find no allegation.

When this case came before me at *Westminster* the point of spoliation of papers was adverted to ; and it was said, that the evidence produced upon the issue afforded strong grounds for an inference contrary to the verdict on the question of the legitimacy. I lay all this entirely out of the question ; but still I cannot think that the case has been argued to the bottom. I am clearly of opinion, that Mr. *James Gordon* has no right, at the present time, to argue from circumstances that *Harry Gordon* is illegitimate ; on that subject he is concluded by the verdict : but he has certainly a right to say, of any particular circumstances, that they, at the time of the contract, induced him to believe that *Harry* was not legitimate ; and the question would then be, whether this is not a case of mistake into which all parties might honestly fall ? Before the Court declares a contract like this void, it ought to be fully satisfied that the contract was entered into under circumstances of wilful concealment.

I have thus explained my view of the case ; and be-[465]-fore I pronounce a final decision I should wish to have it argued again by one counsel on each side.

Feb. 27. Mr. *Heald*, for the Plaintiff, requested that the cause might be heard on an early day.

The *Lord Chancellor*. When this case came before me upon the verdict, it was opened on the principle that the Plaintiff having established his legitimacy, was entitled to the relief prayed; but the order directing the issue has not provided for the event of a verdict of legitimacy, but proceeded solely on the principle that an opposite verdict would have been fatal to the Plaintiff's claim. I observe with surprise that, on the trial, not only the deposition of the mother was read, but witnesses were admitted to prove her declarations. Such a proceeding is certainly irregular; when she was a witness in the cause no evidence of her declaration should have been received from other witnesses. It is singular that such a practice should have occurred, after the elaborate discussions on the law of evidence applicable to declarations of pedigree, in the case of the *Berkeley* peerage (4 *Campb.* 401).

June 29, 1819. The cause was again argued.

Mr. *Heald* for the Plaintiff. In all the cases of family agreement which have been the subject of judicial decision except one, the contracting parties had among them a good title; if the claim of [466] one was bad, by necessary consequence the claim of the other was good. Here, if *Peter* and *Harry Gordon* were illegitimate, the estate was the property of the mortgagees or of the crown, not of *James Gordon*. The agreement, therefore, which the Plaintiff now impeaches was without consideration. *Harry Gordon* sacrificed a part of his rights, in consideration of the title which *James* represented himself to have and to give; but it is clear that he had no title. He cannot be permitted to allege, that the agreement was founded on the probability that he might become the grantee of the crown.

The *Lord Chancellor*. Before the act of parliament introduced by Lord *Redesdale* (39 & 40 G. 3, c. 88, s. 12), the crown could make no grants of estates escheated beyond leases for short terms of years or during lives (1 *Ann. st.* 1, c. 7; 34 G. 3, c. 75); that act has enabled the crown to be more liberal. It may, however, be found, on examination, that the statute of *Anne* is not applicable to lands out of the kingdom. (Note: The words are, "manors, &c., within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*, or any of them.")

Argument for the Plaintiff resumed. The conclusion is, that the agreement was voluntary, and this case is within the principle of those decisions in which agreements founded in misrepresentation, whether wilful or innocent, have been rescinded.

The *Lord Chancellor*. If the Defendant, *James Gordon*, when he entered into the agreement knew that there had been a private [467] legal marriage between his father and mother, it would require little time to dispose of this case; if he knew that there had been a ceremony of marriage, without knowing whether it amounted to a legal marriage, and omitted to communicate that fact to his brother, and enable him to decide for himself the effect of the ceremony in law, the consequence to *James Gordon* might be serious; but does the bill contain any charge even that *James Gordon* knew the fact of marriage? If not, a question will arise, whether evidence to that effect can be admitted at all; and if admitted, whether *James Gordon* is to be concluded by evidence which he has had no opportunity of answering.

My opinion is, that if *James Gordon*, prior to the agreement, knew that there had been a private ceremony of marriage, and conscientiously believing that it was not a legal marriage, omitted to communicate the fact to his brother, the Plaintiff would be entitled to relief; on the principle that, though family agreements are to be supported, where there is no fraud or mistake on either side, or none to which the other party is accessory, yet where there is mistake, though innocent, and the other party is accessory to it, this court will interpose.

Argument for the Plaintiff resumed. The bill contains no distinct allegation that the Defendant was apprised of the ceremony, but the statement in the answer, that the Defendant had been informed that neither *Peter* nor *Harry* were legitimate, is sufficient to introduce the evidence. But the objection is too late; the evidence was received on the original hearing, and cannot now be rejected, when the cause is heard for farther directions.

[468] Mr. *Hart* for the Defendant. The fact that the deed was voluntary, affords no reason for rescinding it. The evidence manifests the existence of mutual doubts of the Plaintiff's legitimacy; and a compromise of rights originating in such doubts, is the very transaction which courts of equity support, in order to



preserve the peace of families. Onn the supposed right of the crown it may be sufficient to refer to *Burgess v. Wheate* (1 *Black.* 123 ; 1 *Eden*, 177).

In the course of the argument the following cases were cited : *Stockley v. Stockley* (1 *Ves. & Bea.* 23), *Stapilton v. Stapilton* (1 *Atk.* 2), *Cann v. Cann* (1 *P. W.* 723), *Pullen v. Ready* (2 *Atk.* 587), *Cory v. Cory* (1 *Ves. Sen.* 19), *Lansdown v. Lansdown* (*Mos.* 364), *Bingham v. Bingham* (1 *Ves. Sen.* 126), *Dunnage v. White* (1 *Swans.* 137).

The *Lord Chancellor* [Eldon]. I have never known a case in which it was more the duty of the Judge to make a covenant with himself not to suffer his feelings to influence his judgment.

It is obvious that the Plaintiff, if not legitimate, has no title to relief ; the trial of the issue has decided, and I think properly, that the Plaintiff is legitimate ; unfortunately it seems to have been taken for granted, when the issue was directed, that after a verdict of legitimacy no dispute could arise touching the relief to be decreed ; but, in fact, the question still remains, whether, admitting the Plaintiff to be legitimate, the agreement was concluded under circumstances which entitle him to [469] relief ? I cannot avoid thinking that it would have been more prudent first to consider the effect of a verdict of legitimacy, lest the expense and time of the trial should be wasted. The case, however, has taken another course, and I am now to decide whether, after this verdict, and on these pleadings and this evidence, the Plaintiff is entitled to relief.

Withholding my judgment on the effect of the evidence which has been read for the first time on this hearing for farther directions—I mean the mortgage deed, reserving the equity of redemption to Colonel *Gordon* and his children, legitimate and illegitimate, and some letters, I will proceed to observe on the rest of the evidence, and to point out in some degree what, as I conceive, must be the principles of decision.

The bill is filed by *Harry Gordon*, who must now be taken to be the eldest living legitimate son of Colonel *Gordon*, stating that his father died in 1787, seised of estates in *Grenada*, and claiming estates in *America*, having by his will devised his real estates to his son *Peter* and his heirs for ever. *Peter* was the elder brother, legitimate or illegitimate, of *Harry Gordon* ; and *Harry* being found legitimate, *Peter* must be taken to be legitimate also ; but while it could be asserted that *Harry* was illegitimate, it followed of necessity that *Peter* was illegitimate ; and on the Defendant's shewing, therefore, this must be taken to be a case in which the father of several children, some legitimate and some illegitimate, has given an estate in fee to one of the latter class, who died intestate ; and in which, by reason of his death, estates in the island of *Grenada*, subject to a mortgage in fee, are so circumstanced, if the law there is, as I believe it to be, the same as the law in *England*, that neither the Plaintiff nor the Defendant, *James Gordon*, [470] have any title to them ; because if the doctrine of escheat applied to those estates, the title was in the crown ; if on the principles adopted in *Burgess v. Wheate*, the mortgagee might refuse to be redeemed by any one, neither the plaintiff nor *James Gordon* could disturb his enjoyment ; the right being on one supposition in the crown, and on the other in the mortgagee. The crown was dealt with as is usual in these cases ; that is considerable care was taken that its officers should know nothing on the subject ; the mortgagees appear to have acted in a manner highly creditable to them, and having a probable title themselves, consented to dispose of the estate according to the agreement entered into by the members of the family.

It has been contended, on the behalf of the plaintiff, that this case is distinguishable from *Cann v. Cann*, and other authorities of that class ; and in general certainly the circumstances are such as have been represented ; namely, a dispute about the title to an estate, which clearly belongs to one of the disputants, unless it belongs to the other : as where between two brothers, supposed to be both legitimate, or one legitimate and the other illegitimate, a compromise is effected, on the supposition of the illegitimacy of one who was found afterwards to be legitimate, the Court holding this to be a family agreement, would not disturb it, provided that there was honest dealing on both sides, and each withheld the communication of no circumstance proper for the consideration of the other ; though one had been dealing for his birth-right, under an erroneous notion that he was illegitimate, he would be bound. But in every case it has been said, and it would be monstrous to hold otherwise, that if what one knows has been concealed from the other, who has been misled by that concealment, the Court would not sanction the agreement.

[471] It is said that this case differs from those to which I have alluded in this respect, that here, on the hypothesis of illegitimacy, which was the foundation of the agreement, neither party was entitled. I doubt much whether that distinction is material, and I think the fair way of putting the case on that point is this : both parties had agreed to set out of question the title of the crown, the adverse title of the mortgagees was waived in favour of both, and both consented that, for the purpose of the arrangement, the estate should be considered as belonging to them ; and I am of opinion, therefore, that if the dealing is honest, this case is within the principle of those decisions. But a difficulty arises here, partly from the manner in which the case is necessarily and properly pleaded, partly from the nature of the case as collected from what appears on the pleadings, contrasted with what in every way of estimating the due weight of the observations made, might have appeared there, if the parties thought proper.

The Plaintiff represents that in 1788, he returned from the *East Indies*, in consequence of his father's death ; that on his arrival here he was taught to believe that his father had been only once legally married, subsequently to the Plaintiff's birth, and must be understood to state that he was not apprized of the fact of that private marriage, which is now to be considered as valid. The case on this point has more of complexity, because it appears that the parties looked to the law of *Scotland*, and may have confounded the law arising from Scottish and English domicil. In this state of ignorance, the Plaintiff concludes an agreement with *James Gordon*, in 1790, and afterwards in 1805. The bill also contains an allegation, in singular terms, that the defendant now knows the private marriage ; not that he knew it at the time of the contract.

[472] The answer of *James Gordon* may be read in two ways ; he denies his belief that there was a private marriage, and if he honestly believed, when he swore to his answer, supposing him to have known the private ceremony, that that ceremony did not constitute a marriage, his answer is strictly true ; but then it is no answer to the case on which the plaintiff insists ; and if it is a fair observation on the one hand, that the plaintiff might have charged much more in his bill, on the other hand it is obvious that *James Gordon* might have made an answer, which, if it truly stated all the circumstances of the case as he knew them, might have put an end to the suit.

Of the evidence, I lay out of the question the circumstances to which more witnesses than one speak, I mean the conduct of *James Gordon* with regard to family papers, on the news of his father's death arriving in *Scotland* ; the pleadings contain no allegation on the subject, and I must therefore know nothing of it. But supposing *James Gordon* to know, that though there had been a ceremony of marriage, the marriage was not valid, if he knew the fact of the ceremony and took on himself to determine its validity, and dealt with his elder legitimate brother without disclosing that fact, knowing that he was not otherwise apprized of it, he was wrong ; when he entered into a contract with his elder brother as the heir at law of their father, while if that ceremony constituted a valid marriage he could not be heir, it was his duty, as an honest man, to state the fact of that ceremony, and his opinion that it was not valid. If the Plaintiff so informed had thought proper to enter for himself into the consideration whether that ceremony did or not constitute a legal marriage, and had then dealt with *James Gordon*, this case would have been brought precisely within those decisions, in which the Court has refused [473] to disturb family agreements. But here occurs a painful part of the case. Dr. *Hogg* positively swears, under circumstances indeed difficult to be accounted for, but which can never justify me in saying that he is perjured, that he communicated to *James Gordon* the fact which he had learned from his father, the private ceremony of marriage. The defendant requires me to believe that this clergyman, the tutor of the family, has solemnly deposed to a falsehood, so infamous as this statement, if false, must be. But the deposition is supported by the evidence of General *Adam Gordon*. It is difficult, indeed, to understand, why neither Dr. *Hogg* nor General *Gordon* communicated these declarations to the plaintiff : but that difficulty will not authorize me in discrediting testimony, than which, if false, more profligate was never given.

It must be considered, therefore, as established, that before the agreement of 1790. *James Gordon* knew that there was a rumour at least of a private marriage ; and I have no hesitation in saying, that whether there had been a private marriage

or not, yet if *James Gordon* withheld from the plaintiff the information which he had received from Dr. *Hogg* and General *Gordon*, this bargain if speedily questioned, could not have stood in this Court. In contracts of this sort, full and complete communication of all material circumstances is what the Court must insist on.

The fact of a private marriage is further established by the evidence of Mrs. *Gordon* and her daughter; and the difficulty of understanding the delay of Dr. *Hogg* and General *Gordon*, in communicating to the plaintiff circumstances so material, is not sufficient to discredit their testimony. The reason which they assign is, that the brothers having settled their differences by the agree-[474]-ment of 1790, the witnesses were anxious not to disturb the harmony of the family. It is remarkable also that General *Gordon* is party to the deed of mortgage, reserving the equity of redemption to the children legitimate or illegitimate of Colonel *Gordon*; he was aware, therefore, that some difficulty attended the question of legitimacy; the mortgagees reasonably required the deed to be so framed, that the question, should not embarrass them. But much more is necessary before this evidence can be rejected.

The pleadings on the part of the Plaintiff seem not so ample as they might have been, with reference to so singular a case; but it must be considered, whether the allegations of the defence have not opened a case within the statement of the bill, however general; and it must be recollected, that it was competent to the Defendant, by a cross bill to obtain from the Plaintiff an answer supplying all the defects of the record.

The case will finally turn on this point: at the time of the agreement, did *James Gordon* know that there had been a private ceremony of marriage, whether he thought it valid or not? If he did not know that there had been a private ceremony, had such a statement been made to him? Although he might not believe that statement, still he was bound to communicate it to his brother. If it can be shown that the Plaintiff had the same knowledge, the case will take another turn; but regard being had to the nature of the answer, and the fact that no cross bill has been filed, the probability is, that *James Gordon* knew, or had reason to believe, that there had been a private marriage, and that the Plaintiff possessed no such knowledge; and then the parties did not meet on equal terms. In that view, taking the case, as I wish to take it, as a case of mere non-disclosure, [475] the Court, even at this late hour, will give relief. But if the Plaintiff had a knowledge of the fact, and exercised his own judgment on the legal effect of it, this case will be one of that class in which the Court, seeing that there has been full disclosure on all sides, and that the parties have thought proper by agreement and compromise to settle what each shall hereafter claim, supports the contract, though proceeding on mistake. If in this case, therefore, the Court refuses relief, the refusal will be grounded on the fact, that all parties acted in knowledge; if it grants relief, its interposition will suppose proof, that some material circumstance known to one party was not communicated to the other.

July 27. The following cases were cited on the admissibility of depositions beyond the allegations in the bill. *Ward v. The Duke of Buckingham* (3 Bro. P. C. ed. Toml. 581). *Tennant v. Stubbing* (3 Anstr. 640, 644). *Clarke v. Turton* (11 Ves. 240).

Aug. 16. The Lord Chancellor [Eldon]. The agreements which the bill in this case seeks to rescind were entered into, it must be admitted, after considerable deliberation on the subject. The chief difficulties of the case arise, unless I mistake its nature, from the infirmity of the pleadings on each side.

At the date of the agreement of 1790, recollecting that if *Harry Gordon* was illegitimate, *Peter Gordon*, as the elder brother, was necessarily illegitimate also, and [476] that by reason of his illegitimacy and intestacy, *James Gordon* could have no title to the estates, it is not easy, from any allegation in the bill or answer, to understand the views of the parties; but the arrangement seems to be explained by the conduct of the mortgagees, who kindly agreed to consider themselves as trustees for the family; and it is evident that the parties dealt with a knowledge that the crown might have a claim in the property, for the contract provides for the event of the crown establishing its claim.

This was originally opened at the bar as a case in which the Plaintiff having, by the event of the issue, established his legitimacy, nothing remained but to decree the relief which the bill prays; but in my opinion, although it is impossible that the

Plaintiff should succeed if illegitimate, his mere legitimacy will not entitle him to success, and for this reason : I apprehend that if on the death of an individual seized in fee of an estate, a dispute arises who is his heir, and there is room for rational doubt as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows, and all the information which he has received on the question, and at length adopt a resolution to distribute the property, under the notion that the eldest claimant is illegitimate, although it afterwards appears that he is legitimate, the Court will not disturb a family arrangement of that kind, merely because the fact is, eventually found different from the supposition on which it was founded. I put the case of full and free disclosure, and where the transaction proceeds on a compromise, with reference to which no want of good faith on either side can be suggested.

[477] On the question of legitimacy the verdict is decisive, and I am bound to consider the Plaintiff as the legitimate son of Colonel Gordon ; and the question now is, whether attending to the *allegata & probata* in this case, these agreements are to be impeached, and to what extent, and on what terms ?

I lay out of the case the question of consideration ; and I think myself justified by the authority of *Cann v. Cann* and other decisions, in holding, that if a dispute arises relative to the legitimacy of children, and the members of the family, to maintain their character in the world, arrange their rights among themselves, if the matter is fully before them, their agreement will not be disturbed, because it is founded on a supposition, which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate ; but then there must not only be good faith and honest intention, but full disclosure ; and without full disclosure honest intention is not sufficient.

My view of this case, and I have not arrived at it without reluctance, is, that James Gordon knew that there had been some ceremony, which is called a private marriage. I cannot doubt that fact without imputing to several witnesses the most infamous perjury. I find no evidence that, at the time when the Plaintiff entered into the agreement of 1790, he was apprized of that ceremony ; and I say that if James Gordon, knowing that fact, of which the Plaintiff was ignorant, dealt with him without disclosing it, whether the omission of disclosure originated in design, or in honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication, the agreement cannot be sanctioned by the Court.

[478] If James Gordon had informed the Plaintiff of the fact of the private ceremony, and afforded him the opportunity of deciding, by his own judgment, whether that ceremony constituted a marriage, and the Plaintiff had consented to impute to himself the character of illegitimacy, when by the verdict it appears that the character of legitimacy belonged to him, I think, omitting at present the question of consideration, that the Court could not have interfered with the agreement.

It is not uninteresting to observe the different effect of the same evidence on different minds ; the letters which have been read in proof that the Plaintiff acted with great deliberation, and knew the fact of the private ceremony, appear to me strong evidence that he never had that knowledge.

Many views of this case it is difficult to reach, considering the penury of allegation in the bill ; but, after an attentive consideration of the bill, the answer, and the evidence, it appears to me that these agreements must be rescinded ; on what terms is another question. If the deeds are declared void, the other parts of the arrangement must also be set aside.

I think that the Defendant is entitled to have a declaration inserted in the decree of the ground on which I proceed in holding the deeds void. Such declarations on the record are always useful, enabling the parties to deal with them as they think right.

June 26, 1821. The decree, stating that the cause now stood for judgment, and reciting the pleadings, and that the parties proceeded to a trial of the issue on the 27th February 1818, when the jury found that the [479] Plaintiff was and is the legitimate son of Colonel Harry Gordon, proceeds thus :—“ His Lordship doth declare that it is established by the verdict found in this matter that the Plaintiff is the legitimate son of his father ; and His Lordship doth declare that Peter Gordon, his elder brother, must also have been legitimate, and, consequently, that the Defendant

*James Gordon* was not the heir at law of *Harry Gordon* the elder, nor of the said *Peter Gordon*; and farther, that it appears that if *Peter Gordon* was not legitimate, yet if having survived *Harry Gordon* the elder, he became entitled in fee, in law or equity, to the estates in question, by virtue of his father's will, mentioned, in the agreement of 1790, to bear date the 5th day of August 1787, the Defendant *James Gordon* could not be entitled at his father's death, or at the death of *Peter Gordon*, to the estates of *Harry Gordon* the father, as his heir at law, or have any well-founded claims to the said estates, as such heir at law; that nevertheless the agreement of 1790 purports to be made between the Plaintiff *Harry Gordon* and the Defendant *James Gordon*, claiming to be the heir at law of the testator *Harry Gordon* the elder, and as such making certain claims upon the estates therein mentioned, over and besides the provisions made for him by the will and codicil of 1776, 1782, and 1787, recited in the said agreement of 1790, and which will and codicil are thereby by the said Plaintiff and Defendant admitted to have been made by the said *Harry Gordon* the elder; that it further appears, from the recitals of the said agreement of 1790, that if *Peter Gordon* had been illegitimate, and *Harry Gordon* the younger also illegitimate, and if the estates were vested in *Peter Gordon* by virtue of the said will of 1787, the said *James Gordon* could not, as heir at law of his father, or otherwise, by his contract, or by any other his act, authorise or give title to *Harry* the younger to enter upon the said estates, or empower him effectually [480] to require the mortgagees mentioned in the said agreement, to re-convey to him the said *Harry Gordon* the younger, upon payment of what was due to them, or vest in the said *Harry Gordon* the younger any interest in the said estates, save the said *James Gordon*'s interest as a legatee; that it also appears that the other agreement of the 4th day of February 1805, as well as the said agreement of 1790, was made between the parties thereto in consequence of the supposed illegitimacy of the Plaintiff, negatived by the before-mentioned verdict; and that the Defendant, if the Plaintiff was illegitimate, had no title to the lands in *America*, nor any right, for his own behoof, to hinder the Plaintiff from obtaining possession thereof, subject to the charges thereon, in case such lands, under the grant thereof, were vested in his father, and passed by his father's will to *Peter Gordon*; and His Lordship doth declare, that if the Plaintiff could not be relieved against the said agreements on the mere ground of mistake respecting his legitimacy, on the ground that the said agreements were entered into in consequence of mistake and misapprehension respecting such legitimacy, yet that the Plaintiff is entitled to be relieved against the same as having been also entered into under a misapprehension and misunderstanding that the said *James Gordon* the Defendant had such right and interest in the said estate, as would enable him effectually to give and assure to the Plaintiff those benefits and interests which, for the considerations mentioned in the said agreements, are contracted or agreed to be given and assured to him by the said *James Gordon*; and inasmuch also as it is established, by the evidence in the cause, that, prior to the entering into the said agreement, the Defendant *James Gordon* had been informed and knew, that a ceremony of marriage had previously taken place between his father and mother before the birth of the Plaintiff (being the marriage which, by the [481] aforesaid verdict, has been established as a valid marriage), and the said agreement having been entered into with such previous information on his part, and without such information being imparted to the Plaintiff, who might, if the said *James Gordon* had communicated to him that information, have been able by due inquiry to prove his legitimacy, as he has since proved the same, after he had discovered that such ceremony had previously taken place; His Lordship doth therefore declare the agreements in the pleadings mentioned, bearing date the 31st day of March 1790, and the 4th day of February 1805, to be void, and doth order and direct that the same be delivered up to be cancelled; and it is further ordered that it be referred to Mr. *Dowdeswell*, to whom this cause stands referred, to take an account of all sums of money paid by the Plaintiff to the said Defendant *James Gordon*, or to any other person or persons by his order or for his use, in respect of the annuity mentioned in the agreement bearing date the 31st day of March 1790, and of the sums of £4600 and interest, and £1040 in the said agreement also mentioned; and it is ordered that the said Master do compute interest on the respective sums paid by the Plaintiff to the Defendant *James Gordon*, from the respective times of paying the same; and for the better taking the said account, &c.; and it is ordered, that what the said

Master shall find to be the amount of such sums and interest be paid into the Bank with the privy of the Accountant-General of this court, on the credit of this cause, subject to the further order of this court ; and His Lordship doth reserve the consideration of costs, &c. ; and this is to be without prejudice to any claims which the Defendant *James Gordon* may have or can establish against the Plaintiff, in respect of the estate or effects of *Harry Gordon* the elder deceased, or *Peter Gordon* deceased, or either of them, in any suit or proceedings which he [482] may be advised to institute against him, and other proper and necessary parties."—Reg. Lib. A. 1820, fol. 1984.

(1) Cited 2 *Bligh* 348. The following cases, on the construction and performance of agreements, are extracted from MSS. in the possession of the Editor.

Anonymous. *Pasch.* 1634.

A gift of a moiety of the donor's goods, to be enjoyed after his death, affects those only of which he was then possessed.

Mr. *Andrew Gray*, a bencher of the Inner Temple, having two daughters, and having concluded a marriage for the eldest, gave unto her a moiety of all his goods and household stuff ; and the other moiety to his other daughter, to have them after his death. Those only pass which are in specie at the time of the gift ; and if any of them be lost, decayed, or changed, and others bought, and brought in their place, they do not pass in law or equity.—MS.

*Coke v. Bishop.* 23<sup>d</sup> November. 29 Car. 2, 1677.

See *Prebble v. Boghurst*, 1 *Swans.* 309.—Effect of an agreement to settle present and future property.

The Defendant having been long since arrested for £1000 at the suit of *J. S.*, the Plaintiff was so kind to him as to lay down the money for him ; whereupon, in requital of this kindness, the Defendant entered into articles with the Plaintiff to settle upon him all his real and personal estate, which he had or should have, except £3000. (Note: The settlement was to take effect from the death of the Defendant.—Reg. Lib. A. 1677, fol. 105.) Upon these articles a suit was commenced in Chancery in the year 1664, and a decree made for the Defendant to settle all he then had, which was performed ; since that an attempt was made before me to have a new decree against the Defendant to settle new acquisitions made by him ; but I did not think a court of conscience obliged to execute such a strange agreement any farther than it had been carried already, since it tended to the discouragement of all honest industry ; so the suit failed. Now this bill was exhibited in aid of the former decree in 1664 ; for it did not demand any estate accrued since, but to have a farther conveyance of that estate which was then in being, but undiscovered, and is now proved, and insisted upon some old forfeited mortgages then unknown, and for this the Plaintiff prevailed ; but because forfeited mortgages in fee simple are, when redeemed, part of the personal estate, *ergo* the decree was with a proviso, that if the Defendant's personal estate was not worth £3000 at the time of his death, according to the exception in the articles, then these forfeited mortgages, now to be conveyed, should be subject to make it up.—Lord *Nottingham's* MSS.—Reg. Lib. A. 1677, fol. 105.

*Collet v. Butler.*

Whether letters referring to other letters which have been suppressed, but not containing in themselves certain terms of agreement, can be made the foundation of a specific performance, *quære*.

On a marriage between a son of the Defendant and a granddaughter of the Plaintiff, the Plaintiff settles lands to the use of the son of the Defendant, the intended husband, for life, remainder to the wife for life, remainder to the issue of their two bodies in tail, remainder to the husband in fee. Immediately after marriage, the husband dies without issue, and devises all his reversionary interest to his father the Defendant.

The Plaintiff exhibited his bill to compel the Defendant to make a settlement on his son's widow, pursuant to an agreement on his part, or else to reconvey the reversionary interest devised to him by his son.

The evidence of the agreement was a letter written by the father, in which were words to this effect :

" All that I have promised I will make good ; " and after, " all that I have is for him and his," i.e. the son. This letter was written in answer to one from the son to the father, which was suppressed.

The contents and occasion of the son's letter were to acquaint his father that his proposals would not be accepted till they could hear from him.

It was insisted that the words of the father's letter referred to proposals which he had given the son authority to make, and which the son's letter would probably have disclosed, and that being suppressed by the Defendant, ought to be taken most strongly against him ; and that the words " all that I have," included both real and personal, " to him and his," his wife and children.

It was said by *How*, that if the Court should be against the Plaintiff as to making a settlement, the Defendant ought to reconvey the estate devised to him. the consideration, viz. the settlement on the husband's side, not being executed ; as in case lands are sold and conveyed, and the purchase money never paid, Chancery will compel the vendee to reconvey.

To this it was answered, that the settlement made by the Plaintiff mentioned no consideration of any other settlement to be made by the Defendant, nor any other consideration at all but marriage, which was executed, and, therefore, no reason for a reconveyance.

The *Lord Keeper* told the Defendant's counsel they need not labour that point.

As to the other, the Defendant's counsel admitted it to be a case of great compassion, but not within the power of the Court to relieve : they agreed that the bare memorandum of an agreement put in writing and subscribed, was not within the statute of frauds, provided it be of a thing in certain, but that this was utterly uncertain of itself, and not capable of being reduced to a certainty, there being no evidence of the proposals to which it referred ; and as to the suppressing a letter, they thought it very different from suppressing a deed, and hard that a man should suffer for not keeping all his letters by him.

*Vernon* cited two cases where the Court compelled the execution of proposals made by letters : in one, the father said he would give his daughter £3000 ; in the other case, the father said he would not give his daughter above £1500 ; but distinguished this case from both, because in them there is a sum certain named, but not in this.

*Lee* cited likewise several cases of great compassion where Chancery could give no relief. The case of the present Earl of *Lincoln*, which was thus : the last Earl of *Lincoln*, by several successive wills, gave his estate to the present, to whom the honour was to descend, but after the date of the last of those wills, he settled his estate in consideration of an intended marriage ; now, though that marriage never took effect, nor consequently the settlement, yet, this being in law a revocation of the will, Chancery would not relieve.

Another case was this : trustees, out of the profits of the trust lands, purchased other lands ; and though the proof was very full that they purchased those very lands with the same money they had received from the trust lands, yet Chancery would not make the purchased lands liable to the trust, money having, as it was said, no ear-mark.

The like case of a miller at *Uxbridge*, who had hid £500 in a hole in a wall ; the person that found it purchased lands with it, and died, leaving no assets ; the Court could not decree those lands to the miller.

The *Lord Keeper*. I will go as far as I can for the Plaintiff. Let the Plaintiff search for precedents where Chancery has decreed reconveyances, and the Defendant attend me, that I may see what he will propose.

Afterwards, the Defendant agreed to settle all the estate he had to the widow of his son for life, and so the matter was compounded.—From Mr. *Cox's* notes, Lord *Colchester's* MSS.

## Gregor v. Kemp. In Chancery. 29th January 1722.

A disposition in fraud of a covenant in marriage articles, to give a fourth part of the covenantor's real and personal estate at the time of his death, rescinded.

*Joan Kemp*, mother of the Defendant, on the marriage of her eldest son, *John Kemp*, with *Mary*, late wife of the present Plaintiff, among other things, in consideration of the marriage, covenanted by her last will, or otherwise, to give, grant, or devise to *John Kemp*, his executors or administrators, one full fourth part of all the real and personal estate she should be seised of or entitled to at the time of her death. The marriage took effect, but afterwards *John Kemp* and his daughter, the only issue of that marriage, both falling into a very bad state of health, the mother often declared her apprehensions that neither her son nor his child would long survive her, and therefore appeared much dissatisfied at the covenant entered into, because so large a portion of the estate was likely to go into the hands of strangers. Three days before her death, she sent for a friend of hers, told him that she had £1000 in bags lying at Mr. *Hearle's*, a banker hard by, and directed him to draw up an instrument or authority in writing, whereby she empowered him to give two of the bags, containing £200, to one of her daughters; two other bags, containing £200 more, to another of her daughters; and the remaining £600 to *Hawes* and *Pearce*, whom, she told him, she had made trustees in her will; and the £600 were to be in trust for several of her grandchildren. Accordingly, an instrument in writing was prepared for the purposes aforesaid; and at the same time she signed an order to Mr. *Hearle* to pay the said sums to *Hawes* and *Pearce* for the use of the children. *Hearle* delivered the money to *Pearce* in £100 bags, which *Pearce* sealed up, and wrote upon them, "for Mrs. *Hand*, Mrs. *Tomkins*, Mrs. *N. Kemp*" (the three daughters), and then left them in the hands of *Hearle*, to be delivered when called for. Three days after this transaction *Joan Kemp* died; and in a short time *John Kemp*, the son, died, and by his will devised to his wife all his goods and chattels, real and personal estate whatsoever, and made her executrix. His daughter died, and *Mary*, the widow, married the Plaintiff, and died.

The Plaintiff, as administrator of *Mary*, and administrator *de bonis non* of *John Kemp*, filed a bill against *N. Kemp*, to have an account of the estate of *Joan Kemp*, and to have the full fourth part of her estate, and that the £1000 disposed of as above might be charged upon the remaining three parts of the estate; insisting that the disposition was in fraud of the articles, that it was made in her last sickness, and but just three days before she died; that it was at best a *donatio causa mortis*, and would have been alterable by a will made after, or in case she herself had recovered; that if this was so, it was like the will of a freeman of *London*, which never had been allowed to defeat the customary shares of his widow or children after his death.

On the other side it was argued, that there could be no pretence that *Joan Kemp*, notwithstanding these articles, was not at liberty in her lifetime to have disposed of her personal estate as she thought fit; that she might have invested it in a purchase, or might have lived upon the principal; and if she had thought fit to spend and give it all away in her lifetime, the Plaintiff must have been content, and could have had no remedy; that this was not a *donatio causa mortis*, but a *donatio inter vivos*; that the donation was followed by an actual delivery in her lifetime, and could never after have been recalled or revoked if she had recovered; that though £600 of the money were given to the same persons whom she had named trustees in her will, yet that was only a description of the trustees she intended to take care of it for her grandchildren, and did not make it any part of her will, or in any sort dependent upon her will, and therefore the Plaintiff had no colour to impeach or call it in question.

The Lord Chancellor [Macclesfield] was of opinion, that the disposition was in fraud of the articles. He agreed, that notwithstanding the articles, Mrs. *Kemp* was not restrained from disposing of her estate any way in her lifetime, and had a full power over it, but with this single exception, *viz.* she was restrained from making a distribution on purpose to defeat the covenant, which it is here fully proved she did; for she was unwilling her estate should go to strangers; and the disposition is a plain fraud; it was the intent of the articles that it should be for strangers, for it is to him, his executors, &c.; therefore, if he should think proper to make his wife executrix, as he did, it was designed for her benefit. But supposing this disposition



had not been with this avowed design to evade the articles, yet he should have thought it, as it is circumstanced, a *donatio mortis causa*, and not good; for otherwise articles of this nature will signify nothing, if they are thus eluded by a disposition a day or two before death; and in this case she puts the greatest part of the money into the hands of the trustees named in her last will, so that it seems to have the air of a will. The Plaintiff, therefore must have the full fourth part of the estate after debts paid; but this disposition is good to affect the remaining three parts of her estate, and must be satisfied out of it to the several Defendants.—MS.

“Whereupon, and upon long debate of the matter, &c., His Lordship declared, that although he was of opinion that the said *Joan Kemp* was not restrained, in her life-time, from disposing her estate, or doing any thing which was not professedly in breach of the said articles made on the marriage of the said *John Kemp*, her son, yet it manifestly appearing that the said *Joan Kemp*'s disposing the £1000 in the pleadings mentioned was not *bona fide*, but purposely done that the articles might not take place, it was a fraud, and ought not to stand against the Plaintiff *Gregor*; and doth therefore order and decree that the Defendants, the executors of the said *Joan Kemp*, and the other Defendants to the Plaintiff *Gregor*'s bill, do come to an account with the said Plaintiff, before Mr. *Edwards*, one, &c., for what of the said *Joan Kemp*'s estate came to their, or either of their hands, &c.; and the said Master is also to take an account of the debts of the said *Joan Kemp* which remained unsatisfied at the time of her death, and is to make an allowance thereof to the said Defendants, the executors, out of the estate of the said testatrix, and is also to make them all just allowances; and for the better taking the account, &c.; and what upon taking the said account shall appear to be the personal estate of the said *Joan Kemp*, after her debts satisfied, and all other just allowances made to the said Defendants, the executors, as aforesaid, it is ordered and decreed that the said Defendants, the executors, do pay one-fourth part thereof to the Plaintiff *Gregor*, with interest for the same, to be computed by the said Master, from the end of the year after the death of the said testatrix; and do likewise, out of the three remaining fourths of the said *Joan*'s estate, pay unto the Plaintiff, *Gregor*, £250, being fourth part of the £1000 so disposed by the said *Joan* in fraud of the said articles; and do likewise pay interest for the said £250 from a year after the death of the said testatrix *Joan Kemp*; but as to the other Defendants to whom the said £1000 were given by the said *Joan Kemp*, His Lordship doth order that the matter of the Plaintiff *Gregor*'s bill do stand dismissed out of this Court, with costs, to be taxed, &c.; but such costs are to be repaid by the Defendants, the executors, who are also to pay the Plaintiff's own costs so to be taxed,” &c. Reg. Lib. A. 1722, fol. 267–269.

*Green v. Sparrow. In Chancery. 25th October 1725.*

[Distinguished, *Wheatley v. Westminster Brymbo Coal Co.*, 1869, L. R. 9 Eq. 550.]

Rent for a colliery commencing the first quarter day after a certain quantity of coal had been dug, ordered to be paid from the quarter day prior to which that quantity would have been dug, but for the fraudulent delay of the lessee.

The Plaintiff, in the year 1721, leased to the Defendant some coal mines, reserving a rent of £600 *per annum*, the first quarter's rent to be paid at the next feast after the lessee should have digged 1000 stacks of coal; the lessee covenanted that he would dig or cause to be digged the said 1000 stacks of coal without delay, and in a reasonable time; and it was further covenanted between the parties that the Defendant might, upon six months' notice, determine and quit the said lease, paying all the rents due, and performing all the covenants contained in the lease. The lessee entered, and in 1723 gave six months' notice, according to the agreement, whereby he insisted that the lease was determined at *Christmas* 1723. The Plaintiff preferred his bill, and set forth that the Defendant after entering into the lands at *Christmas* 1721, wrought in the mines; and having digged the 1000 stacks of coal about a week before quarter-day, wanting only a small quantity, employed his workmen in other works, telling some of them that he was not such a fool as to pay a quarter's rent for a few days' work; by which means the 1000 stacks of coal were not digged till after *Lady-Day*, whereas they might have been digged before, had not the Defendant himself prevented it; and insisted that the first quarter's rent therefore ought to have been paid upon *Lady-Day* 1721: and

prayed that the Defendant might be obliged specifically to perform his covenants, and continue the lease for the twenty-one years; for not having performed his covenants, he insisted he could not determine it; for that the power to determine by notice was conditional, *viz.* on paying the rent and performing the covenants, by one of which he was obliged to dig the pits in a workman-like manner, and to level the pits with the gin-pits (*viz.* the pit where the engine is to carry away the water), which he had not done, whereby the pits were overflowed with water, and become of no service to the Plaintiff.

It was said for the Plaintiff that the Plaintiff's application was very proper in this Court, for the Defendant had made use of fraud and contrivance to prevent the commencement of the rent, and that he was entitled to insist on a specific performance of the Defendant's covenant, and continuance of the lease; for though there might be an action of law for breach of covenants, if he had not performed them, yet it is more just and reasonable in a court of equity to oblige the Defendant specifically to perform his covenants, than to drive the Plaintiff to an action of law to recover damages only for the breach of them.

For the Defendant it was said, that the bill ought to be dismissed, because the Plaintiff, if injured, might have his remedy at law; for if the Defendant had prevented the digging the 1000 stacks of coal by design, an action of covenant would lie against him at common law, since he covenanted that he would dig them without delay, &c. And as to the second point, if he has not performed his covenants, he cannot determine the lease; and then it still continues without the assistance of this Court; if he has performed them, he may determine it: and this is a proper fact for a jury to decide, and not for this Court.

*King*, Lord Chancellor, agreed that, as to the second point, it is proper to be tried at law, and in an action of debt; for if the Defendant has not performed his covenants, he cannot then determine the lease, and if that is still subsisting, which is a fact for a jury to try, an action lies for the rent. But as to the first point, though he might indeed have remedy by an action of covenant, upon the collateral covenant to dig the coal without delay, &c., yet here was fraud in preventing the digging before the quarter-day, in order that the rent might not commence so soon; and this fraud requires the interposition of the Court. Decree, therefore, the Defendant must pay the first quarter's rent due at *Lady-Day* 1721, and account and pay the rent to *Christmas* 1723, till which time he allows the lease continued; and the Plaintiff to have the costs against the Defendant so far as he has prevailed; and as to the other point, whether the lease is determined or no, it is properly cognizable at common law, and the bill must be dismissed as to that, and the Defendant, as to that matter, so far must have his costs.—MSS.

The following is the entry in the register relative to the question noticed in the preceding report:

"Upon debate, &c., His Lordship declared, that the said *George Sparrow* fraudulently delayed the getting the 1000 stacks of coal till after the quarter day, on purpose to keep off the commencement of the rent; and doth, therefore, think fit to order and decree that the Defendant *Sparrow* do pay to the Plaintiff *Green* the first quarter's rent for the said colliery works, as due at *Lady-Day* 1721; and do continue to pay the rent for the same from *Lady-Day* 1721 to *Christmas* 1723," &c.—Reg. Lib. A. 1725, fol. 120–124.

*Sear v. Ashwell. In Chancery. March 1739.*

*Vide Bolton v. Bolton*, 3 Swans. 414.—A voluntary deed in favor of younger children, though retained in the possession of the grantor, and afterwards destroyed by him, established against legatees.

The Lord Chancellor [Hardwicke]. The first question is in respect of two demands made by two persons under two bonds given to each of them for £40, payable after the death of the testator's mother; and as to them, I am of opinion, that the legacy of £60 a piece given to them in the will was in satisfaction of those two bonds, the legacies being greater than the bond debts, and made payable at the same time. The next question is as to the claim by the testator's younger children by his first wife, under the settlement 26 February 1720, which has been destroyed, but a draft thereof has been produced and admitted by the Defendant's answer, which I make no doubt is a reasonable settlement. *Dimmock* devised his estate to *Atkins*,

the testator, and his wife, and their heirs; *Atkins*, after his wife's death, intending to marry again, made a settlement to trustees for 500 years, in nature of a mortgage, with condition that if his heirs or executors paid £300 to *Reileard* his eldest son, £200 a piece to *John*, his younger son, and *Mary*, his daughter, then the term to cease. *Atkins* afterwards married *Elizabeth*, now his widow; the Defendant then sent for the former settlement and burned it, and a copy thereof is produced and proved; and the question is, whether younger children are entitled to the benefit of the settlement? and I am of opinion they are entitled, and that the settlement will be good against the testator, and all claiming under him; for it was plainly a provision for younger children from whose mother or uncle *Atkins* had the estate, and younger children are to many purposes considered as purchasers; and being an absolute settlement, *Atkins* had no power to revoke it. It was admitted for the Defendant that if the settlement was now in being, they would at all events be intitled to the benefit of it, but that being always kept in testator's own custody, and never delivered to the trustees, and he having destroyed it, it should not now be set up again; and for this purpose the case of *Naldred v. Gillam* (1 P. W. 577) has been cited, but I think that was different; there was a mere voluntary settlement in every respect, not only as to creditors, being a settlement by an aunt for the benefit of her nephew, which never was disclosed, but kept always in her possession, and made for a person for whom she was not obliged to provide; some body broke open her scrutoire, and the nephew clandestinely took a copy, and she afterwards destroyed the settlement; this Court would not suffer the copy to be set up, because it would not have it set up for any body else, not even in favour of an heir at law, but the person claiming under it, must take his chance, whether it should appear fraudulent or not. The present case is different, being a settlement for children otherwise unprovided for, and, therefore, as such they are entitled to set up this copy.

The question then is, how far they are entitled to have the benefit of it? And I think they are entitled as against all those claiming under the bill, but not against the specialty creditors; for being voluntary it will be considered as fraudulent against them, upon the statute of *Elizabeth* (13 *Eliz.* c. 5); for though in some cases voluntary settlements have been held good, where there appear any badges of fraud, and a settlement is to commence after the death of the person who makes it (as in the present case), it has been always held such in a court at law; and if at law the creditors would be entitled against the settlement, there is no colour why in equity they should not be entitled: but this is only as to the bond creditors; those by simple contract cannot prevail against the settlement, because that was a prior charge upon the estate in favour of children, and against those, simple contract creditors will not be preferred, though they would against legatees. Indeed, even that was formerly otherwise; where debts and legacies were charged upon the estate, it has been decreed that they should be paid *pari passu*; but now it is settled that creditors always must take place.

The next question is as to the residue of the personal estate, and I should be inclined to think that it ought to be taken as a specific legacy, exempt from debts, in case the real estate was sufficient, which in this case it is not. The real estate is devised to trustees to sell the same for payment of all his debts, and for the maintenance of children to twenty-one, or day of marriage; and then the residue of the land to his eldest son; then he gives out of the personal estate several specific legacies; and then says, "Item, I give all the rest and residue of my money and personal estate unbequeathed to my wife"; and makes her executrix. Now where a personal estate is given as a residue, it is generally held to be liable notwithstanding, in the first place for the payment of debts; it must be something very particular to make it otherwise, and I think that particularity does occur here; because the real estate is before charged for payment of all his debts, and the residue of the personal estate unbequeathed is given to the wife; which shews the residue of the personal estate in that case was meant as a specific legacy, and the real estate (in case it was sufficient) is charged therewith; and so it has been determined (2 *Vern.* 718); and the only doubt remaining is as to the wife's being made likewise executrix; but I believe the cases cited at the bar were likewise where the residuary legatee was made executor, as in the case, so that circumstance is not material. But the real estate here not being sufficient, I think the creditors must come upon the personal estate. MSS. Reg. Lib. B. 1739, fol. 437.

*Bolton v. Bolton. In Chancery. 5th December 1739.*

*Vide Sear v. Ashwell, 3 Swans. 412 ; Worrall v. Jacob, 3 Mer. 256.*—A voluntary deed executed in favor of children, without a power of revocation, is not revoked by a subsequent will.

A. settles his estate on himself for life, remainder to his wife for life, remainder to his first and other sons, in tail, and in default of such issue male, limits a term of 500 years to trustees, to raise £2000 a piece to his daughters, remainder to his own right heirs.

A. having no children but daughters, and having the remainder to his own right heirs, executed a deed, by which (after reciting that he had promised to give to a gentleman, who had married one of his daughters, £3000 and his estate, but that he had altered his mind) he charged his estate with £4000 a piece for all his children, and gave some other legacies ; and bound himself and his heirs, &c., in the sum of £25,000 to his children, their executors, &c., if all his estate was not equally divided among them.

A. afterwards by his will disposed of his estate in a very different manner from the last deed ; and the bill was brought against the devisees and trustees of the will, and to have the deed carried into execution.

The question was, whether the will was a revocation of the deed ?

The *Lord Chancellor* [Hardwicke]. As this is a deed formally executed in the life-time of A., and a voluntary settlement without a power of revocation, it will not be subject to a revocation by the will ; for, if it was, there would be no difference between a deed with a power of revocation, and one without it.

The case of *Naldred v. Gillam* (1 P. W. 577) is where an old woman executed a voluntary settlement of her estate, which she always kept by her, in favour of her nephew ; a copy of this was surreptitiously got by the nephew's father ; the old woman changed her mind and made a different disposition by will ; and after her death, a bill was brought to set up the copy against the will, and the *Master of the Rolls* decreed the copy to be good, because the original was lost. But on an appeal to Lord *Macclesfield*, the decree was reversed ; for as it was only a voluntary settlement and kept always by the party, it must be presumed she intended to have a power over it ; and he refused to shew any kindness to a copy gained so fraudulently, or to a voluntary settlement under such circumstances ; and decreed in favour of the will, because of the attendant circumstances.

As this deed is a provision for children, there is a kind of consideration for it. and it ought to take place of all other voluntary settlements, and, therefore, of the will, but not of debts or other settlements for a valuable consideration.

The Defendant's counsel urged that the £2000 a piece secured to the daughters by the settlement were to be included, and make up a part of the £4000, and, therefore, what was not given to the daughters by the deed, was well devised by the will.

But the *Lord Chancellor* said, that A. must think that the £4000 a piece to his five daughters would exhaust his whole estate, and lest it should, he bound himself in the £25,000, if all his estate should not be equally divided amongst his daughters.

Decree, account of the personal estate, and after payment of debts, &c., let the surplus be equally divided among the five daughters, the Plaintiffs, and also the real estate be divided amongst them as tenant in common.—From Mr. *Short*, Lord *Colchester's* MSS.

*The Attorney-General v. Launderfield. In Chancery. Mich. 17 Geo. 2, 1743.*

An agreement between trustees of a charity and the next of kin of a testator for division of property, subject to a bequest for charitable purposes, established after a report from the Master that it was beneficial to the charity.

A. by will devised all his estate, both real and personal, to the hospitals of St. *Bartholomew*, &c. ; and it being a question whether this devise was within the late statute of mortmain, the governors of the hospitals, &c., and the next of kin came to an agreement that all the estates both real and personal should be sold, and the produce divided into four parts, one of which was to be for the next of

kin, and the other three to be paid to the use of the corporations. The leasehold was £400 a year, and the personal £4500 after debts paid. This agreement came now to be established in Chancery; but it not appearing what proportion the leasehold and personal estate bore to the real, the Court was unwilling to decree, till the Master should report whether this agreement was for the benefit of the charity; for, by the *Lord Chancellor*, it appears to be a proposal only, and no agreement; if the latter, I should think the agreement of so great a corporation of great weight with me; but these corporations are only trustees for the several charities, and cannot alien the lands or estates given to those uses, and these estates are distinct from those which they are seized of as mayors, &c., of *London*.\*

The agreement was afterwards established by a decree.

*Note*: In this case the *Attorney-General* argued, that as corporations could not be seised to an use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust. 1 Co. 122 a, *Chudleigh's* case. But the Chancellor would not let him go on; nothing being clearer than that corporations can be trustees.

\* Upon debate, &c., his Lordship doth think fit, and so order and decree, that it be referred to Mr. *Holford*, one, &c., to examine whether it is for the benefit of the charities mentioned in the will of the said *John Aldred*, that the proposal and agreement stated in the information, and submitted to by the answers of the said Defendants, *Smith* and *South*, be carried into execution; and the said Master is to state the whole matter, how he finds the same, to the Court, whereupon this Court will give further directions.—Reg. Lib. A. 1743, fol. 69.

#### Hook v. Kinnear and Sir John Philips.

Specific performance decreed at the instance of a person entitled to the benefit of an agreement, though not a party to it.

The two Defendants were tenants in common of certain lands; the Defendant *Kinnear* had taken a lease from Sir *John Philips* of his undivided moiety at a certain rent, but the rent being in arrear, the Defendant *Kinnear* entered into an agreement with Sir *John Philips*, by which he bound himself to execute to the Plaintiff such lease of the premises as Sir *John Philips* and the Plaintiff should agree upon, and that all the rent should be paid to Sir *John* until the arrears that were due to him from *Kinnear* should be discharged, but the Plaintiff was no party to the articles. Accordingly Sir *John Philips* agreed with the Plaintiff that he should have the premises at £30 a year, and executed a lease to him of his part at £15 a year; but the Defendant *Kinnear* refusing to execute any lease of his part, the Plaintiff brought this bill for a specific execution of the agreement.

Mr. *Wilbraham* objected, for the Defendant, that this Court never decrees a specific execution of an agreement, but at the instance of the party with whom the contract is made; consequently that this bill ought to have been brought by Sir *John Philips*, not by the Plaintiff.

The *Lord Chancellor*. I think the Plaintiff is the proper person to bring this bill, because I must take it that Sir *John Philips* contracted not only in behalf of himself, but also of the Plaintiff; for the agreement is that he should join him in making a lease to the Plaintiff; and it is certain that if one person enters into an agreement with another for the benefit of a third person, such third person may come into a court of equity and compel a specific performance; and there are many instances where stewards have made agreements, and yet the masters, for whose benefit they were made, have come into this Court, and obtained decrees. Indeed if Sir *John Philips* had made an unreasonable agreement with the Plaintiff, that would have been a proper defence; but he has not: therefore I must decree that the Defendant execute a lease of his moiety to the Plaintiffs upon the like terms as the lease executed by Sir *John Philips* to him of his moiety.—MS.

*Gascoyne v. Chandler.* 31st October 1755.

[See *Wilcocks v. Carter*, 1875, L. R. 19 Eq. 330].

Injunction to restrain proceedings in the Ecclesiastical Court to set aside a will, contrary to agreement.

The bill in this case was to set aside a deed suggested to have been obtained by the Defendant from the Plaintiff's wife before the marriage, by misrepresentation, imposition, and surprise; and it was also that a paper writing, purporting to be the will of the Plaintiff and Defendant's father, should be carried into execution so far as it went, and that the Defendant, the administrator of the father, with this paper writing annexed, should account for, and make distribution of, the personal estate of the father left undisposed of by this writing. By the deed attempted to be set aside, it was agreed between the Plaintiff and Defendant, that the Defendant should take out administration to the father with this paper writing annexed, and it was agreed that the Defendant should pay to the Plaintiff certain sums of money therein mentioned, in discharge and satisfaction of all her right and interest in the father's estate. The Defendant, by his answer, denied that the deed was obtained by any imposition or surprise, or that the Plaintiff was prevailed upon to execute the same by any persuasion or misrepresentation; and swore that during the treaty between him and the Plaintiff previous to the execution of the deed, he gave her the best information he was able concerning the estate and condition of the affairs, and circumstances of the father at his death, and particularly concerning the nature, amount, and value of his personal estate; and insisted on the deed in bar to the Plaintiff's demands, and that he was not now accountable to the Plaintiff for such personal estate.

Exceptions were taken to the answer, for that the Defendant had not set forth the particulars of the personal estate of the father; and it being referred to a Master, he reported the answer sufficient, in regard he thought the Defendant not accountable for the personal estate till the validity of the deed was determined; and exceptions being taken to the Master's report, the *Lord Chancellor* was of the same opinion, and confirmed the report: but upon arguing the exceptions, the *Lord Chancellor* seemed to think that the paper writing which was taken for a will, ought not to have been considered as such, nor ought to have been annexed as a testamentary schedule to the letters of administration. It was only the incipitur of a will of the father's own hand-writing, in which some legacies were given, particularly to the wife, and it began, I give and bequeath, &c., but had no conclusion, date, or signing, nor was any executor named in it.

Upon this, it being for the benefit of the Plaintiffs that this paper writing should be set aside as a will, they took the advice of several civilians upon it, who all concurring in opinion that the paper writing ought not to be considered as a will, or to have been annexed as a testamentary schedule to the letters of administration, a suit was commenced in the Ecclesiastical Court by the Plaintiff against the Defendant to bring in the letters of administration, praying that the same might be vacated, and that letters of administration without such testamentary schedule might be granted, as upon a total intestacy. This suit in the Ecclesiastical Court to set aside the will being inconsistent with the suit in this Court, the bill praying that it might be established and carried into execution so far as it went, and the Defendants' answer being replied to, the Plaintiffs moved for leave to withdraw the replication, and amend the bill, to make it agreeable to the case as it then stood; but some witnesses having been examined, the *Lord Chancellor* said the replication could not, by the practice of the Court, be then withdrawn (*Anon. Barn.* 222), but that the Plaintiffs, if they had mistaken their case, must dismiss the bill with costs, and prefer a new bill. After this, the Defendant brought a cross bill to establish the deed of agreement, and suggesting that it was part thereof that this paper writing should be performed as the will of the father so far as it went, and that letters of administration, with this paper writing annexed as a testamentary schedule, should be taken out by the Defendants, it was therefore prayed that the Defendants thereto, who were Plaintiffs in the original bill, might be restrained by injunction from proceeding in the Ecclesiastical Court to set aside this paper writing as a will; and now, before any answer was put in to the cross bill, such injunction was moved for, on affidavit

that the proceedings above were depending in the Ecclesiastical Court ; and the Lord Chancellor was of opinion that the Defendants to the cross bill having agreed that this paper writing should be established as a will, they ought not in conscience to be permitted, at least for the present, to controvert this matter in the Ecclesiastical Court ; nor at all, if finally at the hearing of the cause the agreement should be established which went to the question at the hearing ; and therefore granted the injunction.

*Note :* There was a case of this kind of *Sheffield v. Duchess of Buckingham* in this Court in Michaelmas term 1739, wherein the present Chancellor decreed a perpetual injunction against the Duchess to restrain her from questioning the validity of the will of the Duke her husband. (1 Atk. 628.)—From Mr. Coxe's MSS.

Howard v. Okeover and Baxter. *Lincoln's Inn Hall.* 14th January 1778.

Lord Chancellor Bathurst. Demurrer to a bill for specific performance of an agreement, insisting on the statute of frauds, overruled on the merits.

The Plaintiff was occupier of a farm, and desirous of purchasing a contiguous farm belonging to the Defendant, Mr. Okeover, of Okeover ; Cowper, the Plaintiff's agent, applied to Baxter, the Defendants' agent for this purpose. There was a correspondence between Okeover and his own agent Baxter upon the subject ; and in a letter to Baxter, Okeover wrote, " If Cowper will give 2000 guineas, he shall have the estate." Mr. Baxter wrote upon this to Mr. Cowper, but added, " As I apprehend the estate is worth more, I must write again to Mr. Okeover." Mr. Cowper, in answer, wrote to Baxter, " That between gentlemen, the agreement ought to stand."

The bill was filed stating this case, and insisting upon the correspondence as an agreement in writing for sale of the estate at 2000 guineas, and praying a discovery of the names and places of abode of all persons who had any interest in the estate, and that the Defendant Okeover might deliver an abstract of the title, and that the agreement might be performed.

To this bill the Defendants Okeover and Baxter demurred. They set forth the statute of frauds, and insisted that it appeared by the bill, that neither Okeover nor any person authorised by him signed any agreement in writing for sale of the estate to the Plaintiff.

The Solicitor-General, Wedderburne, for the demurrer. A defence by way of demurrer to a bill of this nature is certainly new. The statute of frauds is usually insisted upon by way of plea. But as to the form, there can be no objection ; for whatever is good by way of plea, must be good as a demurrer, if the facts appear sufficiently by the bill. He cited *Bill v. Sir Arthur Lake* in the Common Pleas (*Hetley*, 138), *Plummer v. May* (1 Ves. Sen. 426), and *Jenner v. Tracey* (3 P. W. 287, n.), which was the case of a demurrer to a bill to redeem, where it appeared by the bill that the mortgage had been in possession above twenty years.

Mr. Madocks, for the Plaintiff, insisted that the demurrer was a speaking demurrer ; that it alleged a fact, the statute of frauds. The bill is against the Defendants for the specific performance of an agreement which the Plaintiff collects from written evidence. Whether this is, or is not an agreement to be carried into execution, is a question to be determined at the hearing of the cause. The question will then be upon the letters, whether what has passed amounts to a contract notwithstanding the statute of frauds ; this depends on a number of circumstances, and it is therefore improper to determine the matter upon a demurrer.

*Solicitor-General* in reply.

The argument for the demurrer is, we admit the letters were written as stated in the bill, but we contend that they do not amount to an agreement in writing ; and this is a matter which may well be determined on a demurrer. There must be a written agreement of one party to sell, and of the other party to buy. It may be by letter. But in the present case, take every part of the bill to be true, yet there is no contract. As to the objection, that this is a speaking demurrer because it alleges the statute of frauds, it is clearly not so. The statute of frauds is not alleged as a fact ; it is the law of the land.

The Chancellor overruled the demurrer, thinking the letters imported so much

as intitled the Plaintiff to an answer.—From Mr. *Mitford's* Notes. Lord *Colchester's* MSS.

Child v. Comber. In Chancery. 1723.

To a bill for specific performance, a plea that there was no agreement in writing, was overruled.

The Defendant was possessed, for the remainder of a lease for forty years from the Dean of *St. Paul's* (whereof about two years only were to come), of a very considerable estate, consisting in houses and land at *Shadwell*, and she was likewise seised and possessed of the market, and profits of the market there, which were no part of the Dean's lease. The Plaintiff came to an agreement with her for the purchase of her tenant right in the Dean's lease, in order to renew with the Dean, and likewise of her right and interest in the market, for £750, but this agreement was not in writing; but the Plaintiff, in order to his being better recommended to treat with the Dean for a new lease, desired the Defendant to give him a letter to the Dean for that purpose; and thereupon the Plaintiff wrote the letter, which the Defendant signed, directed to Dr. *Godolphin* to this purpose. "Sir, I having agreed with Sir *Cæsar Child* for the purchase of all my right and interest in the lease which I hold of you for the remainder of the term, desire you will please to admit him to treat with you, which will oblige your humble servant, *Fra. Comber*." Upon this the Plaintiff went to Dr. *Godolphin*, gave him the letter, and agreed with him for £15,200 for a new lease for forty years, on a surrender to be made to him of the old lease; and the Dean thereupon wrote to Mr. *Gilbert*, his agent, acquainting him with the agreement he had made with the Plaintiff, and forbidding him to treat with any other person. In the mean time a draft was prepared for the defendant's assignment of the residue of her lease to the Plaintiff, and being left with the Defendant's counsel, several alterations were made in it by him; and at length the terms and draft were settled by counsel on both sides, and the Plaintiff gave 15 guineas to counsel on that occasion; but the Defendant insisted upon having £250 more, in the whole £1000, before she would assign her interest to the Plaintiff; which he was forced to comply with, and this was one of the alterations made in the draft. After which, both the Dean and the Defendant being informed that their interest in the premises was much more valuable, refused to perform their agreement with the Plaintiff, who had provided his money for that purpose; upon which the Plaintiff brought two several bills, one against the Dean, and the other against the present Defendant, who both pleaded the statute of frauds and perjuries, and that there was no agreement in writing; but the Dean's plea was overruled upon the letter he had sent to Mr. *Gilbert* his agent, wherein he had taken notice of the agreement particularly, and how much he was to have for the new lease; and as to the Defendant's plea, that was ordered to stand for an answer with liberty to except, and the benefit of it saved to the hearing; both these being heard by the *Master of the Rolls* in the absence of the Chancellor.

The Defendant being dissatisfied, petitioned for a re-arguing of her plea, which now came on before the Chancellor. The principal objection was, that this letter not mentioning any of the terms of the agreement, would make way for all that perjury which the statute intended to remedy; that one might swear the agreement was for one thing, another for another thing; one that it was for so much money, another for less; and here it was plain the first agreement, whatever it was, was raised from £750 to £1000; and the draft of the ingrossment of the conveyance could be no ways binding upon the parties to execute; that the agreement was not mutual, and if the Plaintiff had refused to have performed, the Defendant could have had no remedy to have compelled him to it; that this letter was written by the Plaintiff himself, and though the Defendant signed it, yet it was only as a letter of recommendation to introduce him to treat with the Dean; that this £750 was to be paid for the interest in the market which the Dean had nothing to do with, as well as for the remainder of the Dean's lease, and no notice was taken or any distinction made in the letter concerning it; that the Plaintiff being at liberty to except, would certainly except to the plea, till they had an answer whether there was such agreement or not; and if the Defendant should be forced to own it, the Court might decree a performance of it, and so the benefit of the statute be wholly taken away from the Defendant.

On the other side it was argued, that letters written to third persons, and not to the party himself, had been frequently held to be a sufficient writing to take the



case out of the statute; that if the terms of an agreement had been certainly expressed, that would have been the same as the agreement itself, and there would be no difference between an agreement and a memorandum of an agreement; that its being written by the Plaintiff was nothing to the purpose, since the Defendant had signed it; and the drafts being settled by counsel on both sides, 15 guineas paid upon that occasion, and the purchase money provided by the Plaintiff, were as much an execution of it on his part, as where a man agrees by parol to let a lease, and suffers a lessee to go and build, and then refuses to make the lease. This Court has frequently assisted in that case.

The *Lord Chancellor* [Macclesfield]. This is barely a plea of the statute of frauds and perjuries, without any denial of the agreement: if, indeed, the plea had been as to so much as sought any discovery of an agreement, that there was nothing reduced into writing, and then the answer had denied the agreement, this had been directly a plea within the statute; but here it is plain there was an agreement, and the plea only goes to the not being compelled to an execution or a performance, being not reduced into writing, without any denial of the agreement. The primary intention of the act, and the principal object which the parliament had in view, was, that no action at law should be brought upon an agreement not reduced into writing, because they could not suffer or give way to the variety of evidence which might be given at law in that case; and where an action will not lie at law, it is reasonable no bill should be allowed in this Court: but this is not a general rule; as in case where the agreement is performed in part, on a contract for a building lease by parol, though the agreement is denied, yet this Court hath admitted parol evidence to prove it on the head of fraud; yet there the building does not in the least shew what the terms of agreement were, and therefore it lies as much open to fraud as the present case: but where there is any fraud this Court interposes; and is it not strange to say, I will not put it in issue, whether any agreement or not, but whether signed or in writing or not? But here is a note in writing, owning that she had agreed, and therefore no colour to say that there was no agreement; but if by her answer she should deny that there was any agreement, it will then be proper to consider whether the Plaintiff shall be admitted to give evidence of it; and here the fees paid to the counsel, the drawing of the drafts, and ingrossing them, and the Plaintiff providing his purchase-money, are as much an execution of it on his part, as the laying out money on the buildings was in the other case; and the circumstances of his agreement with the Dean, are in consequence a proof of his agreement with the Defendant, which if she owns, where is the danger of perjury? Indeed, a note or memorandum of an agreement must mention the substance of the agreement in short, otherwise no action can be brought upon it at law; but where there is fraud this Court may interpose, though the agreement is not reduced to such a certainty; and it is proper for the Court to look into it.

The Chancellor therefore confirmed the order made by the *Master of the Rolls*; and said, though the Defendant could have no remedy perhaps against the Plaintiff on this agreement, for want of his having signed some writing or memorandum, that was not material; for the act does not say, unless both parties, or unless mutually signed, and therefore an action lies against the party who has signed.—From *Lord Colchester's MSS.*

The bill was dismissed on the hearing, 14th December 1724. Reg. Lib. A. 1724, fol. 56.

*Carey v. Stafford. In the Exchequer. Hil. 12 Geo. 1, 1725.*

A voluntary conveyance of lands, not the property of the grantor, established against him, as an agreement to convey lands of equal value.

The Plaintiff was the Defendant's servant at 50s. *per annum*, which was proved in the cause to be paid, and during her service the Defendant procured a deed to be drawn by an attorney, whereby lands of £22 *per annum* were settled for life, with usual covenants to repair, and for quiet enjoyment, with a reservation of a pepper corn rent; and there was a receipt endorsed for 5s. as the consideration money, but blanks were left for the names of the parties.

The Defendant afterwards filled up the blanks with his own name, as the grantor, and the Plaintiff's name as the grantee; but it appeared after all to be a fiction, and that there were no such lands as were described in the deed; and it was proved in the cause, that when the Plaintiff came to demand where the lands were, the Defendant

laughed at her, and said they were in *nubibus* ; whereupon the Plaintiff brought her bill to be relieved, and to compel the Defendant to convey lands for the same estate, and to the same value.

For the Defendant it was urged, that it appearing that the Plaintiff was a mere volunteer, she ought not to have the aid of a court of equity ; that she did not come to be relieved against a fraud, by which he was deprived of any thing, but to force the Defendant to give her what he never intended. That it was *turpis causa*, and not to be favoured in equity.

Some proofs were then read to shew a criminal conversation between the Plaintiff and the Defendant, but not fully.

*Curia* of opinion that the Plaintiff ought to have relief ; and that it should go to the deputy to see a good conveyance made to the Plaintiff of Defendant's lands to the same value, and to take an account of the rents and profits from the date of this fraudulent deed, as if such lands had been really conveyed by it ; and *per*—

*Gilbert*, Chief Baron. This is not within the case of volunteers, for here is nothing at all given, and, therefore, no remedy can be at law ; but in the case of a volunteer where something is conveyed, damages may be recovered, at law, on the covenants, and, therefore, equity will not interpose.

*Hale*, Baron. If the consideration did arise, *ex turpi causa*, yet it is good in equity, where there is no creditor, &c. ; and courts of equity, in such cases, will decree performance, and that as a punishment for the party ; and the man in this case is more criminal, for it must be supposed the solicitation first came from him. From Mr. *Coze's MSS.*

*Morse v. Faulkner. In the Exchequer. 27th April 1792.*

[See *West v. Berney*, 1819, 1 Russ. & My. 434 ; *Jones v. Kearney*, 1841, 1 Dr. & War. 159.]

Shortly reported 1 *Anstr.* 11.—Effect of an agreement to sell land not then the property of the vendor, but which afterwards became his.

*Thomas Gyles* on the 4th of October 1770 died a bachelor intestate, seised in fee of two several copyhold estates in *Great Coxwell* and *Little Coxwell*, and leaving two nephews, *Thomas Robinson* and *William Robinson* (children of his sister) and also *William Robinson* (who was a common soldier), the son of *Richard Robinson*, the second nephew of the intestate, and brother of the said *Thomas Robinson* and *William Robinson*, who died in his uncle's life-time.

*Thomas Robinson*, the eldest nephew, and the heir at law of the intestate, having gone to reside in *Ireland*, upwards of forty years before the death of his uncle, and *Richard* being then dead, *William*, the third nephew, took out administration to his uncle, and also entered into possession of the copyhold premises.

In April 1772, *William* the soldier, having then lately arrived in *England*, went to *Great Coxwell*, accompanied by his uncle *William*, and claimed title to the copyhold estates, alleging that he had been lately in *Ireland*, where he had been assured of the death of his uncle *Thomas* about two years before, without issue ; and *William*, the uncle, alleged the same thing, and gave up the possession of the copyhold premises to *William*, the soldier, as heir at law of the intestate.

*William*, the soldier, declared his intention to sell the premises immediately, and sent for the steward of the manor, who lived thirty miles off, to take his admission, and his surrender to the purchaser. When the steward came, *William*, the soldier, sent for two or three persons to a public house at *Coxwell*, and about nine o'clock in the evening put up the premises to auction ; *Richard Morse* and another person bade for them, and at the third bidding *Richard Morse* was declared the purchaser.

*Richard Morse* was accordingly admitted to part of the copyhold premises, and the other part was (by his direction) surrendered to the use of *William Morse*, his son ; *Richard Morse* paid the purchase money to *William*, the soldier, and the court fees. He afterwards laid out a considerable sum of money in repairing the premises, and died in 1785.

It afterwards appeared that *Thomas Robinson*, the uncle, in fact, survived the intestate, and was living at the time of the sale to *Morse*, so that *William*, the soldier, had not then any title, whatever, to the premises. But *Thomas Robinson* afterwards, viz., in 1778, died without issue ; and upon his death the premises descended upon

*William*, the soldier. No act was done by *William*, the soldier, after the death of his uncle *Thomas* to confirm the surrender or sale to the *Morses*; and *William*, the soldier, died in 1781, leaving *John Faulkner*, *Mary Shade*, *Hannah Ward*, and *Ann Robinson*, his heirs at law.

In *Easter* 1788, actions of ejectment were brought by *John Faulkner*, *James Shade*, and *Mary* his wife, *Samuel Ward* and *Hannah* his wife, and *Ann Robinson*, against *Ann Morse*, who claimed her free bench in the part surrendered to *Richard Morse* and *William Morse*, to recover possession of these premises, on the ground that nothing passed by the surrender of *William*, the soldier, and that the copyhold premises, therefore, descended on the lessors of the Plaintiff, as his heirs at law.

A case was reserved for the opinion of the Court of King's Bench, and after great consideration, judgment was given for the lessors of the Plaintiff. (*Goodtitle v. Morse*, 3 T. R. 365.)

*Ann Morse* and *William Morse* then filed the present bill against *Faulkner*, *Shade* and wife, *Ward* and wife, and *Ann Robinson*, praying that they might be decreed to make a surrender to the Plaintiffs respectively of the several parts of the copyhold premises which were surrendered to *Richard Morse* and *William Morse* by *William Robinson*, the soldier, and that they might be quieted in the possession thereof, and that the defendants might be restrained by injunction from proceeding to extension upon the judgment in ejectment.

*Partridge* and *Cox* for the Plaintiffs. It is now settled by the judgment of the Court of King's Bench, that the Plaintiffs have not a legal title to the premises in question. They, therefore, come to a court of equity in the character of fair purchasers for a valuable consideration, to have that legal title made good to them by the heirs at law of the vendor. This is the common case of a purchaser coming to have an agreement specifically performed, or a defective conveyance supplied; and it is a species of relief which courts of equity are in the constant habit of giving, either against the vendor himself or any claiming as heir or volunteer under him, whether the agreement for the sale remains wholly unexecuted, or is defectively executed, and whether the vendor had good title to the premises at the time of the sale, or whether such title accrued to him afterwards; and although the case at law turned upon the difference between freehold and copyhold premises, yet, it is evident, that no distinction of that sort can arise here, for the claim of the Plaintiffs is to have a good legal title made to them by all necessary means; and indeed most of the cases on defective conveyances arose on copyholds. In *Wiseman v. Roper* (1 Rep. in Cha. 84), the Defendant was only presumptive heir to his brother, and agreed to settle certain lands to the uses of the marriage within one month after his brother's death; there the objection was taken that, at the time of this agreement, the Defendant had no interest whatever in the lands; but as they afterwards descended upon him, he was decreed to perform his agreement. In *Barker v. Hill* (2 Rep. in Cha. 113) the heir of the vendor was decreed to surrender the copyhold premises to a purchaser. So in *Patteson v. Thompson* (Rep. Temp. Finch, 272) the heir of the mortgagor was decreed to surrender the copyholds to the mortgagee. In *Martin v. Seamore* (1 Ca. in Cha. 170) the bill was by mortgagee of copyhold, the surrender having been defective; and it was particularly argued in that case, that as the Plaintiff would have been clearly entitled to relief upon a bare agreement, he ought not to be in a worse place by having a surrender though defective. In *Clayton v. The Duke of Newcastle* (2 Ca. in Cha. 112) the heir sold in the life-time of the ancestor, and received the money, and when the land descended upon him he was decreed to convey; which case seems very like the present. In *Taylor v. Wheeler* (2 Vern. 564) a surrender of copyhold by way of mortgage, not presented within due time, was made good in favour of the mortgagee, against the assignees under a commission of bankrupt against the mortgagor. That the Court will decree the performance of an agreement, although the vendor has no title until after the agreement, appears, by the constant form of the reference to the Master in all cases of specific performance, viz. to inquire whether the vendor can make a good title to the premises, not whether he could at the time of the agreement make such title. This was settled upon great consideration in the case of *Langford v. Pitt* (2 P. W. 629. *Wynn v. Morgan*, 7 Ves. 202); and the *Master of the Rolls* there mentioned a remarkable case of *Lord Stourton v. Sir T. Meers*, where an act of parliament was necessary to make good the title, and yet the Court ultimately executed the agreement.

*Lord Chief Baron.* I have great doubts about the equity upon which the bill proceeds, and if I found it necessary in this case to lay down any general rule upon the subject, I should think the case deserved great consideration. It is true that when a man having a good title agrees to sell to another, this Court considers such an agreement as a lien upon the land, and will upon that ground decree the heir, or any volunteer under the vendor, to make good such agreement. It is also true that when a man not having a title at the time, agrees to sell, and afterwards such title accrues to him, the Court binds the conscience of the vendor himself, and compels him to make good the title at any future period, when he can; which was the case of *Clayton v. Duke of Newcastle*. But in this case the surrenderer not having any title whatever to the premises, at the time of the surrender, his agreement would not raise a lien upon the land; and although the present Plaintiffs might have been relieved if they had filed their bill against him in his life-time, that is after his title had accrued, yet it does not follow that therefore they can be relieved against his heirs. Neither the land itself, or the conscience of the present Defendants, is bound by this act of *William* the surrenderer; and I am not aware that on a bill filed for a specific performance against the heir of a person who sold without having any title at the time of the bargain, the Court has referred it to the Master to inquire whether the vendor had any title to the premises at the time of his death.

But really I do not think it necessary to go into the general question upon this occasion. This is not the sort of sale that it becomes this Court to take notice of. A common soldier goes down to a country ale-house, and late at night calls together two or three people, and offers to sell his estate; and then two persons bid for it, and the affair is all over. The transaction is not serious enough for this Court to interfere in; and the parties must take their course at law.

The bill was dismissed without costs.—From Mr. Cox's notes, Lord Colchester's MSS.

*Backhouse v. Mohun, Crosby, Sen. and Jun., and Others. Pasch. 10 Geo. 2, 1736. In Chancery.*

Specific performance of a contract not signed by the party enforcing it.

Bill to have a specific performance of an agreement made between the Plaintiff and *Mohun*, for the purchase of an estate of *Mohun's*. The Plaintiff and he had treated about it, and written several letters relating thereto. The last letter from *Mohun* was in 1731, who said therein that the Plaintiff had offered a certain sum which *Mohun* accepted. But it did not appear whether the Plaintiff had done any thing to bind himself, for the Defendants produced none of the letters: but one *Harrison* swore that subsequently to the agreement between the Plaintiff and *Mohun*, he had proposed himself as a purchaser of this estate, and that he was in company with *Crosby*, senior, and the Plaintiff was sent for, and they entered into a conference concerning the estate, and the Plaintiff answered in the negative, but said not what words were used; that the Plaintiff said he would not go to law, but would rather write to *Mohun* before he entered into any controversy about it; a letter was accordingly sent, but not produced. *Harrison* acknowledged he had a previous discourse with *Crosby*, senior, about the affair; which *Crosby*, as it clearly seemed, was the real purchaser.

For the Defendants it was insisted that there was no reason they should be bound by *Mohun's* letters, when *non constat* the Plaintiff was bound on the other side. But, secondly, supposing they were originally bound, yet the Plaintiff had waved the agreement; and that may be done by parol, *Goman v. Salisbury* (1 Vern. 240). for it is only to rebut an equity.

*Lord Hardwicke*, Chancellor. The first question is, whether there is any agreement in writing between the Plaintiff and *Mohun*, for as it relates to lands and tenements, it must be in writing; and I think it sufficiently appears so, and that it is a complete absolute agreement to bind the Defendant *Mohun*. Many cases have occurred where agreements for lands appearing in writing under the hand of the party who was to be bound by it (which are the words of the statute of frauds) notwithstanding there was no writing of the other part, have been carried into execution; and I have known the objection often taken of its not appearing on the side of the purchaser, and as often overruled. But it may be taken as an

ingredient to add weight to other objections. Besides here were letters from the Plaintiff to *Mohun*, which he does not think fit to produce, and the Plaintiff cannot. Therefore I think *Mohun's* letter is sufficient evidence of an agreement in writing.

Secondly, the question is, whether any act has been done on the part of the Plaintiff *Backhouse* to release or wave the agreement? The defence insisted on is of a tender nature, and to be received by a court of equity with great caution; for even the agreement to depart from a former agreement, is as much an agreement concerning lands and tenements as the first; and therefore, taking it originally, and abstracted from circumstances, ought as much to be in writing, and is equally within the statute of frauds; but, notwithstanding that, if it clearly appears that a Plaintiff in a court of equity insisting on such an agreement contained in letters, has by acts done, waved it, and thereby drawn in another to purchase, and complete his purchase, in such case it would be a good defence to be insisted on by the second purchaser, shewing that he proceeded *bona fide*, and consequently would rebut any equity of the first purchaser. But I think there is not sufficient evidence of such matter; it chiefly depends on the testimony of *Harrison*, who makes an extraordinary figure in the cause, and admits a previous consultation between him and *Crosby*, senior, who seems the effectual purchaser; and that objection, though I refused it as to his competency, yet goes to his credit. He says a letter was to be written to *Mohun* to prevent controversy. What occasion was there for that, if the Plaintiff had given up his purchase? The letter was written by the Plaintiff; if it had been produced, what he and *Crosby*, senior, said, might have appeared. But the letter from *Mohun* is produced, and imports directly the reverse of what *Harrison* supposes.

Decreed that the Plaintiff should have the benefit of his purchase. MS.

6th May 1736. "His Lordship doth declare that the Plaintiff is entitled to the benefit of his agreement for the purchase of the estate at the sum of £315, and to have it carried into execution; and doth therefore think fit, and so order and declare that the agreement be performed, &c."—Reg. Lib. A. 1736, fol. 627, 628.

*Pembroke v. Thorpe*.\* Hil. 13 Geo. 2. 29th March 1740.

Specific performance of a contract to build a house.

Lord *Hardwicke*, Chancellor, gave his opinion on the following case: This bill is brought for two purposes, first, for a division of leasehold lands, held by the Defendant from the late Earl of *Pembroke*, the Plaintiff's father, from freehold and copyhold of the Plaintiff, the boundaries of which were confounded by unity of possession; and for a specific performance of an agreement for building a house with the appurtenances in ; or, secondly, to have a performance of a subsequent agreement for the exchange of certain freehold lands of the Defendant, on which he has built a house, with other equal quantity of lands of the Plaintiff. As to the division and setting out of the lands, there is no dispute, but that the lands should be properly set out on both sides; but the great point is, as to the Courts decreeing a performance of either of the agreements. The bill is in the disjunctive, and prays that either the Defendant may be decreed to perform his agreement for exchange; or if not compellable to do that by the strict rules of law, that then he may be compelled to build a new house on Plaintiff's leasehold lands. On this two questions have been made; first, whether any agreement whatever, either for building a new house, or for making an exchange, has been sufficiently proved; second, if it is, whether either of those agreements is such, as in the circumstances of the case, a court of equity will carry into execution? The first depends on the proofs in the cause; and I will consider them, first, as to the pulling down the old house and building the new, and, next, as to the subsequent agreement of exchange.

As to the first, the proof stands thus: it is proved by Mr. *Jerom*, steward to the Earl of *Pembroke*, that in 1731 a proposal was made to take a lease of a farm called *Moses' farm*, then lately purchased in *Foulston* and *Wilston*, where the late Earl had another estate lately purchased, and Mr. *Thorpe* a freehold estate. It appears the agreement about taking *Moses' farm*, was on 16th August 1731, on which there were an old house and malt-house, &c., very much out of repair, for which it was proved the Defendant was allowed £80 for repairs; for notwithstanding another colour has been endeavoured to be given to it, it is clear it was for the repair of *Moses' farm*. The lease is dated 26th August 1731, and executed by the late Earl the 13th

*December* following ; the counterpart was laid by not executed till the 3d *October* 1732. Between the execution of the lease and the counterpart, this proposal was made by *Thorpe* for pulling down the house in *Moses'* farm, and new building it ; and he desired *Gore* to write to the Earl about it, and the reason he gave was, he would hold another for his habitation on *Foulston* farm. *Gore* desired him to give a plan of the house he intended to build ; the Defendant replied to be sure he would not build a worse than was thereon already ; which amounted to an agreement to build as good a house as that on *Moses'* farm ; and upon that agreement, and no other, the Defendant was to pull down the tenement on *Moses'* farm. In *October* 1732 the Defendant began to pull down the house ; and it is sworn and admitted, that the building cost £1000 and upwards, and that he used the old materials. That is the proof on the part of the Plaintiff.

The Defendant in his answer would represent that the proposal for pulling down the house was at the time of the lease, and he agreed that he would make other alterations on *Foulston* farm ; but there is no proof of this : on the other hand it is contradicted by all the witnesses, and by *Gore*, who is witness to the proposal, who swears *ut supra* ; it is contradicted also by the fact, which I take to be clearly established, that the £80 were allowed for repairs of *Moses'* tenement ; for it is then absurd that there should be a proposal at that time for pulling it down, which the Defendant insists upon in his answer.

It is said for the Defendant, in respect of the first agreement, that it is proved only by one witness (*Gore*) against the Defendant's answer, and by the rule of this Court that is not sufficient evidence to ground a decree on ; and the rule is certainly so ; but it is carried too far in this case : for supposing the Defendant's answer to be a full denial, yet it is supported by more than one witness ; for it is corroborated by circumstances proved by other witnesses ; so that it amounts to more than proof by one witness, and would be sufficient to found a decree on. But there is no occasion to resort to that argument, because the Plaintiff's charge is not denied by the Defendant. The Plaintiff says he promised to build him as good a house ; and the Defendant only denies that he did, at the time, when he desired *Gore* to apply for leave to pull down *Moses'* tenement, or at any other time, propose that he would build or set up in the stead or place of the old house, on some part of the Earl's estate, a better and more commodious house for his habitation, and he insists that he made no other proposal than at the time of the lease, and that was only to make other improvements on the *Foulston* farm. This is no denial of the agreement ; it may be of circumstances in the bill, but not of the equity of it ; for the proof is, he promised not to build a worse house ; which may be, though he did not promise to build a better. Therefore the first agreement is fully proved, and not at all contradicted, nor clearly denied by the answer.

The proof as to the second agreement for the exchange is, the testimony of Mr. *Gore*, who is the only witness ; and as to the particulars of that agreement he swears that about the latter end of 1732, the new house was begun to be built, and soon after, as they were about the foundation, the deponent was riding by and saw it was building on a different place than that agreed upon ; upon which he inquired whether it was upon the Defendant's freehold or the Plaintiff's leasehold estate ; and was informed that it was uncertain, and hard to distinguish the Defendant's freehold lands from the Defendant's leaseholds, which he held under Lord *Pembroke*, but that it was generally believed to be on part of the Defendant's freehold ; the Defendant answered, he did not know which it was, but that if it proved so, he would exchange the ground on which the house was building for other equal quantity of land on *Moses'* farm ; by which *Gore* apprehended the Earl was to have the fee of the Defendant's lands, and the Defendant the fee of the Earl's. *Gore* made further inquiries, but could get no better information as to the boundaries of the land ; he, therefore, told the Defendant it would be better to make an exchange, and the Defendant told him that as he had before promised he would make the exchange at any time ; and so the deponent told the Earl. The Defendant swears that he and *Gore* appointed Mr. *Day* to make the admeasurement of the ground, and met the 9th of *February* 1735, a long time after the new house was begun to be built, which was at the latter end of 1732. One *Spire* made the admeasurement, and said it would be better to take in about six luggs, and the Defendant said he would look out a piece of ground to be exchanged for the six luggs, and

bid *Spire* take it in. This fact is supported by *Spire*, who gives an account of a subsequent admeasurement, and that Mr. *Grant* was desired to join with the Plaintiff in the admeasurement; and that he asked *Spire* why the lands were to be measured, and asked the Defendant whether he had articted for the exchange of the lands? "No," said *Thorpe*, "but his word was as good." And this proof on behalf of the Plaintiff is not contradicted.

The second question is, whether one or other of these agreements is such as a court of equity will carry into execution? And I am of opinion here is not a sufficient ground to decree a performance of the agreement of the exchange. There are indeed very strong circumstances in the case to induce a private conviction; but all sorts of proofs which induce private conviction are not such as will found a decree in this Court. One objection is, that it is not in writing, but only a parol agreement about land and tenements, and so void by the statute of frauds. I answer, such agreements are not void, but may be taken out of the statute according to the rule of this Court, by having been in part performed; for in such case this Court will decree a total performance: but I see no ground to say there has been a partial performance; for as to the admeasurements, I do not look upon that as a performance of any part of the agreement; and so here is no certain proof as to any part of the agreement whereon to found a decree. *Gore* is uncertain as to the time when this agreement for the exchange was made, for no time is mentioned; he only says, that soon after the first agreement he was riding by when the foundation of the house was laying; but he does not say when he first conferred with the Defendant about this exchange. It is plain the agreement was not concluded on the first proposal; for he inquired first about the boundaries of the freehold and leasehold lands; and when the proposal or conclusion was, is quite uncertain; and that is a circumstance the more material, for this reason; had it appeared the agreement for the exchange was made during the course of the building, or before the house was built, or near built, then the Plaintiff's letting him go on might be taken as the consideration, and so part of the performance of the agreement as to the exchange, because the Plaintiff might have applied for an injunction in this Court to stop the building, upon suggesting it to be upon his lands; but the time of the agreement not being fixed, it might be after the new house was entirely built. The agreement is likewise uncertain as to the terms of it. The words of the deposition are, that he apprehended the Defendant was to convey the fee to the Plaintiff, and the term of ninety-nine years, and the Plaintiff was to convey the fee simple of other grounds to the Defendant; this was but his apprehension, and though it was reasonable, yet it is too general to found a decree of this Court; for it is uncertain what part of the lands of either was to be exchanged, or at what value, whether value for value, or whether any allowance to be made; and for a court of equity to make all these inferences is going further than ever this Court I believe has yet done. It does not appear when my Lord *Pembroke* came into this agreement for exchange, or when *Gore* acquainted my Lord with it; for *Gore* does not say whether he had any authority from the Earl, or whether my Lord ever agreed to it; in which case he would not be bound by it; nor was there ever any thing done in execution of the agreement; for the admeasurement was never completed. For on the 9th of *February* 1735 it was proposed that six luggs should be taken in and allowed, and then *Grant* was to make the final admeasurements. But then he put this thought into the Defendant's head, and so the admeasurement was never completed; though if this admeasurement had been completed, I should not think it such a partial performance of the agreement, as could be made the foundation of a decree; for it was only a step towards the performance. Here ought to have been a parting with the interest in some measure, otherwise the Court cannot decree a performance. No stress, therefore, can be laid upon this, but to corroborate the proof that there was such an agreement.

Thus it stands as to the exchange; but I think the agreement for building the house ought to be carried into execution. One objection is, that it would be very hard to oblige the Defendant to build up a new house by applying to this Court, when the Plaintiff might have his remedy at law, and recover damages for the breach of the agreement; and that a court of equity will not decree a specific performance which will be attended with great hardships. But as to sending him to law, that will be no remedy at all, this not being an agreement in writing, which

is necessary, because an agreement to build on land, and therefore relating to land ; nor will the partial performance help him there, because that is a rule in the consideration only of this Court. Here is no hardship in this case of which the Court will take notice. There are some cases indeed where if the Court was to decree a specific performance, it would produce the ruin of the Defendant, where a jury would not give the Plaintiff 12*d.* damages. In such case a court of equity will not decree a performance. But this cannot be called a hardship, because it will put the Defendant to an expense, for it is merely through his own default, and this Court only compels him to perform his own agreement which he has entered into for valuable consideration ; and it would be suffering him to take advantage of his own wrong, if he were not compelled. Nor will the statute of frauds be any objection as to this agreement, because it is plainly in part carried into execution by the Defendant ; and the Plaintiff has done every thing on his part, by giving the old materials which are said to be worth £500, and the Defendant has, therefore, had the benefit of his agreement ; and the Plaintiff done every thing on his part ; and then the rule is, that if an agreement, though not in writng, is partly carried into execution, this Court will not suffer that party to take the benefit of the statute ; but he is bound in conscience and in this Court to perform the whole : and the intent of the statute is answered in this case, because the inconvenience which it intended to remedy, as to perjury, is taken away where there is a performance in part.

Upon the whole there must be a decree for division of the lands, and a building of the new house, and the Plaintiff must have his costs as hitherto. I have not seen a clearer case where costs ought to be paid, and reserve the subsequent costs. MS.

\* The proposition, that a specific performance may be decreed of a covenant to build, is supported by *Holt v. Holt*, 2 Vern. 322. *Allen v. Harding*, 2 Eq. Ab. 17. *City of London v. Nash*, 3 Atk. 515 ; 1 Ves. Sen. 12. *Rook v. Warth*, 1 Ves. Sen. 461. *Moseley v. Virgin*, 3 Ves. 184 ; and opposed by *Errington v. Aynesly*, 2 Bro. C. C. 343. *Lucas v. Commerford*, 3 Bro. C. C. 166 ; 1 Ves. Jun. 235 ; 1 Mer. 265 ; and *Flint v. Brandon*, 8 Ves. 159 ; and see *Rayner v. Stone*, 2 Eden, 128. *Whistler v. Mainwaring*, 3 Wooddeson, lect. 465, n. ; *Hill v. Barclay*, 16 Ves. 405.

#### Halhed v. Marke. December 1742.

An agreement confirmed, not impeached without clear proof of imposition.

*Nathaniel Halhed* (father to the Plaintiff), being a banker, married one of his daughters to the Defendant *Marke*, who was also bred a banker, and gave with her £500, but promised, as the Defendant said, for it did not appear in proof, to make her as good a fortune as any of the rest of his daughters. One of them being afterwards married, received £1000 portion. The Defendant says that *Nathaniel Halhed* afterwards gave him £500 more ; and on the marriage of the third daughter he gave a bond to pay with her £1000 after his death, having paid £1000 in hand ; so that the Defendant *Marke* said he was entitled to £1000 on the death of *Nathaniel Halhed*. It appeared that between the father and son-in-law business had been transacted, by verbal agreements only, of great consequence.

Serjeant *Darnell* was indebted to *Nathaniel Halhed* in £9000, and he had two copyhold houses to dispose of. *Nathaniel Halhed* had agreed (as the Plaintiff alleged) with the lord of the manor to purchase no more within that manor, under the penalty of paying a large fine ; and therefore *Marke* was to purchase these two houses, in his own name, from Serjeant *Darnell*, in trust for *Halhed* ; but there was no proof of such intention. In 1722 *Marke* purchased the two houses from Serjeant *Darnell* for £1000, and paid the money, and produced in court a receipt from *Nathaniel Halhed* to the Defendant (received from *John Marke* the sum of £1000 on account of *John Darnell*), and was admitted into them immediately. *Nathaniel Halhed* let one of the houses to Mrs. *Seywell* for £30 a year rent, the other *Marke* lived in ; and the Defendant produced two receipts which were mentioned to be for rents, which were given by *Nathaniel Halhed* to *Marke* ; and *Halhed* paid the taxes of both houses ; but *Marke* alleged that *Halhed* agreed verbally to purchase one of these houses from him for £500, but that *Marke* should continue to live in it, paying him the £30 interest for the £500, as



long as he lived, which he said was the rent mentioned in the receipts. *Nathaniel Halhed* afterwards laid out £1600 in re-building the house where *Marke* lived, which *Marke* accounted for by saying £1000 of that £1600 were the £1000 which *Marke* was entitled to after *Nathaniel Halhed's* death, as the additional portion ; and that they agreed that *Halhed* might lay out that sum on the house, and that *Marke* should allow him £40 *per annum* interest for it, until *Halhed's* death, at which time *Marke's* right to it commenced ; and he said that when he perceived *Halhed* exceeded that sum, he told him that he did not propose to expend more upon it, and *Halhed* answered that he should be charged with the £1000 only.

On the 5th of *February* 1728, *Halhed* made his will, and devised these houses to the Defendant *Marke*, paying £1200 to his executor, the Plaintiff ; and it appeared he had said when he was rebuilding the house, that he was doing it for his son Mr. *Marke* ; and he surrendered two small parcels of copyhold land to Mr. *Marke*, which lay contiguous and convenient to his house. Mr. *Halhed* died some time afterwards, and the Plaintiff, his son and executor, having a meeting with Mr. *Marke*, told him if he was a rogue he might have cheated him of both the houses ; and agreed that on account of Mr. *Marke's* surrendering the house called *The House of the Gate*, being one of them, to the Plaintiff, and for other valuable considerations, as Mr. *Marke* said, such as services, &c., the Plaintiff should release to Mr. *Marke* the £1200. After this agreement, in 1732, a deed of release (which recited, whereas *John Marke, &c.*, was admitted into the said copyhold, &c., in trust for *Nathaniel Halhed*, yet, nevertheless, subject to certain agreements and terms between the said *Nathaniel Halhed* and the said *Marke*, and also in consideration of all the said *Marke's* right under the custom of *London*, and the surrender of the house aforesaid), was executed by the Plaintiff to the Defendant of all demands, &c. The Plaintiff being at this time ignorant of the Defendant's being only a trustee for his father, brought his bill to set aside this release, and to have the £1200, with the interest of it from the death of his father, paid to him.

The questions made by the counsel were two : first, whether *Marke* appeared to be a purchaser in his own right or in trust for *Nathaniel Halhed* ? and, secondly, though he was, whether this release should be set aside ? And *Chute* mentioned the case of *Standard v. Metcalf*, to prove that if a party does an act, though induced to it by fraud, yet if he afterwards confirms that act, the subsequent confirmation makes it valid and good. He cited also the case of *Cole v. Martin*, which was the first case determined by Lord *Talbot*, where a person who just came from sea went to seek refuge at a relation's house, and was kept without clothes to his back until he made a solemn release of his ticket for five or six pounds a year, and in six months afterwards he confirmed that release ; and Lord *Talbot* refused to relieve, though the first act was fraudulent, because of the subsequent confirmation.

Lord *Hardwicke*, Chancellor. This bill is to set aside an agreement, and a release founded on that agreement, on the head of fraud and imposition in obtaining it ; and in all cases of the kind the fraud and imposition must be made out to the Court by proof ; and it does not appear there was any actual fraud or imposition by either of the parties to this agreement and release ; for they were both of full age and capable of transacting. So that all the fraud and imposition to impeach this fact must arise from the circumstances of the thing itself. The next consideration, therefore, is whether there is any fraud apparent on the circumstances of it ? and both fraud and imposition may be as well proved from the circumstances as by direct proof. What is alleged for the Plaintiff is, first, that the Defendant set up a title in himself in these two houses, whereas in truth he was a trustee only ; and in the next place, that he made his pretence of a claim under the custom of *London* a consideration for this release, when in fact the portion he got was far more than he could have under the custom. To be sure there is a great obscurity in this case, and that arises naturally from the near relation between the parties to it. Then taking it with such grains of allowance as may be expected from a transaction between persons so closely related, let us consider the merits of it.

First, upon the head of imposition, it is insisted that the estate is to be considered in trust only, and that it is proved by the release, which it is said amounts to a declaration of the trust ; but it is by no means clear to me, that this purchase was originally in trust for *Nathaniel Halhed*. It appears that Serjeant *Darnell* was indebted to *Halhed*, and that this purchase money was paid to *Halhed* by the

Defendant on account of Serjeant *Darnell*, and a receipt was taken by the Defendant for it. Now on what account was that receipt, unless to discharge so much of Serjeant *Darnell's* debt, by the Defendant's paying the purchase money to *Halhed*? Thus it stood on the original transaction, and if it rested on that I should not thing this a trust. But on the whole evidence I am of opinion there was some trust between the parties, though not on the original purchase; for Mr. *Halhed* took upon him to build one of these houses, and it is proved, on both sides, that he declared he built it for the Defendant; and he said it was on consideration that he should pay interest for the £1000 during his life. It is true the receipts given to *Marke* were for rent; but I lay little weight on that, being a very common mistake to call interest, &c., rent in receipts. I believe *Nathaniel Halhed* intended that both the houses should come to *Marke* after his death; and afterwards when he comes to make his will he devises them to him, charged with the sum of £200; and I believe the original of Mr. *Marke's* resentment, and saying if he was a rogue he might have kept both houses, proceeded from his thinking they were charged with too much, and that that brought on his agreement to release, &c.

Thus the case stands, and the doubts of it have arisen from this mutual confidence between the parties; for taking it either way there appears to be some: either if *Marke* purchased and laid out £1000 in trust for *Halhed*, or if *Halhed* laid out £1600 on the house, there was a confidence in *Marke*; but the greater probability seems to be that *Marke* purchased with his own money and for himself, and that the trust arose after on laying out £1600 on the house.

Consider it next on the other parts of the case. *Nathaniel Halhed* makes his will, and after giving legacies to his children, says if they refuse to release their right under the custom of *London*, that it should be void; and after his death this release was executed. Then consider that this claim under the custom was a plain demand against the Plaintiff. When I say a plain demand, I do not mean one whereby any benefit may arise, but a right to have an account taken; and on the whole complexion of the case, it looks as if the Defendant's wife had a less fortune than the rest of her sisters; and it appears that the Plaintiff had a very large estate left him; and whether the account would turn out to the Defendant's advantage or no, the expense of the inquiry might be an inducement to him to execute this release, and therefore it is not to be laid aside.

Then this will bring the case to the agreement in 1730, and the release in 1732; and though it was suggested that the agreement was immediately after the Plaintiff's father's death, and as if it was obtained by surprise, yet the release was on no circumstances of surprise, and I think it puts all supposition of surprise in the first agreement out of the case. Suppose the Plaintiff had been at first amused with what the Defendant said, had he not opportunity enough to recover his surprise in above a year's time? Also this very release recited the will of *Nathaniel Halhed*, and the trust as it is there set forth; and though the words are that he was admitted tenant, &c., in trust for, &c., yet I take that to be no more than the words of the scrivener which are usually thrown in. It was objected that the release goes farther than the agreement; for the agreement did not mention a word of the Defendant's claim under the custom of *London*; but the agreement has the words other valuable considerations, which takes off all the repugnancy, and it seems to me it might have been extremely reasonable in the Plaintiff to have acted thus; and if so, where there is no actual proof of imposition can the Court set aside these two solemn acts? Dismiss the bill with costs. MS.

Reg. Lib. A. 1742, fol. 85.

PALMER v. CRAUFURD. *Rolls. July 2, 3, 16, 1819.*

[S. C. 2 Wils. Ch. 79. See *Dawson v. Hearn*, 1831, 1 Russ. & My. 612.]

Under a bequest to trustees for investment in government life annuities, to be paid to *C.* during his life, the annuitant is entitled absolutely to the sum bequeathed; and in consequence of the inability of *C.* to attend at the public office, no investment having been made during his life, and an annuity which the testator paid to *C.*, and which he by a letter directed to be continued until his executors should be ready to make the investment, having been continued beyond that time until *C.*'s decease, the payments of the annuity are to be considered as payments on account of the sum to be invested, and the representatives of *C.* are entitled to receive that sum with interest, after deduction of those payments.

*James Craufurd, Esq.*, being possessed of considerable personal property in this country, where he resided, and in *Holland*, and having made a will dated 31st of *December* 1806, relating to his *Dutch* property, which he directed, after payment of his debts, to be remitted to *England*, afterwards on the 31st of *January* 1816, made another will, by which he confirmed the former, and directed that the balance should be paid to his executors in *England*, and should go into the mass of his effects here. By this will, after bequeathing certain legacies and annuities, to his wife, he gave to the Defendants *John Craufurd* and *Coutts Trotter*, the sum of £3000 in trust, to be by them employed in purchasing in their names, upon the life of his brother *George Craufurd*, an annuity in the government life annuities of the value of £3000, to be by them received and paid to him in equal shares every six months during his life, upon condition of his renouncing in writing within eight days after receiving the notification of the testator's death, all demands and claims whatsoever upon the testator's estate, or upon any property of which he might die possessed, failing which, the present disposition in his favour to be null and void; and after bequeathing some other legacies and annuities he further left, out of his remaining property, to *John Craufurd* and *Coutts Trotter*, the sum of £2000, in trust, to be by them employed in purchasing in their names, and on the life of his brother *George Craufurd*, an annuity of the government life annuities of the value of the said £2000, to be received and paid by them to *George Craufurd*, in equal shares every six months; *John Craufurd* and *Coutts Trotter* being thereby authorized, if they thought it necessary, and for the advantage of *George Craufurd*, to dispose of the said £2000 for his benefit, and with his consent, in any other manner which might appear to them most eligible; the whole upon condition only of his renouncing in writing, within eight days after receiving the notification of the testator's death, all demands and claims whatever on his estate, or upon any property of which he might die possessed, failing which, this disposition, as well as the preceding one of £3000, to be null and void; it being also understood that this sum of £2000 should not be called for in any way before the expiration of one year after his death. The testator appointed *John Craufurd* and *Coutts Trotter*, and *Robert Elliott* and *Mary Craufurd*, the testator's wife, executors and executrix of his will. *John Craufurd* alone proved the will; the other executors and the executrix having renounced probate, and *Coutts Trotter* also having renounced the trusts.

During his life the testator had allowed his brother, *George Craufurd*, who resided in *Holland*, an annuity of 3200 guilders, being in value about £300 sterling. On the 9th of *February* 1816, a few days before his death, he wrote the following letter to Messrs. *Ferrier* and Co., his agents in *Rotterdam*. "I have hereby to request and authorize you to continue to pay to my brother, Mr. *George Craufurd*, for my account, the sum of 3200 guilders *per annum*, in equal quarterly payments, in the event of my death, till such time as my executors shall have arranged my affairs, should they require some time [484] for that purpose; and this letter will be your authority with them, which will be confirmed to them by me; and you will observe that your Mr. *Ferrier* will have funds of mine, out of which the said payments to my brother will be found."

After the testator's death a paper was discovered of his handwriting, without date, in the following words:

"In order to provide for my brother's subsistence upon my death, before my

executors may be enabled to make the necessary arrangements, I shall authorize Messrs. *Ferrier* and Co. to continue to advance to him the same sum of 3200 guilders *per annum*, which he now receives, and that so long after my death till my executors shall declare themselves ready to carry into effect the clause contained in my will respecting my brother; and I shall further authorize Messrs. *Ferrier* & Co. to pay themselves for such advances out of the money due to me by Mr. *Alexander Ferrier*; provided always, that before making any payments after my death, my brother comply with the stipulation concerning him contained in my will, which compliance or non-compliance will be communicated to Mr. *Ferrier*. By this manner of preventing my brother from suffering any inconvenience by my death, my executors will be the better enabled to make arrangements with the other legatees; and they are reminded that there are three years, namely, 1813, 1814, and 1815, of profits on the mines still to account for." Neither this paper nor the letter to Messrs. *Ferrier* were proved as testamentary.

In *February* 1816, the testator died; and *George Craufurd* (within the time prescribed by the will), duly renounced all demands upon the testator's estate. The executor *John Craufurd* at different times during the first [485] year after the testator's death, paid to *George Craufurd*, £1820 on account of the legacy of £2000, and was prepared to invest the legacy of £3000, according to the directions of the will; but *George Craufurd* being prevented by ill health and other obstacles from coming to *England*, to present himself at the government annuity office, where his personal appearance was necessary previous to the purchase of an annuity, the £3000 were in consequence never invested. In the meantime Messrs. *Ferrier* & Co. continued to pay to *George Craufurd* the annuity of 3200 guilders, till his death in *February* 1819, the payments amounting in the whole to about £1050.

The suit was instituted by the executors of *George Craufurd* to obtain payment of the £3000, and of the remainder of the £2000.

Mr. *Heald* and Mr. *Winthrop* for the Plaintiffs. On the performance of the condition annexed to the gift of these sums they became separated from the rest of the testator's estate. The bequest is absolute, and the will only directs in what manner the sums were to be applied for the benefit of the legatee; but if the annuity had been purchased, he might have sold it, or he might have had the sums paid to him instead of their being invested; *Bayley v. Bishop* (9 *Ves.* 6), *Barnes v. Rowley* (3 *Ves.* 305). The right to the sums vested in him from the time of the testator's death. There is nothing in the letter to the *Ferriers*, or in the paper of instructions to the executors, that can restore this property to the testator's estate. The provision made by them was only to continue till the purchase of the annuity, and was not to defeat it. *George Craufurd* might, notwithstanding these documents, at any time have called for the investment of [486] the £3000. But, strictly speaking, they are of a testamentary nature, and not having been proved as such, cannot be read in evidence.

Mr. *Hart* and Mr. *West* for the Defendants. The letter and paper of instructions the Plaintiffs have made part of their bill, and they cannot now object to their being used in evidence; if it were necessary the Court would allow the cause to stand over to afford time for proving them. They are evidence of the testator's intention and serve to explain the will.

An intention is avowed both in them and in the will, that this sum (by distinction to the £2000, which might be laid out in any way that the trustee and legatee thought proper) should not be enjoyed except in the shape of an annuity as a personal provision; and the Court cannot apply it to a purpose different from what the testator intended. The trustees were ready with the sum, and the non-investment of it arose merely from the neglect of the intended annuitant; can his representatives be allowed to derive benefit from his default? *George Craufurd* actually received during his life considerable sums more than he would have had if the annuity had been purchased. Thus he was in a better situation than the testator intended, and his estate cannot now be entitled to the capital sum in addition.

The *Master of the Rolls* [Sir Wm. Grant]. With respect to the legacy of £2000, provision had been made by the testator, that it should be invested in the purchase of an annuity, or paid to his brother *George Craufurd*, at his election. Part of it, at his desire was applied in a manner settled between him and the exe[487]-cutors. There

remains due a sum of about £130, and to that his representatives are unquestionably entitled.

The legacy of £3000 is differently circumstanced. As to that the executors had no option; they were expressly directed to invest that sum in the purchase of a government life annuity, which they were to pay half yearly to *George Craufurd*. It is admitted in the pleadings, that the non-investment of that sum in the mode prescribed was occasioned by the inability of *George Craufurd*, who was then residing in *Holland*, to come to *England* and present himself in person at the proper office. Instead of this, the intermediate payments directed by the testator in the letter to the *Ferriers*, such as he had been accustomed to make during his life, were continued after his death, to the amount in all of about £1050. *George Craufurd* died without the £3000 having been invested in the purchase of any annuity. The bill is filed by his representatives, insisting that they are entitled to that sum, destined for *George Craufurd*, after deduction of the sums received.

First, to consider the question independently of these documents, the letter to the *Ferriers*, and the instructions. The cases of *Bayley v. Bishop* (9 Ves. 6), *Yates v. Compton* (2 P. W. 308), and *Barnes v. Rowley* (3 Ves. 305), have established, that where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even, as in *Bayley v. Bishop*, before the fund is available, as during the life of the person after whose death the investment is to be made, yet still it is a vested legacy from the death of the testator; and that the legatee for whose benefit it [488] was intended, having survived the testator, may elect either to take the sum, or have it laid out in an annuity. It would follow that in the present case the representatives of *George Craufurd* are intitled to this sum which was destined for him.

The only novelty in the case arises from these two documents, the letter and the instructions in the life of the testator, and the conduct of the parties since his decease, under this temporary provision made by the testator; and the question is, whether it can be considered that the legacy which had once vested on the death of the testator, was given up, by the acceptance of a substitute, or whether the inability of the legatee to attend in this country for the purpose of the investment, shall take this case out of the general principle? The letter and the instructions were intended to have only a temporary effect, to make a provision, till the executors should be ready to invest; it is admitted that they were ready, and that the investment was delayed by the circumstances of the legatee; but although for his benefit and for his convenience, the other provision was continued, this cannot operate to divest the legacy. If he had been living could he not have now claimed to have the annuity purchased? The only effect, therefore, of these transactions is to reduce the amount of the legacy.

The question is, in what manner the reduction shall take place? The legatee cannot receive both the intermediate annuity of £200 a-year, and the legacy also. I think that it must be considered in the same manner as if he had elected to take the £3000 in money. As he had a vested interest in this sum from the time of the testator's death, the Plaintiffs are entitled to it, together [489] with the interest from the expiration of a year after that event, and they must deduct the amount of the payment made to *George Craufurd* in his life time.

EDWARD ALDER, *Plaintiff*; ROBERT FOURACRE, JOHN MACKAY, and the Earl of MOUNT EDGECUMBE, *Defendants*.(1) August 12, 13, 1818.

A deceased partner having contracted in his own name for a lease of premises to be employed in the partnership trade, the Court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner.

The bill stated an agreement between the Plaintiff and his late partner *R. Yeo*, whose executors were the defendants *Fouracre* and *Mackay*, for obtaining from [490] the Earl of *Mount Edgumbe* a lease of certain premises, to be employed in their partnership trade, and an agreement between *Yeo* and the agent of the Earl for [491] granting a lease: that the Plaintiff and *Yeo* entered into the premises

with the consent of the Earl's agent, and expended large sums in building thereon : that the Plaintiff had lately discovered that *Yeo* had made the agreement in his own name alone : that since the death of *Yeo*, the Plaintiff, as surviving partner, had expended £1200 on the premises ; and that *Fouracre* and *Mackay* had lately applied to the Earl for a lease of the premises in their own names, and intended to dispose thereof as the separate estate of *Yeo*.

The bill prayed that the Earl of *Mount Edgumbe* might be restrained from granting, and *Fouracre* and *Mackay* from applying for or accepting, any lease of the premises.

Mr. *Joseph Martin*, on certificate of bill filed and affidavit, now moved for an injunction.

The Lord Chancellor [Eldon]. What equity is there for compelling the Earl of *Mount Edgumbe* to take another lessee ? The contract was made with the deceased alone, and unless there is evidence that the Earl knew that it was made on behalf of himself and his partner, that partner has no equity against the Earl. Possession might be given to both, but the contract was with one alone ; unless a contract with both parties is established, Lord *Mount Edgumbe* cannot be compelled to grant a lease to the survivor.

By altering the frame of the bill, the executors may be restrained from disposing of the lease, if the Earl grants one, except for partnership purposes ; but no injunction can be obtained against the Earl.

[492] The bill was afterwards amended by the insertion of a prayer, that *Fouracre* and *Mackay* might be restrained from assigning or parting with or any way affecting the lease of the said ground, or their interest therein, when such lease shall be granted to them, pursuant to the agreement, except for the benefit of the co-partnership, and for co-partnership purposes, with the consent of the Plaintiff ; and an injunction was granted.

"Whereupon, &c., His Lordship doth order that an injunction be awarded to restrain the Defendants, *Fouracre* and *Mackay*, from assigning, making over, or parting with, or in any manner affecting, the lease of the ground in the Plaintiff's bill mentioned, or their interest therein, when the lease shall be granted to them pursuant to the agreement in the pleadings mentioned, except for the benefit of the partnership, and for co-partnership purposes, and with the Plaintiff's assent," until answer or farther order. Reg. Lib. A. 1817, fol. 1732.

(1) Elliot v. Brown. In Chancery. 25th July 1791.

[See Dale v. Hamilton, 1846, 5 Hare, 385.]

1 Vern. 217.—Injunction against a surviving partner, proceeding by ejectment to obtain possession of a farm of which a joint lease had been made to himself and his deceased partner.

Motion by representatives of a deceased partner, to restrain the surviving partner from bringing ejectment, upon his title as surviving lessee of the partnership premises.

The case was, a lease to two persons partners in a farm ; one partner dying, the other agreed to the division of stock with the representatives of his deceased partner, but insisted on holding the lease by survivorship.

The Chancellor thought by the joint tenancy the lease would survive ; yet if turned by agreement into a partnership, it would not survive. The law is clear. The only question is of fact, whether there be such an agreement ? Also if the purchase was by two with the money of both, there would be no survivorship.

The Solicitor General [Macdonald] cited, Bunb. 342, to shew it was otherwise in case of a lease, though purchased by two.

The Lord Chancellor [Thurlow]. I must think the lease was accessory to the trade in which the parties were embarked. Injunction granted.—From Lord *Colchester's MSS.*

Injunction ordered against farther proceedings at law against the Plaintiffs in the action brought against them now depending, and also from commencing any other action at law against the Plaintiff touching the matter in question in this cause, until hearing or farther order. Reg. Lib. A. 1791, fol. 475.

Webster v. Webster. *In Chancery*, 19th May 1791.

[See *Levy v. Walker*, 1879, 10 Ch. D. 441 ; *In re David & Matthews*, [1899] 1 Ch. 383. Cf. *Thynne v. Shove*, 1890, 45 Ch. D. 577.]

Injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade, refused.

*Mitford* moved on the part of the Plaintiff, *John Webster*, an executor of *James Webster*, for an injunction to restrain the Defendants *David Webster* and *James Wedderburn*, the two other executors of *James Webster*, from using the name of the testator in the trade carried on by them in partnership.

The ground upon which this motion was made, was that the Defendants used the name of the testator in the trade, for the purpose of subjecting his estate to the consequence of the trade, under a pretended agreement made by the testator in his life time.

*Lord Chancellor* [Thurlow]. It is impossible that using the testator's name in the trade, can subject his name to the trade debts.

*Mitford*. If it has not that effect it must be a fraud upon the public.

*Lord Chancellor*. The fraud upon the public is no ground for the Plaintiff's coming into this Court.—Motion refused. From Mr. *Romiley's* notes. *Lord Colchester's MSS.*

OLIVER HERRING, and CATHERINE LOWFIELD, *Plaintiffs.* and The DEAN and CHAPTER of the CATHEDRAL CHURCH of ST. PAUL, in LONDON, *Defendants.*(1)  
*Rolls.* June 14, 17, 1819.

[S. C. 2 Wils. Ch. 1.]

Chapter not being entitled to fell timber on the Deanery lands, except for the purpose of repairs, a lease granted by them of certain "woods, groves, hedge-rows, and springs," was construed not to include the right of felling timber, and a bill by the lessee for an account of timber felled during the lease by the lessors, was dismissed with costs.

The bill stated an indenture of lease, dated the 24th of July 1813, between the Defendants of the one part, and the Plaintiff *Catherine Lowfield* of the other [493] part, by which as well in consideration that *Catherine Lowfield*, had surrendered to the Defendants a former lease, dated the 5th of August 1806, from them to her [494] of the woods, groves, hedge-rows, and springs thereafter demised, to the intent that the said lease might be cancelled, and also in consideration of the yearly rent, [495] covenants, and agreements thereafter referred and contained on the tenant's or lessee's part, and for other good and valuable causes and considerations, the Defendants [496] demised and granted unto *Catherine Lowfield*, all those their woods, groves, hedge-rows, and springs, lying, standing, growing, or being, within, of or upon their manor, of [497] *Heybridge*, in the county of *Essex*, therein after severally named ; that is, one wood called *Bromley Wood*, with two little grovets thereunto adjoining, one wood, called [498] *Hawke's Wood*, with one grove, or hedge-row, adjoining at the east end thereof, one little grove at the west end of the said grove or hedge-row ; two hedge-rows, or groves in the Upper Heathfield, whereof one extends, &c., within twelve rods of the south stile, in the common footpath that leads through the same field to the heath, commonly called *Tiphee Heath* : and all the trees, woods, [499] and underwoods, growing and being, or that thereafter should grow or be within and upon the said woods, groves, hedge-rows, and springs above named, and [500] every of them ; all which premises theretofore were in the tenure or occupation of *Edmund Percival*, Esq., or of his assigns or under tenants ; except and always [501] reserved unto the defendants, their successors and assigns, upon every fall of the said woods, groves, hedge-rows, springs, or any part or parcel thereof twelve [502] standells, or stovers, of oak, ash, elm, or horn-beam, that should be most likely for timber, for every acre of the woods, groves, hedge-rows, and springs, thereafter during the term ; to hold the said woods, groves, hedge-rows, and springs, and all the before-mentioned demised premises, with the appurtenances (except before excepted), unto *Catherine Lowfield*, her executors,

&c., from the feast day of the nativity of St. *John* the Baptist, then last, for the term of twenty-one years, at the yearly rent of 50s. ; with a power of re-entry for non-payment during twelve weeks after demand.

The lease contained a covenant by the lessee for maintaining the hedges and ditches about the woods, &c., and that she, her executors, &c., would at and upon any fall of the woods, groves, hedge-rows, and springs, or of any part or parcel thereof, during the term, leavestanding in and upon the premises, to the use of the Defendants and their successors, in and upon every acre so to be felled, twelve good and sufficient standells and storers of oak, ash, elm, or hornbeam, most fit or convenient to be timber, according to the statute in such case made and provided ; the same standells or storers to be appointed out in the manner and form following ; the Defendants their successors or assigns, should for every acre felled as aforesaid, first choose and appoint out four of the best trees that should happen to grow upon any acre so felled ; then the said *Catharine Lowfield*, her executors, &c., should accept and take out to her and [503] their own proper use four other of the next best trees that should grow upon every of the same acres ; and then thirdly, the Defendants, their successors, and assigns, should choose and appoint eight other trees upon every of the said acres, at their will and pleasure, for the making up of the said twelve standells or storers for every acre so to be felled as aforesaid ; and that it should be lawful for the Defendants, their successors and assigns, the said trees, standells or storers, at any time after they should be so appointed out and left standing for their use as aforesaid, to have free ingress and regress unto and from the said woods, groves, hedge-rows, and springs, at their pleasure to fell, cut down, hew, square, and carry away, by all and every such way and ways as *Catherine Lowfield*, her executors, &c., should use to carry her and their own wood and trees, out of and from the said woods, groves, hedge-rows, and springs, or any of them ; and also that the lessee, her executors, &c., would not convert the said woods, groves, hedge-rows, and springs, or any of them, to pasture, meadow, or arable ground, but maintain and keep the same as wood-grounds during the term, and at the end thereof would deliver up the same to the Defendants, their successors or assigns, of the several growths following ; *Bromley* Wood of two years' growth ; *Hawk's* Wood of six years' growth ; the hedge-rows adjoining to *Hawk's* Wood, and the Grovet at the west end thereof, at five years' growth ; and the woods, groves, and hedge-rows, in *Heathfield*, of one years' growth.

The bill then stated the execution of a counterpart of the lease by *Catherine Lowfield*, the surrender of the lease of 5th of August 1806, and that the renewed lease was made to her in trust for the plaintiff *Herring*.

[504] The bill proceeded to state that at the time when the lease of the 24th of July 1813, was granted, there were large quantities of timber-trees, and underwood, growing in and upon the woods, groves, hedge-rows, and springs, demised ; and that in May 1814, the Defendants by their agents cut down and sold divers of the said timber-trees, &c.

The bill, charging that a large fine was paid by *Herring* to the Defendants in consideration of the lease, and that former lessees had paid to them large fines in consideration of leases of the like tenor ; that such fines were paid in the confidence that *Herring* and the other lessees should have the right of cutting all the timber-trees and underwood growing on the premises, except the twelve standells or storers reserved for the Defendants, and were calculated with reference to that right ; and that the Defendants had not, during any former lease (except in the years 1806 and 1813 some trees of small value cut during the absence of *Herring* from this country), cut down any of the timber-trees on the premises, except the twelve standells or storers ; prayed an account of timber-trees cut down and carried away from the said premises by the Defendants, and of the sums of money for which they were sold, and which have been received, or for which security has been taken by the Defendants, and payment, and an injunction.

The Defendants, by their answer, admitting that they had felled timber-trees of the value of £1169, 13s. 9d., stated, that they and their predecessor had been accustomed to grant leases of the premises in terms similar to the present ; that none of the former lessees had claimed a right to cut down any timber-trees thereon, but that they and their predecessors had from time to time felled and disposed of them for their own use ; that the fine [505] for the renewed lease of July 1813.



was £89. 3s. 9d., being one year and a quarter's value of the property demised, including underwood, but excluding timber-trees; and they insisted that they were entitled to fell the timber-trees, and that the lease authorized the lessees only to cut the underwood according to their covenant.

Mr. *Hart*, and Mr. *Shadwell*, for the Plaintiffs. The Dean and Chapter being tenants in fee, in right of their church, of the lands on which the trees in question grew, were entitled to fell, and, therefore, to grant the right of felling, timber. The lease to the Plaintiff is not a lease of the lands, which to a tenant for years would certainly not have conveyed more than the use of the timber during the term; but it is a lease of the timber itself. The terms of the grant, "woods, groves, hedge-rows, and springs," expressly include every species of wood, the latter word alone would have been sufficient to pass coppice and underwood; woods and groves unquestionably include timber.

The clause of exception confirms this construction; that clause must have been intended to preserve that which without the exception might have been taken: and it therefore implies, that the standells or storers which, upon every fall of the woods, &c., it secures to the Dean and Chapter, would otherwise have belonged to the lessee.

The covenant which upon every fall reserves to the lessors four of the best trees growing upon every acre, expressly entitles the lessee to take for her own use the four next best trees, without any restriction of age or growth. The subsequent reservation of eight trees to [506] the lessors is inconsistent with the supposition that the whole of the timber was theirs.

Mr. *Horne* and Mr. *Sugden*, for the Defendants. The lease appears on the face of it to have been granted in consideration of the surrender of a former lease; successive leases in the same form have been granted during many years, and the growth of timber has been maintained on the estate by means of the exceptions and covenants introduced in them. It is admitted that the lessee could not cut down the excepted standells during the term of each lease, and if the lessors suffered them to remain, the lessees would not be entitled to fell them after they had become timber, during the continuance of all the leases, which are in law but one lease; nothing being included in a renewed lease which had been excepted from a former lease.

The lease contains not the word timber; and the exception renders it manifest that by trees are meant the standells, which were not yet, but might become, timber.—The covenants regulating the mode of cutting the wood are evidently designed to provide a nursery for timber, and to carry into effect the provisions of the statute "for the preservation of woods" (35 H. 8, c. 17, made perpetual by statute 13 Eliz. c. 25), from which the terms standells and storers are borrowed.

The lease could not either as a grant of a demise of the timber, entitle the lessee to fell and remove the timber, the subject demised; as a demise of lands would confer no right of carrying away the soil. In much more favourable cases, such a construction [507] has been rejected.—*Anon.* (*Dyer*, 374, pl. 18); and in a case cited in *Rolle* (1 *Rolle Rep.* 100), it was held that land and trees being "demised, granted, and let" for years, the terms grant and let could not be severed; and, therefore, the trees were only "leased."—The opposite construction would introduce this absurdity, that part of the subject would be passed during the term only, and part beyond the term. Clearly whatever is comprised in the *habendum* of this lease, is passed only during the term.

In the year-book of *Edward IV.*, cited by *Brooke* (12 *Ed.* 4, 8, pl. 20, cited in *Bro. Ab. Waste*, pl. 126), the question is asked by *Brian*, if a wood in which there are only great trees is leased at will, can the lessee cut them? and answered in the negative by *Choke*; who adds, that the lessee shall have no profit but the grant. By a grant of woods, trees shall not pass where the cutting them would be waste. *Shephard's Touchstone* (p. 95).

A conclusive objection to the bill is, that the Dean and Chapter, though seised in fee, have no right to fell timber, except for repairs. *Wither v. The Dean and Chapter of Winchester* (3 *Mer.* 421). On the construction for which the Plaintiff contends, the lease is void. The enabling statute of *Henry VIII.* (32 H. 8, c. 28) expressly excepts leases without impeachment of waste; and such leases by a Dean and Chapter have always been considered within the equity of the restraining statute of *Elizabeth* (13 Eliz. c. 10). *The Dean and Chapter of Worcester's case* (6 Co. 37).

[508] The *Master of the Rolls* [Sir Wm. Grant]. This bill requires from the Dean and Chapter of St. Paul's an account of the timber which they have cut down since the execution of a lease granted by them to the Plaintiff *Lowfield*, as a trustee for the Plaintiff *Herring*; the Plaintiffs insisting, that according to the true construction of the lease, the Plaintiff *Lowfield* is lawfully entitled to fell timber trees on the demised premises, and dispose of them, and receive the produce of the sale for the use of the other Plaintiff. That proposition is denied by the Defendants. The Plaintiffs relying altogether on the terms of the lease, necessarily assume that the Dean and Chapter possess the right which they claim by virtue of the lease from them, the right of cutting down for their own use all timber-trees on the premises without regard to situation, age, or quality; and they insist that the Dean and Chapter having by the lease transferred that right to the Plaintiffs, they are entitled to the profit derived by the Defendants from acts in derogation of that conveyance. The facts of the case are not controverted. It is admitted, that the present lease is drawn in conformity with those which preceded it; and that the Defendants have, since it was granted, felled timber to the amount of about £1100. But it is contended by the Plaintiffs that they have fairly purchased the timber trees; for although the annual reserved rent is but fifty shillings, they say that a large fine was paid for the lease, and on the faith that the Plaintiffs should be entitled to that which they now claim. The Defendants maintain that the fine paid was only one year and a quarter's value of the coppice and underwood; that it did not include the value of the great trees; and that under the antecedent leases, the usage has been for the Dean and Chapter always to exercise [509] the right of felling the timber-trees, and their lessees the right of cutting the underwoods and coppices alone.

The subject of dispute, therefore, resolves itself into three questions; first, whether the Dean and Chapter, prior to the execution of the lease, possessed the right of felling all the timber on the demised premises, and of converting it absolutely to their own use? Secondly, supposing them to have possessed that right, whether they intended to transfer, and have absolutely transferred it by the lease? Thirdly, if they both possessed and transferred the right, whether the contract is such as ought to be carried into execution by a court of equity?

On the first question, recollecting that this is property belonging to an Ecclesiastical Corporation, after the cases of *Jefferson v. The Bishop of Durham* (1 Bos. & Pull. 105), and *Wither v. The Dean and Chapter of Winchester* (3 Mer. 421), no doubt can be entertained. Whatever question may exist respecting the Court which has jurisdiction to interfere in case of an abuse of the power possessed by Ecclesiastical Corporations over their estates (which formed the principal subject of discussion in *Jefferson v. The Bishop of Durham*), it is clear that that power is not absolute but qualified, and that the timber growing on the estates is a fund for the benefit of the Church. In *Wither v. The Dean and Chapter of Winchester*, the Lord Chancellor expressed his opinion, that Ecclesiastical Corporations may fell the timber for repairs, and apply either the timber itself, or the produce of the sale, for that purpose; but so far only have they a power over the timber; it is the inheritance of their Church, and they have no authority to cut it down and divide the produce among themselves.

[510] In the present case it has been contended that the Defendants are competent to give to their lessee a power over the timber, without reference to any other property to be repaired by means of it,—a general right to cut down the timber for his own use, unencumbered by any obligation to apply it in repairs. No ecclesiastical body possesses any such right. To fell the timber on their estates in the manner for which the plaintiffs contend, is waste, and an ecclesiastical offence, and cause of deprivation (*Corpus Jur. Can.* Caus. xii. quest. 2, l. 52, Caus. x. quest. 2, c. 7, 8; *Lyndw. Prov.* 148, 149; 2 *H.* 4, 3; 20 *H.* 6, 46 a; 11 *Co.* 49 b); and the single question is, whether the offence is cognizable only in the ecclesiastical courts, or whether the temporal courts are not authorised to interfere?

In one of the old cases (11 *Co.* 49 b), it was observed, that the statute (35 *Ed.* 1, st. 2), or treatise, as it is there denominated, intitled "Ne Rectores prostrnant arbores in Cæmeterio," is declaratory of the common law. If it were clear, therefore, that the Defendants intended to convey, and in consideration of a fine, actually conveyed, to their lessee the power of cutting down all the timber trees on the estate demised, it would be a question whether such a contract ought to be carried into

execution by a court of equity. Certainly, on such a question, the Court would expect that the terms, before such a construction is adopted, should be explicit.

In this case, all the topics extrinsic to the lease tend to an opposite result. The amount of the fine paid on the renewal of the lease, compared with the magnitude of the property, totally excludes the supposition that the lessors intended to convey the absolute interest in the [511] timber. It cannot be supposed that they designed, for a fine of about £80, to dispose of property worth £1100 or £1200. It is not a very credible proposition, that an ecclesiastical corporation, whose known practice is to employ competent persons to make a strict estimate of their property, and to take as a fine generally a year and a quarter's rent, should commit such an error in computation, and be so ignorant of the value of their possessions, as the Plaintiff's argument implies. On the point of usage, there is no evidence of any entitling the lessee to the timber; and it is sworn that the usage has been inconsistent with that claim.

It remains to consider the terms of the lease. The subject comprises four distinct properties; *Bromley Wood*, with two grovets, *Hawk's Wood*, a little grove, and two hedge rows, or groves, and all the trees, woods, and underwoods,—every thing which was in the lease of *Percival*, the former lessee. Whenever woods are the subject of a lease, the first question is, What is the nature of the wood? It may consist only of great trees, or a mixture of great trees, coppice, and underwood, or of underwood alone; and different rules are applicable to each. As between an ordinary landlord and tenant it is settled, that if the wood consists of great trees only, the tenant enjoys not the property of the trees, but only the use of them. In the passage cited from *Bro. Abr. (Waste*, pl. 126), it is said that where a man leases twenty acres of wood at will, the lessee may cut the trees seasonably, but not the great trees.

It is clear, also, that if there is a demise of land on which trees are growing, or of a farm including the trees, though there is no express exception of the timber-trees, [512] yet the law makes the exception, and the lessee for years has no right to cut them down. Why? Because by law he has only the limited use of the trees, not the property in them, which, as a part of the inheritance, remains in the landlord. This distinction is stated in *Lifford's* case (11 Co. 46 b, p. 48), where the subject was fully discussed; and it is supported by an earlier case in *Dyer* (p. 374, pl. 18), already cited, and noticed in the argument of *Lifford's* case, and in *Shephard's Touchstone* (p. 95), in which a majority of the Judges held, that under a demise of a farm and divers closes, with all timber, wood, underwood, and hedge-rows, except the great oaks in a certain close, the trees not excepted did not pass by the grant, and the lessee could not fell them.

These are the general principles on this subject applicable to leases between laymen; and they are to be applied *a fortiori* to leases by ecclesiastical corporations, who have themselves not an absolute but a qualified property in the timber on their estates. The claim of the Plaintiffs to an unlimited right to fell trees, militates, first, with the particular fact that they derive title from landlords who have no such unlimited right; and next, with the general principles of the law, which allow to a tenant the use only of timber-trees, and not a power to fell them. What expressions in the lease are sufficient to establish so extraordinary a proposition?

The terms of the lease are general, and the first observation to be made on its contents is, that it is totally silent on the right of the lessee to fell a single tree; it is by inference only that the Plaintiffs attempt to collect from any part of it the grant of such a right. The words are, demise and grant; which Lord [513] *Coke* and *Shephard* agree in representing as proper terms of lease: it is a lease for 21 years, and under such an instrument whence arises the right to fell trees? Not from express words, nor from inference, unless the subject demised is such that the right to fell trees is only the fair exercise of the lessee's right to the use and profits during the term. Whether he has a right to cut down a single tree, depends, therefore, on the nature of the woods demised. If they consisted only of timber-trees, the lessee could have had no right to fell them. Whence then does he derive his right? From this alone, that the greater part of the wood appears, by the evidence of the lease itself, to be coppice and underwood. It was not necessary to give, by express words, the power of cutting coppice and underwood, which is part of the periodical profits of the tenancy. They must be cut from time to time; and the lessee has

the right of cutting them, as he would have the right of taking the corn, or the grass, under a demise of arable or meadow land. But this includes no right of cutting timber-trees. The interest of the lessee in the woods is derived from the nature of the property; that alone both gives and limits it.

An examination of the language of the lease, warrants the same conclusion. The first words are general, but the exception ascertains the subject of the lease. The exception reserves to the lessors, on every fall, twelve standells or storers of oak, ash, elm, or horn-beam, that shall be most likely for timber, for every acre of the woods. The excepted articles are such as are not yet timber, but most likely to become such. The whole from which this part is excepted, must have been of the same description, trees not yet become timber.

[514] The lease afterwards provides a particular mode in which the twelve standells are to be chosen by the lessors, and reserves to them a right of ingress and regress to cut them down and carry them away.

It has been properly observed, that this exception refers to the statute 35 H. VIII. c. 17; and that is another circumstance tending to ascertain the subject of the lease. The first section of that statute, which relates exclusively to coppice and underwood, employs the terms standells and stores (2) as they are employed in the lease; and the word fell, which has been considered as not applicable to falls of underwood, is there used in that very sense. The fair inference seems to be that the clause of reservation, which adopts the phraseology of the statute, refers to the same subject.

The covenant on the part of the lessee to leave the woods of a certain specified growth, one of the growth of two years, another of six, a third of five, and others of one year, is intelligible only in application to coppice woods, which are felled periodically; and the inference returns, that the subject of the lease was underwood, not timber.

Adopting this interpretation, the lease is no violation of the duty of the Dean and Chapter, for they have conferred on their lessee, not the right of felling timber, but the regular enjoyment of the profits of the underwood; it is conformable to the rules of law, intelligible in the reservation, and the reference to the statute, agreeable to [515] the constant usage, and just to the tenant, who obtains all for which alone a consideration was paid. On the opposite construction, the lease would be a direct violation of the law, and certainly not a fit subject for the interposition of a court of equity.

In every view, therefore, of this case, and considering first, that the Dean and Chapter have not an absolute right to fell timber; secondly, that if they had, they have not transferred it to the Plaintiffs; and, thirdly, that such a transfer would not be a transaction fit to be carried into effect by a court of equity, I am of opinion that this bill must be dismissed with costs.

17th of June 1819. "His Honor doth order that the Plaintiffs' bill do stand dismissed out of this Court with costs to be taxed," &c. Reg. Lib. A. 1818, fol. 1362.

(1) Bishop of Winchester v. Wolgar.

*Die Jovis, 25 Junii, Termino Trinitatis, Anno Regni. Car. Reg. quinto, 1629.*  
*Rich. Episcopus Winton, Quer.; William Wolgar. A. Anville, Def.*

2 Swans. 171, n.—Injunction to restrain the lessee for years of the temporalities of a bishop, under a lease confirmed by the Dean and Chapter and without impeachment of waste, from felling timber.

For as much as this Court was this present day informed by Mr. Browne, being of the Plaintiff's counsel, that the Plaintiff being seized in his demesne as of fee in the right of his church, of and in the manner of *Havant*, in the county of *Southampton*, whereof the Defendant claimeth an estate, without impeachment of waste, under a demise made unto Sir *Richard Cotton*, Knight, in the time of King *Edward the Sixth*, without any consideration appearing in the lease, except the rent reserved, by reason whereof the Defendant being assignee of the said tenement doth commit great waste, and spoil, and threateneth to cut down the woods and timber trees growing upon the said manor, wherewith it is replenished, from the doing whereof the several

Lessors of the said manor have been restrained by an order made by his Majesty's Privy Council, regard being had of the common weal, and the commodiousness of the said timber for the maintenance of the shipping; in consideration whereof, and for that the said waste, if the Lord Bishop himself should commit any excessive waste or spoil of woods, the same ought to be prohibited and restrained by the law; it is thereupon ordered, that the Defendant be enjoined from felling any more trees until he can give good satisfaction to the Court for doing thereof; and an injunction to that purpose is awarded against him and his workmen inhabiting the same. Reg. Lib. A. 1628, fol. 1140.

3d November, 5 Car. 1629.

Whereas by an order of the 25th of June last, for the reasons therein set forth, it was ordered that the Defendant should be enjoined from felling any more trees, until he could give good satisfaction to this Court for the doing thereof, and an injunction was to that purpose awarded against him and his workmen, inhibiting the same; Upon opening of the matter this present day unto this Court by Mr. *Serjeant Bramston*, being of the Defendant's Counsel, and upon reading of the said order, as also of a letter from the Lords of the Council, directed to the High Sheriff of the County of *Southampton*; it was alleged that the lease by and under which the Defendant claimeth was made in the time of *King Edward the Sixth*, and confirmed by the Dean and Chapter, and is dispunishable of waste, and the Defendant claimeth as a purchaser for great and valuable consideration; it is therefore thought fit and so ordered by this Court, that if Mr. *Broune*, being of counsel with the Plaintiff, and who moved the former order, having notice thereof shall not on Saturday next shew to this Court good cause to the contrary, then his Lordship doth dissolve the said injunction, without further motion. Reg. Lib. A. 1629, fol. 75.

8th Dec. 5 Car. 1629. Upon opening of the matter this present day unto the right Honourable the Lord Keeper by Mr. *Serjeant Davenport*, being of the Plaintiff's counsel, and upon the shewing forth of an order of the 3d of November last, by which the Plaintiff was to shew cause on Saturday then next following, or else the injunction should be dissolved, and of other orders whereby further time was given to the Plaintiff to shew his cause; it was moved in regard as was alleged, the said Defendant hath already felled one hundred and fifty of the timber trees, and the matter is very difficult upon point of law, whether the Defendant upon the clause in the lease, without impeachment of waste may cut down trees and make spoil at his pleasure in this case; it is ordered that the two Lord Chief Justices shall be attended, who are intreated together with Mr. Justice *Hutton*, and Mr. Justice *Whitelocke*, to take the matter into their consideration, and certify their opinion what they think fit to be done in such case, and then his Lordship will give further order; and in the mean time the aforesaid injunction is to continue and stand in force. Reg. Lib. A. 1629, fol. 215.

7th June 1630. Upon opening of the matter this present day unto this Court by Mr. *Brampton* being of the Defendant's counsel, and upon reading of a former order of the 7th of December last, and showing forth of an affidavit by which it appears that the houses belonging to the manor in question are most of them down, and that part which is standing is much decayed and no habitable, and unless a speedy course be taken for the reparations they will all fall down, and therefore it was prayed that the Defendant may be at liberty to fell and cut down such timber trees as will necessarily serve to repair and build up the said houses, and for necessary bootes; now this Court, in the presence of Mr. *Mason*, being of the Plaintiff's counsel, doth order accordingly, unless the plaintiff shall upon Saturday next show unto this court good cause to the contrary. Reg. Lib. A. 1629, fol. 675.

14th June 1629. The order, after reciting the last, proceeds thus: Upon motion this present day made by Mr. *Mason*, being of the Plaintiff's counsel, it is ordered that the said Defendant shall fell and cut down such timber only for his bootes and reparations as shall be assigned him by the Plaintiff's officer or officers, and not otherwise; which if the Defendant shall otherwise do, then the said Defendant shall be deemed to have broken the injunction of this Court. Reg. Lib. A. 1629, fol. 675.

*Die Martis 2 Dec. Termino Michis Anno Regni. 10 Car. 1634. Walterus Episcopus Winton, Quer.; Wilius Wolgar, et A. Anville, Def.*

Whereas by an order of the 25th of June A° 5° *Caroli Regis*, made in a suit then depending in this Court, between the Right Reverend Father in God *Richard* then

the Bishop of *Winton*, Plaintiff, and the said *Wolgar* Defendant, upon the information of the said then Plaintiff's counsel, that he the said Plaintiff being seized in fee, in the right of his church, of and in the manor of *Havant*, in the county of *Southampton*, whereof the Defendant claimeth an estate, without impeachment of waste, under a demise made unto one Sir *Richard Cotton*, knight, in the time of King *Edward the Sixth* without any consideration appearing in the lease except the rent reserved, by reason whereof the said Defendant, being assignee of the said term, did commit great waste and spoil, and threatened to cut down the woods and timber trees growing upon the said manor, wherewith it was replenished, from the doing whereof the several lessees of the said manor had been restrained by an order made by his Majesty's Privy Council, regard being had of the commonwealth, and the commodiousness of the said timber for maintenance of shipping; in consideration whereof, and for that the said waste, if the Lord Bishop himself should commit any excessive waste or spoil of woods, the same ought to be prohibited and restrained by the law, it was thereupon then ordered, that the said Defendant should be enjoined from felling any more trees until he could give good satisfaction to this Court for doing thereof; and an injunction was then awarded against him, and his workmen from inhibiting the same; after which injunction sued forth, and sundry other orders made in the said former cause, by an order of the 17th of *June*, seventh *Car. Regis*, it was ordered, that the said Defendant should fell and cut down such timber only for his necessary bootes and reparations, as should be assigned him by the then Plaintiff's officer or officers, and not otherwise, and if the said Defendant should otherwise do, then he should be deemed to have broken the said injunction; now forasmuch as the Right Honourable the Lord Keeper was this day informed by Mr. *Carter*, being of the said now complainant's counsel, that the said former suit being abated by the translation of the said late Bishop of *Winton*, to the Archbishoprick of *York*, and the now Plaintiff being since lawfully constituted Bishop of *Winton*, the Defendant as well in the vacancy of the same see, as since, hath felled and carried away a great number of timber trees and other trees lately growing upon the said manor, &c., without any assignment, part of which trees are still lying upon the demised premises, and that the Plaintiff for stay of the same waste, and preservation of the inheritance of the said Church, hath exhibited his bill of revivor against the Defendant, for reviving the said former suit and proceedings thereupon, as by a certificate from the Plaintiff's attorney appears; it was therefore humbly prayed by the Plaintiff's said counsel, that the said injunction might be revived and renewed, for prohibiting the said Defendant, his assignees, servants, and workmen, from felling or cutting any more timber or other trees, in upon the said manor and demised premises, or to carry away or dispose of any the said timber or other trees already felled, except the timber only for his necessary bootes and reparations, as shall be assigned him by the now Plaintiff's officer or offices, according to the said order of the Fourteenth of *June*; which request his Lordship conceived reasonable, and doth order that an injunction be awarded accordingly. Reg. Lib. A. 1634, fol. 241.

9<sup>o</sup> Feb. 10 *Caroli*, 1634.

Whereas by an order of the Second of *December* last, for the reasons therein contained, an injunction was awarded for prohibiting the said Defendant, his servants, workmen, and assigns from felling or cutting any more timber or other trees, in or upon the manor, and premises in question, or to carry away or dispose of any of the timber or trees felled, except such timber only for his necessary bootes and reparations as should be assigned him by the now Plaintiff's officer or officers: upon opening of the matter this present day unto this Court, by Mr. Serjeant *Brampston*, being of the Defendant's counsel, it was alleged, that the said manor being parcel of the possessions of the Bishoprick of *Winton*, was heretofore demised to Sir *Richard Cotton*, knight, for ninety-nine years without impeachment of waste, which lease being by meane assignment, come to the Defendant, who by reason that the said manor house, and the out-houses belonging thereunto, are ruinous and fallen to decay, hath caused some timber to be felled on the premises, which he intended only to employ in reparations upon the premises, which if the Plaintiff's officers shall not assign unto him by reason of this restraint, the said houses must needs become ruinous; it is therefore ordered, that if the said Plaintiff, his solicitor having notice hereof, shall not at the first or second general seal after this term, show unto his Lordship good cause to the contrary, then the said Defendant, not

withstanding the said injunction, should have liberty to take such of the timber already felled, as shall be necessary to be employed upon the premises, only for reparations, and not to any other use ; and the Plaintiff is to proceed with effect to bring the cause to hearing. Reg. Lib. A. 1634, fol. 410.

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Acland v. Atwell. 3d December 1630.

2 Roll. Abr. 813.—Writs of prohibition and assistance, to prevent a prebendary from committing waste on his prebend.

Forasmuch as the Right Honourable Lord Keeper was this present day informed by Mr. *Noy*, being of the plaintiff's counsel, that the Defendant, being one of the prebends of *Dutton* in the county of *Devon*, whereof the Plaintiff is patron, the said Defendant committed diverse great waste and spoil upon the houses, lands, woods, and timber-trees of the said prebend ; and therefore it was prayed that a writ of prohibition might be awarded against the Defendant, as also a writ of assistance unto the sheriff of the county where the said lands do lie, to see that the Defendant shall not commit any waste or spoil upon the houses, lands, woods, or trees, belonging to the said prebend ; and the said Plaintiff's counsel now offered that he would show precedents in like cases, wherein such assistance had been granted ; it is thereupon ordered by His Lordship, that a writ of prohibition should be awarded against the Defendant, inhibiting him thereby from doing or committing any waste or spoil upon the houses, lands, woods, or trees of the said prebend ; and the said Plaintiff's counsel are to attend Mr. Justice *Powis* and Mr. Justice *Croke* with a draft of the said writ of assistance unto the sheriffs, who are entreated by His Lordship to peruse the same, and see that the same be done according to the course of law, and then the said writ is to issue out accordingly.—Reg. Lib. A. 1630, fol. 136.

15th Oct. 1631. Whereas by an order of this Court the 3d day of *December* last, a writ or prohibition was awarded against the Defendant, inhibiting him thereby from doing or committing any waste or spoil upon the houses, lands, woods, or trees of the prebend in question, upon opening of the matter this present day unto this Court by Mr. *Rolle* of the Plaintiff's counsel, and upon the reading of two several affidavits, the one of *G. G.* and the other of *R. G.*, it appeared that although the said Defendant had been personally served with the said writ of prohibition, yet he had committed waste upon the premises, by rooting up timber-trees growing upon the same ; it is therefore ordered, that if the Defendant shall not, on the return of a subpoena to be served on him for that purpose, show unto this Court good cause to the contrary, then an attachment is awarded against the said Defendant, to bring him into this Court to answer the said contempt.—Reg. Lib. A. 1631, fol. 25.

20th Nov. 1631. After a recital of the preceding order, the Court being this day informed by Mr. *David*, being of the Defendant's counsel, that the Defendant caused but one timber-tree to be felled, which he appointed for the reparation of the house, and that the same was not felled in any contempt to the said prohibition, it is therefore ordered, that if the said Defendant shall, by the second return of the next term, make affidavit that he caused the same to be felled for no other purpose but for the reparation of the said house, then the said contempt and attachment are discharged, and in the mean time the same are suspended.—Reg. Lib. A. 1631, fol. 173.

2d Dec. 1631. After a recital of the preceding order, Upon opening the matter this present day before the Right Honourable the Lord Keeper by Mr. *Germin*, of the Plaintiff's counsel, and upon the reading of both the said former orders, it was alleged that the said tree was not employed about the said house, as by the Defendant pretended, but that the same was sold, and that the Defendant had also felled other trees, contrary to the said prohibition ; it is therefore ordered by His Lordship that the said Defendant making oath that he has felled but one timber-tree upon the premises, and that the same was employed in repairing the said house, then the said attachment is discharged ; or if the Plaintiff shall make affidavit that the said tree was not employed about the said house, or that the Defendant has felled any other trees upon the premises since the said prohibition, then the Plaintiff may proceed with his attachment against the Defendant for the same.—Reg. Lib. A. 1631, fol. 192.

26th Jan. 1632. On oath that the Defendant has broken an order, an attachment is issued against him.—Reg. Lib. A. 1631, fol. 300.

13th Feb. 1632. After recital of the order of the 2d of Dec. 1631, Upon opening

the matter this day by Mr. *Duke*, being of the Defendant's counsel, and upon the reading of the affidavit made by the Defendant, it was alleged, that notwithstanding affidavit was made on the Defendant's behalf, yet the Plaintiff did, nevertheless, take out process of attachment against the Defendant before the second return of this term, and caused the same to be served upon the Defendant on *Candlemas* day last; when, as the Defendant was burying the dead corpse of one *A.* he had him violently carried into a house by two bailiffs, who did not suffer him to bury the said dead corpse, but kept and detained him in prison until he had given good bond for his appearance, by means whereof the Defendant did personally appear accordingly; it is thereupon ordered that the six clerks not towards the cause shall examine the same; and if they shall find the same, this Court will then give good costs against the Plaintiff.—Reg. Lib. A. 1631, fol. 338.

22d Feb. 1632. After recital of the preceding order, and of a certificate of the six clerk, attesting the accuracy of the former allegations, the Plaintiff being unable to make it appear that the attachment was duly obtained, the attachment was discharged, the Plaintiff was ordered to pay costs, and an attachment was ordered against the bailiffs.—Reg. Lib. A. 1631, fol. 396.

Directions were afterwards given for examination on interrogatories relative to the alleged contempt in the process of attachment, but no order on the merits has been discovered.

(2) A "standell" obviously denotes a young tree, left standing in order to become timber; and as increasing the "store" of timber, a standell is denominated a "storer." *Cowell's* definition of "standell" will be correct if the word "oak" is expunged; but *Johnson* appears to have misapprehended the import of the term.

WILKINSON v. WILKINSON. *Rolls.* March 19, June 28, 29, 1819.

[S. C. 2 Wils. Ch. 47. See *Oldham v. Oldham*, 1867, L. R. 3 Eq. 407.]

Under a proviso against assigning or charging or attempting to assign or charge a life interest, so as not to be entitled to the personal receipt and enjoyment of the property, an agreement to charge a debt on the estate in the event of the deficiency of another estate, a power of attorney authorising the receipt of the rents and payment in discharge of debts, and an authority to a creditor to receive future rents, for which anticipated receipts were given, were each declared sufficient to determine the life interest.

*Joshua Wilkinson*, by his will, dated the 30th of April 1790, after devising and bequeathing certain estates, legacies, and annuities, to his wife and daughters, devised and bequeathed all his other freehold and leasehold estates to *William Wilkinson*, and *Thomas Wilkinson*, and to their heirs, &c., upon trust to pay the annuities; and subject thereto in trust for his son *John Henry Wilkinson*, during his life, remainder to trustees to preserve contingent remainders, with remainder for the children of *John Henry Wilkinson*, living at his death, in equal proportions.

[516] The will contained the following clause: "Provided always, and I do hereby declare, that the annuity of £500, before given to my said dear wife for her life, and the provision I have made for my said daughters, *Sarah Pearson* and *Elizabeth Cowdale*, for their separate use during their respective lives as aforesaid, and the estates given to my said sons for their lives, is and are upon this express condition, that in case they, my said wife, sons, and daughters, shall respectively assign, or dispose of, or otherwise charge the life estates, the annuities and provisions so made to and for them during their respective lives as aforesaid, so as not to be entitled to the profit, receipt, use, and enjoyment thereof, then and from thenceforth the annuity or life estate or interest of him, her, or them respectively, so doing or attempting so to do, shall from thenceforth cease, determine, and be void, to all intents and purposes whatsoever, and shall immediately thereupon descend to and devolve upon the person or persons who shall be next entitled thereto by virtue of the limitations aforesaid, in such manner as the same would have been done in case he, she, or they, was or were then respectively actually dead, any thing therein contained to the contrary notwithstanding."

The testator died in December 1790; and after the death of his widow, *J. H.*



*Wilkinson*, from the year 1796, by the permission of the trustee, received the rents of the premises devised to him.

On the 20th of *January* 1809, a commission of bankruptcy was issued against *J. H. Wilkinson*. The bill was filed by *Thos. Wilkinson*, one of the trustees under the will, against *J. H. Wilkinson* and his infant children, and the assignees under the commission of bankruptcy, and against *William Wilkinson*, the other trustee, stating, that *J. H. Wilkinson* had previously to his bankruptcy [517] charged his life estate for the payment of a debt due from him to *W. Wilkinson*, and suggesting the opposite claims of *J. H. Wilkinson*, his assignees and children; and the bill prayed that the rights of all parties might be ascertained.

By the decree made at the hearing of the cause, on the 1st of *July* 1813, before the late *Master of the Rolls*, it was referred to the Master to inquire, whether *J. H. Wilkinson* had disposed of, or otherwise charged or incumbered the life-estate, and provision by the testator's will made for him during his life, so as not to be entitled to the profit, receipt, use and enjoyment thereof; or whether he had attempted so to do.

The Master by his Report, dated the 27th of *June* 1814, certified, that he was of opinion, that the Defendant *J. H. Wilkinson* had by becoming bankrupt charged and incumbered his life-estate, so as not to be intitled to the profit, receipt, use and enjoyment thereof.

To this Report, exceptions were taken by the assignees, which were allowed, and by an order, dated the 6th of *June* 1815, it was referred back to the Master to review his Report; and it being alleged that the Defendants, the infants, had some additional evidence to produce, it was ordered, that the Master should receive such further evidence as might be laid before him by them. (*Wilkinson v. Wilkinson*, *Coop.* 259.)

Upon the Master's Report, the following facts appeared:—

In *October* 1807, *J. H. Wilkinson* executed an assignment to himself, *Nunn*, and two other persons, as true-[518]-tees for the payment of his debts.—The deed was not produced, nor any evidence offered of its present custody. The children of *J. H. Wilkinson* insisted, and his assignees denied, that it contained an assignment of his life-estate under his father's will; and on that point contradictory parol evidence had been received before the Master.

*J. H. Wilkinson* being indebted to *Thos. Bull* in the sum of £200, and *W. Wilkinson* having agreed to advance to him a like sum for the payment of two other creditors, upon his empowering *Bull*, then collector of the rents of his life-estates, to receive the rents, and pay them to *W. Wilkinson*, until the amount advanced by him was repaid; on the 8th of *October* 1798, *J. H. Wilkinson* executed a power of attorney to *Bull*, authorizing him to receive the rents, and in the first place to reimburse to himself thereout all sums advanced by him to *J. H. Wilkinson*, and in the next place to pay them to *W. Wilkinson*, until his advances were repaid.—From the date of the power of attorney to the 29th of *Sept.* 1799, *J. H. Wilkinson* received no part of the rents and profits; and in some portion of that period, a person was employed by *Bull* to distrain upon certain tenants of the estates in which *J. H. Wilkinson* took a life-interest, for rent, which was afterwards paid to *Bull*.

In *May* 1808, *J. H. Wilkinson* being in want of money to pay a debt for which an execution was threatened, borrowed a sum of £396 of *William Wilkinson*, and deposited the lease of a house at *Wandsworth* as a security; but it being understood that this lease was not of adequate value, he also signed the following memorandum:

"This lease is to be a security to Mr. *William Wilkinson*, of *Ludgate Hill*, for the sum of £396, interest [519] and expenses, advanced to me in money; and in case it shall not be sufficient, my life-estate to be chargeable for the deficiency in my father's estates. *J. H. Wilkinson, London, 26th May 1808.*"

The lease of the *Wandsworth* property had been estimated, after the agreement, at £320, and had subsequently become of no value.

In 1807 and 1808, *J. H. Wilkinson* had several times borrowed money on the credit of the rents by anticipation; and in *December* 1808, he borrowed a sum of £58, 17s. 6d. from *Duppa Jenkins*, to whom he gave his receipts for rents, not then due, to that amount, together with the following memorandum:

"*London, Dec. 17, 1808.* I hereby acknowledge to have received of Mr. *Duppa Jenkins*, junior, of *London Road, St. George's Fields, Surry*, coal-merchant, the sum

of £58, 17s. 6d. for the rents stated at the end of this, and numbered, as per receipts, 1, 2, 3, 4; and I hereby authorise him to collect the same, and to repay himself the said sum of £58, 17s. 6d., advanced to me; and for that purpose he has my receipts upon the parties so stated and numbered as at the end of this acknowledgement. I do authorise him to receive the same for his own use and benefit, without my having any claim whatever upon the said rents, they being his sole property for the advance so made to me. And I do hereby authorise and direct the parties on whom the receipts are, to pay the same to him, or any person that may be sent by him to receive the same, producing my receipts as before stated. And in case of default of payment by either of the said parties, this shall be full power for him to seize or distrain in my name for the said rents, or in the names of the trustees, under a power of at-[520]-torney given by them to me for that purpose, to receive the said rents from the broker so seizing or distraining, and apply the same to his own use; and this shall be a sufficient warrant and authority for any broker so seizing and paying over to the said *Duppa Jenkins*, junior, the monies so received. *J. H. Wilkinson.*"

"No. 5, Walton Place, Blackfriar's Road."

£	s.	d.				
7	10	0	Mr. Richardson, Moor's Alley, Norton Falgate	.	.	1
5	0	0	Mr. Kelly, Old-street Road	.	.	2
7	0	0	Mr. Ezshaw, Austin Friars	.	.	3
39	7	6	Jackson and Dampier, Primrose-street	.	.	4

58 17 6

The Master, by his report, dated 26th July 1817, certified his opinion that the Defendant *J. H. Wilkinson* had, by these various acts, assigned and disposed of, and otherwise charged and encumbered, the life-estate and provisions by the testator's will made to and for him during his life, so as not to be entitled to the profit, receipt, use, and enjoyment thereof.

To this report the Defendants, the assignees, excepted.

Mr. Wetherel and Mr. Stephen for the exception.

The deed of assignment, if it included the life-estate of *J. H. Wilkinson*, was certainly a violation of the prohibition; but the deed is not produced, and no proof has been offered of its loss to justify the Court in receiving parol evidence of its contents.

In considering the effect of the other acts, the Court will not incline to declare a forfeiture, and will strictly [521] construe so penal a proviso. The restraint of alienation is applicable only to alienation of the whole interest, on the same principle on which it has been decided, that an under-lease is no violation of a covenant by a lessee not to assign. Every charge or incumbrance is not within the prohibition, but such only as is inconsistent with personal receipt and enjoyment of the property.

The power of attorney was not contrary to the letter or the spirit of the proviso;—a mere appropriation of the rents by a revocable instrument for the payment of a debt; not an incumbrance, but a mode of enjoying the estate. The charge in favour of *W. Wilkinson* was contingent only, and never caused any exclusion from personal receipt; even an absolute mortgage would not have had that effect while interest was paid. That the mere anticipation of rent is not a violation of the prohibition, is established by the analogous decisions, that without an express restraint in terms, married women may anticipate the profits of property settled to their separate use.

They cited *Doe v. Carter* (8 T. R. 57), *Dommett v. Bedford* (6 T. R. 684; 3 Ves. 149), *Brandon v. Robinson* (18 Ves. 429; 1 Rose, 197), *Shee v. Hale* (13 Ves. 404), *King v. Robinson* (Wightw. 385), *Hulme v. Tenant* (1 Bro. C. C. 16).

Mr. Hart, Mr. Horne, and Mr. Rose, for the report. The estate of *J. H. Wilkinson* was equitable only, and a power of attorney authorising the receipt of the rents, executed for a valuable consideration, is not revocable, and amounts to an alienation in equity. The deed of assignment must be presumed to have remained with [522] the assignees, and to be withheld by them, because the production would be fatal to their claim. (Note: The substance of the argument in support of the report is contained in the judgment.)

The Master of the Rolls. The question here is, whether, upon the evidence stated

in the report, it appears that *John Henry Wilkinson* has done any act within the description of the proviso in the will? It is insisted, on the part of the Defendants his children, that, by reason of the acts which he has committed, his life-estate has ceased; that proposition is denied by his assignees. The Court is now to decide whether the children have substantiated their title to this estate.

With respect to the validity of the proviso, it is clear that a testator may thus modify the estate he gives (1 *Swans*. 481); for though, in a case which has been mentioned (*Brandon v. Robinson*, 18 *Ves.* 429; 1 *Rose*, 197). it is stated as the opinion of a very great judge, that if an estate is given for life, the incidents to a life estate cannot be taken away, and though it is better, therefore, when such a limitation is intended, to give the estate until bankruptcy or alienation, and not first to give it for life, and then to prohibit the attempt to alien, yet this is answered by considering that, in a will, any condition or modification may be annexed which does not offend against any rule of law; and it is immaterial by what form of words the intention is executed, whether by a devise until the devisee shall have charged or encumbered it, or by a proviso with a limitation over upon such an event. Each mode is equally valid, and of the same effect.

[523] Cases respecting restraints on alienation have frequently arisen, and some are of considerable antiquity; they are to be found in *Dyer* (*Anon. Dyer 6 a*), in *Anderson* (*Anon.* 1 *And.* 123, 124), and in *Leonard* (*Moor v. Farrand*, 1 *Leon.* 3. *Large's case*, 2 *Leon.* 82); the modern books are full of them; and although the Courts look with a jealous eye on such restraints, yet it is now clear that he who gives may annex such conditions to the gift. The principles applicable to this question are clearly explained by Lord *Kenyon* in *Doe v. Carter* (8 *T. R.* 57), but the decision there, and in *King v. Robinson* (*Wightw.* 387), proceeded on a ground which has no application to the present case, namely, a distinction between acts done by the party voluntarily, and those which pass *in invitum*.

The question then here is chiefly a question of fact, whether the acts of *J. H. Wilkinson* are within the range of the clause of prohibition? The acts said to have caused a forfeiture, are four. One of them, if proved, would have at once put an end to all argument; I mean the deed executed by *J. H. Wilkinson* in the year 1807, by which he is said to have passed the life estate, which he took under his father's will, for the benefit of his creditors. The existence of that deed is admitted, but the assignees deny that it included the bankrupt's life estate. To determine that point, nothing is required but the production of the deed; and the question is, whether, so far as the deed is concerned, the fact is established by those who claim under the forfeiture? That the claim is made by an infant is wholly immaterial; the claim must be supported by legal evidence, and the rules of evidence are the same for infants as for adults. Is there any evidence on which the Court [524] can act judicially on the contents of this deed? Nothing can be clearer than the rule of law, but the best evidence, namely, the deed itself, must be produced. A difficulty in the way of the production affords no excuse for a departure from the rule. The existence of the deed being acknowledged, the single ground on which secondary evidence of its contents can be received, is the loss of primary evidence, either by loss of the original, or by refusal of the parties having it in their possession, after notice to produce it.

The loss of the deed is not proved; but there is proof of its existence subsequent to the bankruptcy. The witness *Newby* deposes that in 1819 the deed was given to him to be carried to *Guildhall*; that the deed was then in the possession of *Nunn*, for whose use it was deposited at *Watson's* house, and was afterwards removed thence; there the evidence stops: by whom and when it was removed appears not. It is said that the court must presume that the deed was in the hands of the bankrupt. Why? On the bankruptcy of a trustee, the trust deeds should remain with the solvent co-trustee, not with the assignees of the bankrupt, who are strangers to the trust. Then it is said that the assignees withhold it, because it would be evidence against them; that assertion assumes the question; if not such as represented, the production would assist them; and what evidence is there that it ever reached their hands? It is alleged that *J. H. Wilkinson* delivered it on his bankruptcy, but no diligence has been employed to prove when or to whom. Why has not the bill addressed to the assignees an interrogatory on that subject? On the supposition that the deed is in the possession of the assignees, and that its contents are such

as they have been represented, three years' litigation might have been prevented by a simple question, have [525] you the deed, and what are its contents? If not made the subject of inquiry in the bill, yet when the late *Master of the Rolls* allowed the infant defendants to adduce additional evidence, they might by a short process have compelled the assignees to state whither the deed was in their custody. Parol evidence of the contents of the deed has been received; but if the objection had been taken. I cannot doubt that the Master would have rejected it.

If I considered myself, as I do not, at liberty to look into that evidence, my conclusion would be that this deed did not comprise the life estate, because I think that the parties were aware that forfeiture or cesser would be the consequence; and because I find from the correspondence, that when a creditor whose consent was solicited, objected that the deed had not conveyed the life estate, that objection was not removed. In his last examination also the bankrupt swears that it was not included, and his present statement is, not that the deed actually included it, but that such was the intention when the deed was executed. If the case depended on this question alone, it would deserve the consideration of the Court, whether some course ought not to be adopted for ascertaining the contents of the deed; and whether, notwithstanding the great neglect of those who should have furnished the Court with the deed, or accounted for its non-production, an inquiry should not even now be directed. But there is little probability that the production would establish the fact of forfeiture or cesser.

The case then depends on the other three acts of the bankrupt, the power of attorney given to *Bull*, the agreement of *May* 1808, and the anticipation of rents in favour of *Jenkins* and others; and it is impossible to [526] avoid seeing that they are directly in violation of the testator's intention. The father was anxious that this son, who was in trade, should have the personal enjoyment of the property, and not in any way alien or incumber it; and it appears that from 1798, two years after he came into possession, to 1809, the son was struggling under embarrassed circumstances, and being aware of the prohibition imposed upon him, endeavoured to evade it by contriving modes of encumbering and hypothecating, which should not amount to a mortgage within the letter of the prohibition.

It has been properly argued, that in cases of this nature, the acts done must be contrary not only to the spirit and meaning of the prohibition, but to the letter; but there has been some fallacy in insisting principally on the words assign or dispose of, as referring to a complete assignment of the son's interest. The effect of such a construction would be, that he might in effect deprive himself of the enjoyment during his whole life by partial dispositions of the rents and profits. But the words here are not merely assign and dispose of, but charge or incumber, or attempt so to do.

The latter phrase occurred in the case of the *King v. Robinson* (*Wightw.* 385), the decision in which proceeded on a ground foreign from this case.

The execution of the power of attorney to *Bull* is admitted; he was a creditor, and the power of attorney authorised him to receive rents for the purpose of paying himself and another creditor. It has been argued, that notwithstanding this instrument, the bankrupt's right to the property continued; that it was not essential for him [527] to receive the rents *propriis manibus*; and that the testator's intention was satisfied, if he retained the dominion over them. But the answer is, that a power of attorney given to a creditor is not revocable. It is an equitable security, conferring a right to receive and withhold the rents until the debts are paid; and the bankrupt had no longer dominion over the property. What is a security by *vivum vadium*, but a power to receive the profits of an estate, and apply them in payment of the debt? It is a charge that for a time dispossessed him, and deprived him of the use and enjoyment of the estate.—The clause contrasts throughout his enjoying the estate himself, and pledging it as a security; and this is in fact a security, although not made in the ordinary mode. It is clearly a violation of the prohibition against charging and incumbering.

The agreement of the 26th of *May* 1808, although the operation of it was to be only conditional, was yet certainly an attempt to charge the life-estate. If the estate at *Wandsworth* was notoriously inadequate, it was in its inception a direct charge, and at all events it was an incumbrance on both estates; both were made responsible by it. It is said, that this did not interrupt the use and enjoyment of the estate; but

according to that reasoning, even a mortgage, if the mortgagor continued in possession, would not have been a breach of the proviso.

The last act is the anticipation of rent. It appears, that the bankrupt had given an authority to receive the rents, and to distrain in his name, and to appropriate the amount to the payment of a debt. The person to whom this authority was given was not to be accountable for what he received until after satisfaction of his debt. Thus the right of receiving the rents was parted with, [528] and transferred to another, for a valuable consideration. Comparisons have been made to the cases of bailiffs and stewards; but this is really analogous to a mortgage, for the right to the rent is transferred.

On the effect of bankruptcy no question arises, and I am surprised that it has been noticed; considered as a proceeding *in invitum*, it was not an act which could occasion a forfeiture under this proviso (see *Cooper v. Wyatt*, 5 *Madd.* 482); and such must have been the opinion of the late *Master of the Rolls*, or he would not have allowed the exception, and referred the case again to the master.

Upon the whole I concur with the Master, and the exception must be overruled.

His Honour held the said exception to be insufficient, and doth, therefore, order that the same be overruled.—Reg. Lib. B. 1818, fol. 1724.

[529] DREWRY v. THACKER.(1) Dec. 11, 1818; Feb. 23, 25, 27, 1819.

[See *Lee v. Park*, 1836, 1 Keen, 721; *Russell v. East Anglian Railway Co.*, 1850, 3 Mac. & G. 123.]

Whether on a bill filed for the administration of assets, the Court will restrain the legal proceedings of a creditor who had previously obtained a right of execution against the personal representative, *quære*.

The bill was filed on the 13th of November 1818, by a creditor of Robert Thacker, who died intestate in June 1817, for the administration of his estate against, [530] Ann Thacker, his administratrix, and other persons to whom she had assigned the intestate's interests in certain trades carried on by him, on trust to continue or dispose of them for the benefit of his creditors.

[531] On the 13th of September 1811, the intestate, together with his brother Thomas Thacker, executed two bonds, one to Robert Wood (since deceased) and Richard Stanley, [532] in the penalty of £4000 for securing the payment of £2000 and interest, by two instalments, the latter of which became due on the 25th of March 1814; and the [533] other to the same Robert Wood and Samuel Lucas, of the same tenor.

Actions having been commenced against Ann Thacker on the bonds, she in each craved over, and pleaded non [534] *est factum*; and the causes being called on for trial at the sittings after Hilary term 1818, she, by her counsel *ore tenus*, pleaded, *puis darrein continuance*, three judgments recovered against her as administratrix, and that she had fully administered, except goods to the value of £10. In Easter term the Plaintiffs at law replied, that [536] the Defendant had in her hands, at the commencement of the actions, assets unadministered beyond what she had admitted, and more than sufficient to satisfy the [537] three judgments; issue was joined, and notice of trial given for Trinity term. Before the trial, the attorneys of both parties signed a written agreement in the action by Stanley, that the Defendant should withdraw the pleas, and that the Plaintiff should take judgment for £4000, and that no bill in equity should be filed, or other proceedings taken for setting aside the judgment, or restraining the Plaintiff from levying execution thereon, or otherwise availing himself of the full benefit thereof; and the Plaintiff at law was not to take execution except in default of payment on the 22d of August 1818, of £1000, and the interest then due on the sum of £2000, and the costs in the cause, and of the remaining £1000 on the 22d of November 1818; and upon such payment the Plaintiff was to assign to Ann Thacker a judgment recovered by him, in Easter term, against Thomas Thacker, the co-obligor. A similar agreement (with the exception of the undertaking to assign a judgment) was signed in the action in which Lucas was Plaintiff.

The first instalment not having been paid at the time appointed, and propositions having been made, but not [538] accepted, for farther delay, writs of *feri facias* on

the judgments were sealed on the 28th of *August*, and sent to the attorney for the Plaintiffs at law, who, on the same day, received from the attorney for *Ann Thacker* two bills for £1000 and £200, and an undertaking to pay £1000 more in two months, which were accordingly paid on the 16th of *October*.

It was then proposed by the attornies of *Ann Thacker*, that as the estate of the intestate had thus paid his moiety of the sums secured by the bonds, the Plaintiffs at law should proceed to recover the other moiety due from *Thomas Thacker*, by means of the judgments obtained against him ; but the proposal was declined.

By the decree made in the cause on the 19th of *November* 1818, it was, among other things, ordered that it should be referred to the master to take an account of what was due to the Plaintiff, and all other the creditors of the intestate *Robert Thacker* for their debts ; and directions were given for the due administration of his effects.

On the 21st of *November* 1818, notice of the decree was served on *Stanley* and *Lucas*, and on the 24th of *November*, it was ordered by the *Master of the Rolls*, that upon the Defendant *Ann Thacker*, the administratrix, paying to *Stanley* and *Lucas* respectively, their costs at law up to the time they had notice of the decree, an injunction should be awarded to restrain them from all farther proceedings in the actions at law brought by them respectively, in the Court of Common Pleas, against *Ann Thacker*, as administratrix of the intestate ; and notice of the order was on the 26th of *November* served on *Stanley* and *Lucas*.

[539] On the 24th of *November* a writ of *testatum fieri facias* was obtained in the action in which *Lucas* was Plaintiff, and sent by the general post to the under-sheriffs of *Leicester*, and received by them on the following day, and executed on the 26th of *November*.

On the 30th of *November* the attornies of *Ann Thacker* served on the attornies of the Plaintiffs at law, notices that if the execution was not withdrawn, application would be made for an attachment ; and on the 1st of *December* notices that they were ready to pay the costs in the actions to the time of the notice of the decree.

On the 11th of *December* 1818 a motion was made before the *Vice-chancellor*, that the sheriff of *Leicester*, and his deputies or bailiffs, might be ordered forthwith to restore, deliver, and give up to *Ann Thacker*, possession of all goods, &c., of the intestate which had come to the hands of *Ann Thacker* as his administratrix, and which the sheriff had received or taken possession of by virtue of the writs of *fieri facias* ; and that all further proceedings under the writs might be restrained.

The affidavit of *Ann Thacker* stated, that after the execution of the deed of trust, she had delivered to the trustees all the effects of the intestate in her possession, and accounted with them for her receipts, and had left the management of the intestate's affairs to them ; and that not having assets to pay the debts for which the actions at law were brought, she left it to her solicitors to take such proceedings as might be most for the benefit of the estate of the intestate, and his creditors ; and that the suit in equity was instituted without her knowledge.

[540] The *Vice-chancellor* made the following order : " This Court doth order that the said *R. Stanley* and *S. Lucas* do respectively sign an authority to the sheriff for the county of *Leicester*, for the delivery to the Defendant *Ann Thacker* of the goods, chattels, property, and effects belonging to the intestate *R. Thacker* deceased, taken in execution by the said sheriff under and by virtue of the two several writs of *fieri facias* issued out of the Court of Common Pleas against the said Defendant *Ann Thacker*, as the administratrix of the said *R. Thacker*, at the suit of the said *Stanley* and *Lucas* respectively ; and it is ordered that the said sheriff do accordingly deliver up the said goods and chattels, property and effects, to the said Defendant *Ann Thacker*, upon being paid his costs and charges in respect of the said execution, and his costs of this application to be taxed, &c. ; but this is to be without prejudice to any application which any of the parties may be advised to make as to the costs of this application, and as to the repayment of the said costs and charges which shall be so paid to the sheriff as aforesaid ; and in case there shall be a deficiency of the estate of the said intestate to pay in full to the said *R. Stanley* and *S. Lucas*, the debts due to them upon the administration of the said estate, by this event, it is ordered that the said *Stanley* and *Lucas* be at liberty to proceed at law against the said Defendant *Ann Thacker*, as if the said sheriff had returned *nulla bona præter* the sum received by the said *Stanley* and *Lucas* upon the administration of assets in this case ; the said *Ann Thacker* by her counsel undertaking not to dispute the suggestion of such return in the writ at law." Reg. Lib. A. 1818, fol. 155.

A motion was now made to discharge this order. The case was argued by the *Solicitor-general*, Sir Ar-[541]-thur Piggott, Mr. Hart, Mr. Garratt, Mr. Blake, and Mr. Stephen.

The following cases were cited: *Erving v. Peters* (3 T. R. 683), *Terrewest v. Featherby* (2 Mer. 480), *Paxton v. Douglas* (8 Ves. 520), *Gilpin v. Lady Southampton* (18 Ves. 469).

In the course of the argument the *Lord Chancellor* inquired, whether the order for an injunction on payment of the costs of the action, was according to the usual form of injunctions, after a decree in a creditor's suit, and the registrar (Mr. Walker) answering in the affirmative, his Lordship observed, that the form was improper, inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the estate, be unable to obtain it in time. The following observations were also made by

The *Lord Chancellor* [Eldon]. The question which this important motion presents to the Court must be considered with reference both to the bill filed here by a creditor, and to the situation in which the administratrix has placed herself by her pleading at law. If the administratrix has so defended herself at law as to take under her protection not only herself but all the other creditors, that is one case; but if, on the other hand, she has pleaded falsely, or admitted assets when she has them not, it will be necessary to consider many cases in which the Court has held that it could not stop the legal proceedings of creditors. It has, indeed, been long settled, that when this Court has taken into its hands the administration of assets, it will stay [542] proceedings against them at law; (2) but the question is, whether the conduct of an executor or administrator never can be such that the Court will decline to act on that principle? I am sure that cases have occurred in which an executor or administrator, having made himself personally liable at law, has been protected in this court, only on the terms of paying to the extent of his legal liability. The present application is made by a creditor; and the question is, whether a creditor can protect the administratrix, and whether the Court should stop proceedings to which she would become liable at law, if certain intermediate proceedings had been first taken, by stopping those intermediate proceedings?

If the Plaintiff at law has established a right to an execution against the goods of the representative, in the event of a deficiency of the goods of the deceased, it may be assumed as clear, that at some day such execution may be taken; and if this Court interposes at all, must not the representative be required to state the amount of assets? (3) The first question, independent on the specialties of the case is, whether, if judgment is recovered against the administratrix in such circumstances that she would not be permitted at law to dispute assets, she can obtain an injunction here on an affidavit denying assets?

[543] If the representative, being Defendant at law, consents to an execution *de bonis propriis*, the Plaintiff at law might be directed to assign to the representative a certain portion of his claim to the assets; but is there any instance in the history of the court, where, after a judgment at law *de bonis testatoris et si non de bonis propriis* of an executor, and execution issued, on a decree subsequently obtained for administration of the assets, the proceedings at law have been restrained? At law the administratrix is liable to the deficiency returned by the sheriff; the question is, whether this Court will interpose to render her liable for the deficiency returned on the Master's report?

The doctrine of courts of law on judgments against executors and administrators *de bonis propriis* has fluctuated so much, that a judge in equity may without dishonor acknowledge his ignorance. (See 2 Saund. ed. Williams, 336. *Fielden v. Fielden*, 1 Sim. & Stew. 255.)

At the close of the argument judgment was given as follows.

The *Lord Chancellor* [Eldon]. This application involves questions which have not been the subject of decision. The order of the *Vice-chancellor* is subject to two difficulties; first, if the administratrix is liable at law, it renders her liable to a much greater extent; next, it is not at present within my recollection that this Court, when it takes into its hands the administration of the estate of a testator or intestate, for the protection, in some sense, of the personal representative, and in another sense of creditors, is accustomed to qualify the effect of a judgment at law, [544] by staying the proceedings there for the present, but with an intimation that a period

will arrive in the course of the suit, in which the parties will be permitted to make the most of them. At the same time I will not assert that there is no such case.

It is fully settled, though not from a very ancient time, that if this Court once takes on itself the administration of the assets of a testator or intestate, a creditor seeking, and not having yet obtained, satisfaction at law, shall not be suffered to proceed there; it being impossible, while the decree is considered as a proceeding for the benefit of all the creditors, to permit some of them to proceed elsewhere. That doctrine has been much enlarged even in my time; for it was first determined by Lord *Thurlow*, that such relief might be obtained, not only by a creditor but by a residuary legatee. (Note: *Brooks v. Reynolds*, 1 Bro. C. C. 183. The report of this case in *Dickens*, 603, erroneously represents the suit to have been instituted by a creditor.) It is now an universal rule, that after a decree for the administration of assets, those who make a demand which they have yet to recover against those assets, must come in under that decree. The rule is intended for the protection of creditors, and of executors and administrators; but that it has been the occasion of enormous frauds there can be no doubt. The use made of it is very often this: that persons who have more interest in forbearing than in urging their demands against the personal representative, either omit to institute a suit for the administration of the estate, or, when instituted, so manage it, as to leave the representative in almost an undisturbed enjoyment of the assets as before the bill was filed. The circumstances of this case, though I am not disposed to represent any party as acting otherwise than honestly, illustrate the use that may be made of the rule of court.

[545] Two creditors having brought actions, the administratrix put in pleas, which amounted to an admission of assets; the pleas were afterwards withdrawn, and the instruments called *cognovits* executed, by which the creditors were allowed to take judgment, with a stay of execution, on terms of making certain payments at times specified, and an express agreement, in the most comprehensive words, that no bill in equity should be filed or proceedings adopted to restrain the Plaintiffs at law from enforcing their judgment. The first instalment due under that agreement having been paid, on the 13th of *November*, the bill is filed by a creditor, stating his debt to be about £65; the amount of debt is not material, but the effect of the suit will be very different if it is the suit of the administratrix and not of a creditor. The bill represents, according to the common allegation, that the administratrix has possessed assets adequate to the payment of all the creditors; that she has appointed certain persons, who are co-defendants, her attorneys to collect the estate; and that it has been accordingly collected under a deed to which I shall not give much attention, because I think that those Defendants, having submitted to this decree, are in such a situation, that if they ever intended to act on the deed, it may now be considered as laid aside. Probably, if the *Master of the Rolls* had seen not only what is stated concerning that deed in the bill and answer, but the deed itself, he would have hesitated before he granted the injunction as a matter of course.

On the 19th of *November* a decree is pronounced; the answer of the administratrix submitting to account, but containing no statement relative to the situation of the testator's estate at the time of his death, or the subsequent transactions. Speaking without application to this case, I have often observed with surprise the conduct of solicitors in amicable suits of this nature; it is their duty to bring the personal representative before the Court in the manner most beneficial for the creditors whom they represent, and on whose behalf they have instituted the suit; and should a case arise of assets wasted by a personal representative from their neglect, it will not be for want of repeated caution from this place, if they are not prepared for the responsibility which they have incurred.

The order made by the *Master of the Rolls* on the 24th of *November* for an injunction, was grounded on an affidavit of the administratrix, stating only that the creditors at law threatened to issue execution, and her belief that she had not assets adequate to pay them; but omitting all mention of the circumstances attending the actions at law. I agree, that it is not an absolute rule of this court to refuse an injunction, unless there is an affidavit stating the assets in the hands of the personal representative; but I will never grant the injunction without using my best endeavours to know the state of the assets. In many cases those endeavours might fail to obtain the information sought; but if ever a case required it, it is one in



which all these solemn engagements have passed before the application for an injunction. On a full explanation of the facts there might have been a difficulty in granting that application ; the order, however, has been made, and must be obeyed : but on an application against persons guilty of a breach of it, the Court would forget its duty, if it did not give to them the benefit of the fact that the order ought not to have been made.

This application is founded not only on the decree pronounced, but also on an alleged breach of the injunction ; and it is necessary for the Court to consider [547] both the creditor restrained, and the personal representative on whose behalf the restraint was imposed ; and in these views this motion is as important as almost any that I recollect in the course of my professional or judicial life. Although the Court has said, that when it takes the administration of assets into its hands, it will protect the personal representative from pressure at law ; yet it is always careful not to exclude creditors proceeding at law from the benefit of that due diligence by which they have established a right to be satisfied, either out of the assets of the deceased, or *de bonis propriis* of the representative, a right which, in some cases, the conduct of the representative will confer on them, and in others their own activity ; and will not indulge creditors who have lain by, to the extent of depriving the diligent of the fruits of their diligence. My memory furnishes me with the recollection of no case in which the Court has interposed as in this order ; that is, considering the proceedings at law effectual for some purposes, to be carried into execution at a future time, when the fruits to be collected from them have been ascertained by the result of certain proceedings in equity.

With respect to the cases of levying execution *de bonis propriis*, the Court can labour under no difficulty ; because if, in those cases, *bona propria* are at law to be applied in payment of debts, so *bona defuncti* are to be applied in equity ; and there may be a third case ; and in reference to levying *de bonis propriis*, I doubt whether there was any representation that the judgment was or was not *de bonis propriis*, so as to introduce the distinction to which I advert. The judgment in this case is represented as a judgment against the assets of the intestate, but such that the Defendant at law must be considered as having confessed assets ; and if the sheriff, therefore, could not collect goods of the intestate sufficient [548] to pay the debt, it would be of course for him to levy on the goods of the representative ; but as *bona propria* are not to be resorted to until there is a deficiency of the goods of the intestate, and as those are to be administered in this court, the question arises what is to be done where a creditor has acquired a right to proceed against *bona propria* ? What is to be the effect, as soon as it is established conclusively at law, that there has been a *devastavit*, and that the representative is subject to pay the debt out of his own property ? There is thus an intermediate case ; for as in some cases the remedy is against the *bona propria* of the representative originally, and in others against the *bona defuncti* only, there may also be a judgment originally *de bonis testatoris, et si non de bonis propriis*, even for costs alone ; and the Court must determine what is to be done on such a judgment. It becomes matter of very serious consideration, whether it shall be possible for a body of creditors, or a personal representative, after having permitted a creditor at law to proceed until he has obtained an admission of assets, which in this court could never be retracted, unless a case of mistake were most clearly established, then upon the representative here denying assets, to delay that creditor, having a right to take immediate execution against the goods of the representative ; whether it is competent to the Court, in such a state of circumstances manifested by the sheriff's return, to enjoin the legal diligence of the creditor, until, at some unknown period, it shall be ascertained what proportion of the assets is to be paid to that creditor ; and that he shall then be at liberty, not by any order of this Court, to call on the sheriff to make a return that there were no *bona defuncti præter* what was paid into his hands under the decree of the Court of Chancery, and to take his chance of recovering the rest.

[549] There is another difficulty, arising perhaps from a mere slip, that this administratrix, if entitled to protection at all, must be entitled to protection beyond what is given to her by this order ; because, if the Court has authority to compel a creditor having a legal right to lay his hand on all the goods of the deceased, that the sheriff could find, to take so much only of those assets as he should be found entitled to on taking the accounts in this Court, it seems extremely difficult for the Court

to proceed on this principle, that the creditor thus proceeding at law shall be restrained from taking more than his proportion of the assets at present, that proportion to be ascertained by the decree on farther directions, and restrained at the instance of another creditor, who has never, perhaps, made any demand at law or otherwise, until he filed his bill, after execution had been taken out : but that the administratrix shall be liable, not only as she would have been liable if the execution had proceeded, which would be against the assets of the testator in the first instance, and for the deficiency according to the sheriff's return against the goods of the representatives, but to the extent to which the goods of the testator are insufficient to satisfy the debt, upon a proportionate distribution among all the creditors on the account in this Court. The consequence would be, that the Court would give to a whole body of creditors a relief to which either conjunctively or separately they could have no claim.

I cannot, therefore, at this moment, assent to the notion, that this order can in all respects remain ; and I will not undertake to say that this case is very easy of solution, putting all these difficulties out of view ; but where the case at law affords an ulterior resort, the *bona propria* of the representative, if this Court is so to arrange its proceedings, as to take care, that while it destroys [550] one remedy it does not affect the other, it seems to me, that a course must be adopted somewhat different from that of the present order. (*Lord v. Wormleighton, Jac.* 148.)

(1) *Parker v. Dee.* 27th October 1674, 26 Car. 2.

2 *Ca. in Cha.* 200 ; 1 *Rep. Temp. Finch*, 123.—Effect of a judgment confessed by an executor pending a suit.

The cause between *Parker* and *Dee* came now to be reheard the fourth time upon this case. *Parker* sued *Dee* at law upon a note of £700, given by *Everard* the goldsmith, to whom *Dee* was administrator ; *Dee* pleads a special *plene administravit*, and that he hath no assets *præter, &c.*, *quæ non* sufficient to satisfy certain recognizances. *Parker* exhibits a bill to discover ; *Dee*, pending the bill, acknowledges several judgments upon bills and notes to the value of £12,900, after he had put to *Parker* to make his election, and so fixed him in Chancery.

At the hearing *Dee* appeared to have assets to the amount of £1400, and also to be a trustee of land for payment of debts. The *Master of the Rolls* allowed all payments before the bill, and all judgments after the bill obtained by coercion of law, but disallowed all obtained by confession, since the bill, for debts *in æquali gradu* ; and so directed the accounts. The *Lord Bridgman, custos sigilli*, was assisted by Judge *Raynsford* upon the appeal. Judge *Raynsford* agreed with the *Master of the Rolls*. *Lord Bridgman* allowed all judgments confessed before the answer, but disallowed all judgments confessed since the decree for debts *in æquali gradu* ; and as to judgments between the answer and decree took time to advise : so it hung.

*Shaftesbury, C.*, assisted by two judges, set aside all the judgments confessed after plea pleaded, but would allow the Plaintiff in equity no more than his proportion, *viz.* out of the personal estate, according to priority, and out of the trust without regard of priority.

I agreed with my *Lord Chancellor* to set aside all judgments confessed for debts *in æquali gradu* since the plea pleaded ; for since they could not have prevailed against the plea, if it had been falsified at law, it was good reason that the falsification of that plea in equity should equally avail the Plaintiff ; the rather because the Defendant forced the Plaintiff to elect, and so tied him to proceed here ; but differed in this point, *viz.* that the Plaintiff should not be tied to his proportion, but should recover the whole, for so he should have done at law, if he had falsified the plea there, and the falsifying here is as good ; nor is this any prejudice to the rest of the creditors *in pari gradu*, for the Defendant must pay it out of his own purse if the personal estate be not sufficient, just as he ought to do at law ; for if the judgments confessed after the plea be executed, and sweep away all the assets, yet in regard by the falsifying of the plea it appeared he had assets *jour de breve purchase*, this will amount to a *devastavit*, and draw the debt upon himself ; not but that an executor who hath not assets to pay all may prefer whom he please, but that must be understood with these differences ; first, before suit he may volun-

tarily pay whom he please ; second, after suit commenced he can make no voluntary payments of any debt in equal degree (that is to say), if the suit be commenced by originals ; but if the suit be by *latitat* or *quo minus*, the executor may make voluntary payments till declaration delivered, for until then he is not bound to take notice of the cause of action. *Off. d'executors*, 208, 209. Third, yet after suit commenced by A. he may prefer a subsequent suit by B., either by confession of his action, or by dilatory pleas, essoins, or imparlances to A. : but he must not delay or hinder A. of judgment by a false plea, which is a lie, as here, and then confess judgment to others ; for it is a fraudulent proceeding, and will bring the debt upon himself at law, and ought so to do in equity ; for after all this, to decree him only liable in proportion is an illusory and fruitless decree ; it treats the executor at last as if he had never misdeameanded himself, puts him in a better condition, when his plea is falsified in equity, than he could have been if it had been falsified at law, and so at last protects a fraud in Chancery.

And the Defendant, hearing my opinion, presently agreed in open court to pay the Plaintiff £800 within a week, and so the matter ended. In the debate of this question, I demanded of the Plaintiff's counsel why they did not presently pray judgment at law upon the plea of fully administered with a *cesset executio donec assets acciderint* ; for this would have prevented all puisne judgments, and is warranted by *Mary Shipley's* case (8 Co. 134), which, for this very reason, was affirmed to be good law in parliament in *Noel v. Nelson*, 23 Car. 2 (1 Lev. 286 ; 1 Sid. 448 ; 1 Vent. 94 ; 2 Keb. 606, 621, 631, 666, 671 ; 2 Saund. 226), contrary to *Dorchester v. Webb*, 10 Car. 1 (Cro. Car. 372 ; *W. Jones*, 345 ; *Hutt*, 128), where it is held, a man must take issue upon the plea, or be barred by an implied confession of the truth of the plea, &c. Serjeant *Maynard* answered, that if he had prayed judgment he could have had no advantage but of such assets as should happen after the plea ; for the prayer admits the plea true, and that there were no assets at the time of the plea ; which I held to be a good answer ; but the counsel on the other side argued that assets before the plea are assets after the plea, and so within the words *cum acciderint*, as a bond paid before the day is paid at the day ; to which I replied, true it is, assets are always assets till aliened, but it lies not in averment by him who hath admitted the contrary upon record by his prayer.—Lord Nottingham's MSS.

Nov. 25th, 1764. This cause having received many hearings in this court ; first, by the Hon. the Master of the Rolls, then by the late Lord Keeper *Bridgman*, and afterwards by the Lord Chancellor the Earl of *Shaftesbury*, and there being diversity of opinions in the several orders pronounced upon these hearings, whereby the matter had been much intricated and perplexed ; and the master to whom the accounts stood referred, having made a report *ex parte*, the same was confirmed, and a decree being thereupon drawn up upon that order to confirm the said report, thereupon the Defendant, who had not been fully heard touching the matters of the said report, and merits of his case, nor ever had any notice of the order for confirming the said report, before such decree was signed, entered a *caveat*, to the end he might be heard before any decree should pass, yet nevertheless the Plaintiff did, after such *caveat* entered, procure the decree to be signed, and afterwards, as appeared by the certificate of one of the six clerks of this court, enrolled ; whereupon his Lordship, being made acquainted with the surprize, was satisfied thereof, and appointed the cause to be reheard ; and the same coming to be reheard accordingly, in the presence of counsel on both sides, the substance of the Plaintiff's bill being to have satisfaction from the said Defendant, as administrator with the will annexed of *Charles Everard* deceased, of the sum of £700 lent to the said *Charles Everard* by the Plaintiff in August 1665, with the interest thereon from that time, and to have a discovery of the estate of the said *Charles Everard* come to the said Defendant's hands ; the said Defendant, by answer thereunto, set forth the whole estate of the said *Charles Everard*, and denied that he had any thing of *Everard's* effects to satisfy the Plaintiff, but that he had paid more to the creditors of the said *Charles Everard* than he had received, and that *Charles Everard's* estate was indebted to him £59 and upwards ; and further, that the estate of the said *Charles Everard* was not near sufficient to pay his debts by many thousand pounds, and the Defendant's counsel insisted that, before the first hearing of this cause, the letters of administration granted to the Defendant were repealed, and new letters of admin-

istration were granted to one *Charles Cornwallis*, Esq., to whom the Defendant had accounted in the prerogative court, and had delivered all the books of account and other things belonging to the estate of the said *Charles Everard* deceased, to the said *Charles Cornwallis*, so that the Defendant ought to be wholly discharged of and from all matters relating to the estate of the said *Charles Everard*, and of and from all attempts concerning the same; his Lordship thereupon, and upon full debate of the matter, and reading the proofs taken in the cause, and also upon reading the several orders made upon the former hearings, and upon due consideration of the whole matter, the Plaintiff's counsel not opposing the same, doth think fit and so order, that the matter of the Plaintiff's bill be and do henceforth stand clearly and absolutely dismissed out of this court, but without costs; and as touching the decree drawn up in this cause that was signed and enrolled, inasmuch as it appeared to his Lordship that the same was done by surprise as aforesaid, it is ordered that the said decree and enrolment be set aside and vacated, and that a *vacat*. be thereof made upon the record.—Reg. Lib. B. 1674, fol. 64. (Note: On vacating decrees, see, among other cases, *Anon.* 1 Vern. 131; *Price v. Solly*, Dick. 21; *Kemp v. Squire*, 1 Ves. Sen. 205; *Anon.* 1 Ves. Sen. 326.)

*Pigott v. Nower.* 7th December 1677, 29 Car. 2.

*Nels.* 183.—Effect of judgments confessed by an administrator *pendente lite*.

The Defendant was administratrix to her husband *Daniel Nower*, who being bound in a bond of £6000 for securing the Defendant's jointure, and another bond of £400, which is since satisfied, and being also indebted to the Plaintiff in £500, the Defendant confessed judgments upon the two first bonds. The Plaintiff exhibited a bill to be relieved; whereupon it was decreed at the Rolls, that debts by judgment ought to be satisfied before the Plaintiff; but if any judgments were confessed *pendente lite*, the Master ought to report that specially. He reports that there was a warrant to confess judgment for debts, which were of no higher a nature than book debts; that this warrant did bear date 29th January 1671; that the Plaintiff's *subpœna* was taken out 25th January 1671, returnable 29th January 1671, but the Plaintiff's bill was not filed till 1st February 1671; and he reports further, that when those judgments were acknowledged, there was an agreement with the cognizees that they should take but 12s. in the pound, and that the residue should go towards satisfaction of the rest of the creditors.

I conceived, 1st, that a judgment after the *teste* of the *subpœna*, and before the return of it, or before the bill filed, is a judgment *pendente lite*; for when the *subpœna* is returned, it is depending from the *teste* of it, as all other originals are, and so much was implied in the resolution of *Burgh v. Francis* [see next case]. It was objected, that it could not properly be said *lis pendens* till the bill filed, because till then the true cause of suit is not known, the *subpœna* being only *quibusdam certis de causis*; but I regarded not this objection, because every *subpœna* is as certain as a *latitat*, and yet the common law allows a *latitat* to bind from the *teste*, and the Chancery will favor a *subpœna* more than a *latitat* (Note: The objection may receive a different construction since the statute 4 Ann. c. 16, s. 22. And see *Anon.* 1 Vern. 318); nay, perhaps it will control the common law in case of a *latitat*, as I have said before in *Parker v. Dee* (1 Swans. 531).

2. Yet the bringing of a *subpœna* does not hinder an executor or administrator to prefer one creditor before another, by confessing judgment or pleading dilatory pleas, so he plead no false pleas, or make use of that fraud to delay, as *Parker v. Dee's* case was.

3. Had the Plaintiff sued at law, and fully administered had been pleaded, and then he had come into equity, the judgment acknowledged for book debts *pendente lite* would have been set aside, as they were in *Parker v. Dee's* case.

4. If a man foresee that *plene administravit* may be pleaded at law, and then come first into equity, as he may, why should not that avail him as much as if he had falsified such a plea? for a man is not bound to play an aftergame, and stay till he be hurt by a plea. It is no cause of demurrer to a bill for discovery of assets, that fully administered is not yet pleaded.

5. The judgments stood upon in this case are as bad as a false plea; for they demand the whole as due, whereas by agreement no more is to be paid than 12s.

in the pound ; for the other creditors, who have no judgments, cannot be let in for 8s. in the pound upon these judgments, unless the judgments were acknowledged upon a special trust for them ; which before it be determined against them, they ought to be made parties.—Lord Nottingham's MSS.

Burgh v. Francis. 9th December 1673, 25 Car. 2.

[Followed, *Ross v. Army & Navy Hotel Co.*, 1886, 34 Ch. D. 43.]

*Rep. temp. Finch*, 28 ; *Nels.* 183 ; 1 P. W. 279 [1 Eq. Ca. Abr. 320].—Mortgagor compelled, under the covenant for farther assurance, to supply a defect in a mortgage, against judgment creditors.

A mortgage in fee was defective for want of livery ; the heir after the death of the father offers to pay the money, but upon view of the defect in the deed, retracts, and then is sued by his father's creditors as heir, and pleads *riens præter* the mortgaged lands ; so the creditors by bond have judgments which relate to the first day of *Hilary* term 1670, but in truth were after the *teste* and service of a *subpœna*, though before the return of it. I decreed the heir to make a conveyance to the mortgagee according to his father's covenant for further assurance, and that he should hold, till redemption, discharged of those judgments ; wherein I did not rely upon the legal notice of *lis pendens*, but held the heir in this case to be a trustee of the land descended, which was charged with the equity of the mortgage, but could not be incumbered by the heir ; for a purchaser without notice of the trust may be free, but an incumbrance is not like a sale.—Lord Nottingham's MSS.

(2) *Morrice v. The Bank of England*, *Ca. temp. Talb.* 217 ; 2 Bro. P. C. ed. Toml. 465 ; 10 Ves. 37. For a fuller report of Lord Talbot's judgment *vide post*, Appendix [3 Swans. 573]. *Martin v. Martin*, 1 Ves. Sen. 211. *Douglas v. Clay*, *Dick.* 393 ; 10 Ves. 40. *Brooks v. Reynolds*, 1 Bro. C. C. 183 ; *Dick.* 603. *Goate v. Fryer*, 3 Bro. C. C. 23 ; 2 Cox, 201. *Hardcastle v. Chettle*, 4 Bro. C. C. 163. *Kenyon v. Worthington*, *Dick.* 668 ; 10 Ves. 40. *Paxton v. Douglas*, 8 Ves. 520. *Gilpin v. Lady Southampton*, 18 Ves. 469. *Farnell v. Smith*, 2 Ball & Beat. 337.

(3) *Cleverley v. Cleverley*, cit. 8 Ves. 521. *Paxton v. Douglas*, 8 Ves. 520. *Gilpin v. Lady Southampton*, 18 Ves. 469.

BOUGHTON v. PIERREPOINT. May 15, 22, 1819.

A motion to suppress the depositions of witnesses examined on behalf of the Defendant, after a conversation by him with one of the Plaintiff's witnesses on the subject of his testimony, refused, the conversation not having been communicated to his solicitor before the Defendant's interrogatories were prepared ; but without costs ; communications between witnesses and parties being disapproved.

A motion was made, on behalf of the Plaintiff, for the Defendant to shew cause why the deposition of *William Hopkinson*, and, all other depositions taken since the 3d of May 1819 before the examiner in this cause should not be suppressed, or why the examiner should not be ordered not to deliver out the same, or any copy thereof ; and also why the Defendant should not be restrained from examining any other witnesses in this cause.

In support of the motion, the solicitor of the plaintiff made an affidavit, stating (in addition to some alleged neglect of the defendant's solicitor to procure the attendance of his commissioners for the examination of witnesses), that *John Ullett* was a material witness examined on the part of the Plaintiff ; and that the deponent had been informed by *Ullett*, since his examination, that the Defendant came to *Ullett's* house, shortly after the execution of the commission, for the purpose of conversing with him upon the evidence given by him, and of learning the nature and substance thereof ; that *Ullett* informed the deponent, that, not knowing there was any impropriety in his so doing, he acquainted the Defendant with the whole tenor and substance of the evidence which he had given upon the execution of the commission, and that the Defendant expressed himself [551] to be much vexed at the nature thereof, and told *Ullett* that it was very different from what the Defendant had always considered *Ullett* would give, and that he would obtain a fresh commission for the examination of witnesses, and should expect *Ullett* to

attend it, and be examined again ; and that the Defendant particularly inquired of *Ullett* the names of the other witnesses who were examined on the execution of the commission ; that upon receiving this information from *Ullett*, the deponent asked him to make an affidavit thereof, but could not prevail upon him so to do, although he declared that it was strictly true, and that he would swear it, if compellable ; but he intimated to the deponent that he was a tenant of the Defendant, renting a farm under him, and that although he would speak the truth if legally called upon, yet that he did not like to offend the Defendant by making any voluntary affidavit.

In opposition to the motion, the solicitor of the Defendant made an affidavit, in which (after exculpating himself from the alleged neglect) he stated, that *Ullett* was a tenant of the Defendant, and a material witness in his behalf, and had frequently, previously to the day on which he was examined, declared to the Defendant, and also to the deponent, the evidence which he intended to offer on behalf of the Defendant ; and on the morning of the day of examination *Ullett* called on the deponent, and informed him that he had been summoned to give evidence on behalf of the Plaintiff, at which the deponent expressed his surprise, but said nothing more : that the deponent had not since held any conversation with *Ullett* respecting the cause, or his evidence therein, or any matter relating thereto, and had not in any manner interfered with any of the witnesses of the Plaintiff, nor in any manner, directly or indirectly, endeavoured to obtain any information of the [552] nature of the evidence given by them, nor was he acquainted with the evidence given by the Plaintiff's witnesses on the execution of the commission, or any thing relating thereto ; that he had had no communication with the Defendant respecting the evidence given by *Ullett* under the commission, on the part of the Plaintiff, nor did the Defendant or any other person inform or communicate to the deponent, the nature and substance of the evidence of *Ullett*, or of any other witness of the Plaintiff.

The *Solicitor-General* [Sir Robert Gifford] and Mr. *Pepys* for the motion. It is an established rule of courts of equity, that the contents of depositions shall not be disclosed before publication ; that no party shall be allowed to examine witnesses, who knows what the witnesses against him have deposed. The Defendant having obtained from a principal witness for the Plaintiff the substance of his testimony, proposes to examine witnesses in contradiction.

They cited *Geast v. Barber* (2 Bro. C. C. 1), and *Ridley v. Obee* (3 Pri. 26).

Mr. *Heald* and Mr. *Roupell* against the motion. No order of court restrains witnesses from disclosing their testimony, nor do they take an oath of secrecy ; the disclosure is usual, and often necessary for the proper conduct of the cause.

The *Lord Chancellor* [Eldon]. I know no order prohibiting witnesses from communicating their testimony ; but cases may arise in [553] which the Court would interfere. Even if there were an order, I should not suppress depositions on an affidavit of mere information ; but such an affidavit requires an answer.

An affidavit was made by the Defendant, stating, that he was absent from *England* in *August* when the commission was executed ; that shortly after the commencement of the suit, and before he put in his answer, he had a conversation with *Ullett*, a considerable farmer there, but who occupied a few acres of land only belonging to the Defendant, regarding the situation of the land in the pleadings mentioned, at which time *Ullett* informed the Defendant that a subdivision fence which runs through a part thereof had not been made until seven years or thereabout after the inclosure of the common and waste ground of *R.* and *B.* ; that *Ullett* did not then inform the Defendant that such fence had been made by *Ullett* at the expense of the then owner of the lands, but the Defendant understood and believed that the same had been made by *Ullett* merely as a tenant's hedge, and for the convenience of his own occupation ; that in *October* last, the Defendant accidentally met *Ullett* upon the high road, when *Ullett* stopped the Defendant, and without any allusion being made by the Defendant to the cause or the matters in question therein. *Ullett* voluntarily stated to the Defendant that there had been a meeting at *Stamford* since the Defendant's absence from *England* ; that the Defendant not being informed of the issuing of the commission for the examination of witnesses, inquired of *Ullett* the nature of the meeting, and what persons attended it ; that *Ullett* then mentioned the names of some persons who had attended the

meeting, and also informed the Defendant that he had been subpoenaed as [554] a witness by the Plaintiff to give evidence touching the subdivision fence upon a part of the estate; whereupon the Defendant said to *Ullett*, of course you have given them the same information respecting it as you have previously given to me; that *Ullett* immediately replied, they wanted me to say that the fence was a substantial one, but I told them I could not say any such thing, but that it had been made seven years after the inclosure, and that I would not have taken the land unless a subdivision fence had been made; and *Ullett* also informed the Defendant, that he stated to the commissioners that he was in consequence permitted to make the fence by the then owner, and to deduct the expenses of making it out of his rent; that he considered that the statement made by *Ullett* to the commissioners varied in some measure from the account which he had formerly given to the Defendant, and the Defendant mentioned to *Ullett* the difference between the statements, and remarked to *Ullett* that he did not consider the variation to be of any importance in the issue of the suit, yet that he was desirous of *Ullett* mentioning the subject thereof to Mr. T., the Plaintiff's solicitor, or to Mr. H., the solicitor of the Defendant, and particularly to Mr. T., in order that no imputation might fall upon the Defendant from the apparent difference between the statement, regarding the hedge in the Defendant's answer, and the evidence of *Ullett*; that he never had been in the house of *Ullett* since the commencement of the suit, nor had at any time since the execution of the commission, except as before stated, spoken to or conversed with *Ullett* respecting the evidence which he had given in the cause, or with any other person or persons who have been examined as witnesses on behalf of the Plaintiff, or with any other persons whomsoever, touching the evidence given on behalf of the Plaintiff; that *Ullett* had not at any time informed the Defendant [555] of the tenor and substance of the evidence which he had given under the commission other than as before mentioned; and the Defendant denied that he ever told *Ullett* that the testimony which he had given on behalf of the Plaintiff was different from what the Defendant had always considered *Ullett* would give, save as before mentioned; that he never said to *Ullett* that he would obtain a fresh commission for the examination of witnesses, and should expect *Ullett* to attend and be examined again; he denied that he inquired of *Ullett*, save as before mentioned, the names of the other witnesses who were examined on the execution of the commission; and said, that being ignorant of the issuing of any commission for the examination of witnesses, the Defendant was induced to make the inquiries of *Ullett* from curiosity, and not with a view of availing himself thereof, for any purpose in the suit; and that he had not at any time communicated to the said Mr. H. what passed between *Ullett* and the Defendant, nor had he spoken to or communicated with any other person respecting what so passed, until he gave instructions for preparing this affidavit.

The *Lord Chancellor* [Eldon]. I think that this affidavit is satisfactory: The motion is founded on the information of *Ullett*, who makes no affidavit. The principal question in the cause appears to relate to a subdivision fence. The Defendant states a conversation with *Ullett* which was natural, *Ullett* being his tenant, and competent to give him information. On the Defendant's return from abroad, a farther communication takes place between him and *Ullett*, the particulars of which he states, and he expressly denies the most important suggestions in the affidavit on which the motion proceeds: and concludes [556] with a positive denial of having communicated what passed to his solicitor, or to any other person.

It would be too much, on such an affidavit, to exclude the Defendant from examining witnesses on interrogatories prepared by his solicitor, to whom no communication of the conversation with the witness had been made; at the same time it would be better for parties not to communicate with witnesses. I dismiss the motion, but without costs.

Mr. *Heald* and Mr. *Roupell* applied for the costs of the motion, which they represented as novel, and founded in misapprehension of the practice.

The *Lord Chancellor*. I refuse costs, because I think it important to prevent these communications between witnesses and parties.

JOHN SPILLER and WILLIAM SPILLER, *Plaintiffs*; HENRY SPILLER, ROBERT BUNSCOMBE, and HENRY WAKELY, *Defendants*. June 30, 1819.

[See *London & County Banking Co. v. Lewis*, 1882, 21 Ch. D. 491.]

Injunction to restrain the vendor of copyhold premises, after delivery of possession and receipt of part of the purchase money, from surrendering them to persons other than the purchasers.

In November 1816, the Plaintiffs and *Henry Spiller* signed an agreement for the sale to the Plaintiffs of certain copyhold lands, the property of *Henry Spiller*, held under the honor of *Taunton Dean*, in the county of *Somerset*, at the price of £900. Possession of the premises was delivered to the Plaintiffs, and £300, part of the purchase money, were paid, the remainder being payable upon a surrender; and the Plaintiffs, accompanied by the vendor, applied to the deputy steward of the manor for the purpose of obtaining a surrender, but were informed by him that the steward was dead, and that he could not take the surrender until he had received an appointment from the new steward. *Henry Spiller* afterwards becoming involved in pecuniary embarrassments, executed a conveyance and assignment of all his property, real and personal, to the other Defendants as trustees, and refused to surrender the copyhold premises to the Plaintiffs. The bill prayed specific performance of the agreement, and an injunction to restrain *H. Spiller* from surrendering the copyhold premises to the other trustees.

A motion was now made, on certificate of bill filed, and affidavit, for an injunction. *Mr. Buck* for the motion.

The *Lord Chancellor* [Eldon]. The Plaintiffs are, under the circumstances, entitled to an injunction; but I wish it to be understood as my opinion, that, in general, on a bill for the specific performance of an agreement to sell, the Plaintiff is not entitled to restrain the owner from dealing with his property: a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed. (See *Echlin v. Baldwin*, 16 Ves. 267. *Curtis v. The Marquess of Buckingham*, 3 Ves. & Bea. 168.)

"His Lordship doth order that an injunction be awarded to restrain the Defendant *Henry Spiller* from surrendering the copyhold premises to the Defendant *Robert Bunscombe* and *Henry Wakely*, until the said Defendants shall fully answer the Plaintiffs' bill, or this Court make other order to the contrary."—Reg. Lib. B. 1818, fol. 1243.

[55£] *MORRIS v. CLARKSON. Rolls. June 1, July 14, 20, 1819.*

1 *Jac. & Walk.* 604, n.—The purchaser of a copyhold estate, devised subject to payment of debts, in trust for sale, and sold, during the infancy of the heir, under the usual decree is not entitled to have a portion of the purchase money retained in court, as a provision for defraying the expense of the fine which would become payable on the death of the heir before a conveyance.

*Samuel Morris* by his will, in the first place, directed all his just debts and funeral expenses to be fully paid and satisfied by his executor; and, after a specific bequest of his household furniture, gave and devised to his executor *James Clarkson*, his heirs, &c., all the testator's copyhold, leasehold, and other estates, and all the residue of his effects, upon trust, within six months after his decease, to sell the same, and to divide the money arising from the sale among the testator's sons and daughters.

The testator died in 1807, seised of a copyhold estate of inheritance which he had not surrendered to the use of his will. A suit having been instituted against the heir of the testator, and his executor, for executing the trusts of the will, and, on the death of the heir, having been revived against his infant daughter *Amelia Morris*, the heiress of the testator, on the 16th of May 1808, the following decree was pronounced: "His Honor doth declare, the will of *Samuel Morris*, in the pleadings named, well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, and doth order and decree the same accordingly; and the said testator not having surrendered the copyhold estate devised by his will, his Honor doth declare that the defect of such surrender ought to be supplied, and



it is ordered that the Defendant *Amelia Morris*, the infant, be admitted to the said copyhold estate ; and it is ordered that when she shall attain her age of [559] twenty-one years, she do surrender the same to the use of the will of the said testator." And, after directing the usual accounts of the testator's personal estate, and of the rents and profits of his leasehold and copyhold estates, the decree proceeds thus : " And it is ordered that the said testator's leasehold and copyhold estates be sold, with the approbation of the Master, to the best purchaser or purchasers that can be got for the same, to be allowed by the said Master ; and it is ordered that all proper parties do join in such sale as the Master shall direct ; and in order thereto, it is ordered that all deeds in the custody or power of either of the parties be produced before the Master upon oath ; and it is ordered that the Defendant *Amelia Morris* do also join in such sale of the said copyhold estate, when she shall attain the age of twenty-one years, unless she, on being served with a subpoena to show cause against this decree, shall, within six months after she shall have attained her said age, show unto this Court good cause to the contrary ; and in the mean time it is ordered that the said purchaser of such estates do hold and enjoy the said copyhold estate as against the said *Amelia Morris* and her heirs ; and it is ordered that the purchase money be paid into court," &c.—Reg. Lib. B. 1817, fol. 801.

The copyhold estate was sold according to the decree, the purchase money paid into court, and the purchaser admitted into possession on his own petition.

The legatees now petitioned to have the fund in court paid out and distributed. It was insisted on the part of the purchaser, that a sufficient sum ought to be left in court to indemnify him from payment of the additional fine, which would become payable if *Amelia Morris*, the infant, should die under age.

[560] Sir A. Piggott and Mr. Roupell for the petitioners.

Mr. Barber for the purchaser.

July 14. The Master of the Rolls observed, that it was a very general and important question, whether in judicial sales before the Master, the purchaser can retain the money in court and prevent the distribution of it, because the heir is an infant not competent to convey the legal estate ; and, not having been referred to any authorities on the subject, he desired that the case might be again argued before him by one counsel on each side.

July 20. Mr. Barber for the purchaser, cited *Noel v. Weston* (Coop. 138), where one of the necessary parties to the conveyance of an estate being absent beyond the jurisdiction, the Lord Chancellor would not compel the purchaser to accept the equitable title, but allowed him the option of abandoning the contract. Here the estate being copyhold, if the infant should die, the purchaser cannot compel her heir to be admitted, and by default of admission a forfeiture will be incurred, *Clayton v. Cooke* (2 Atk. 149). At least admission cannot be compelled without payment of the fine ; an expense with which the purchaser certainly ought not to be charged. In the case of freehold property, the heir being a mere trustee, may be compelled to convey ; there is no third party interested, as the lord here, nor any expense of a fine.

It may happen that several deaths of successive heirs may take place before the purchaser can be admitted, and on each death the lord will be entitled to a [561] fine. The purchaser here, however, will be content with impounding a sum sufficient for one fine. He cited also *Grant v. Astle* (Doug. 722).

Mr. Roupell for the petitioners. The objection, if valid, would prevent the distribution of any part of the purchase money ; for it is possible that the whole may be exhausted by successive fines. The purchaser here has all that he bargained for ; and, according to the established practice on judicial sales of the estates of infants, must take the estate under the decree to enjoy during the infancy. *Chandler v. Beard* (1 Dick. 392), and the case under Lord Waltham's will (*Sugden's Law of Vendors*, 318. The remaining arguments in support of the petition may be collected from the judgment).

Mr. Cooper, for the heir, cited stat. 9 G. 1, c. 29, enabling the lords of manors to obtain payment of fines during the infancy of the heir, by the effect of which in this instance, not only was the legal estate outstanding, but the equitable estate might be charged with an incumbrance.

The Master of the Rolls [Sir Wm. Grant]. I have bestowed considerable time and attention in the examination of this question, but have not been successful

in my search after authorities on the subject. It is necessary, therefore, to proceed upon principle, and decisions in analogous cases.

The facts of the case are, that the estates of which the testator died seised in 1806, having by his will charged them with the payment of his debts, were, by [562] the decree pronounced in 1808, directed to be sold. He left his eldest son, *Samuel Morris*, his heir at law, an adult, and if the suit had proceeded to maturity during his life, no difficulty could have arisen. After his death, in 1807, the suit was revived against *Amelia Morris*, his only child; and by the decree of *May* 1808, the defect of surrender of the copyhold was supplied, and a sale was directed in the usual terms. (3 *Swans*. 558.)

It appears that the first sale was made in *April* 1809. The biddings were afterwards opened, and a resale took place in *July* 1809. The advertisements announced that the sale was under the decree of the Court, and it was effected at the public sale-room. The present purchaser was afterwards, at his own instance, substituted for the highest bidder at the sale. It is evident that the purchase was made with perfect knowledge that the sale was a judicial sale, under a decree of the Court; and at that very time a receiver was in possession of the premises. The purchaser had full notice of the decree, and it must be supposed that he was acquainted with all its contents; he had ample opportunity of becoming acquainted with them. He must be considered to have known that the estate which he purchased was the copyhold estate of an infant, who was to convey at twenty-one; and in the mean time the purchaser was to hold and enjoy under the direction of the decree.

On the 20th of *July* 1813, the purchaser obtained the Master's report of his being the best bidder, and afterwards the confirmation of that report, knowing as he must have done, that till that confirmation he was not absolutely fixed as the purchaser. He then applied for liberty to pay in the purchase-money, and to be let into [563] possession, and declared himself satisfied with the title. He accordingly obtains possession; and all this is done with full notice that the title was of an imperfect nature, and that the legal estate could not be immediately obtained.

It is after this series of proceedings, that in the next stage, when the fruit of the decree is sought to be obtained by the application of the purchase-money to the purposes to which it was destined, the objection is for the first time taken by the purchaser, that he may eventually incur the risk of the expense of an additional fine. If the infant should die under age, there will be a necessity for the next heir to be admitted, and upon that admission a fine must be paid. There may thus be several successive deaths and several fines; and the danger, therefore, is not limited to the amount of one fine only, but of indefinite extent, and a considerable sum may be exhausted. The purchaser will never be free from hazard till some adult heir has been admitted and surrenders it to him. In these circumstances, the purchaser insists that, to the extent of one fine at least, the purchase-money ought to be compounded.

In considering this question I shall first advert to the case of freehold property, and then inquire whether the same rule extends to copyhold.

On the sale of a freehold estate, the property of an infant heir, the purchaser may be subject to additional expense and inconvenience. Some time may elapse before he obtains a marketable title. The infant heir at law may die during minority, and the legal estate may descend to a feme covert, in which event it would become necessary to incur the expense of a fine, or to a [564] person beyond the jurisdiction, from whom a conveyance could not be compelled; or it may escheat for want of heir, and difficulties may arise in obtaining a grant from the crown. Yet, although, as between party and party, it would be unreasonable to subject a purchaser to this contingent expense and inconvenience, it is admitted that such is the practice in the case of a judicial sale of freehold estate; and the practice is founded on the necessity of it for accomplishing the purpose of the sale, and administering the estate of the deceased, and providing for the payment of creditors. It is a known exception to the general rule which protects a purchaser from paying the purchase-money until he has obtained a conveyance.

A judicial sale is regulated by peculiar principles. It takes place under the guarantee of the Court, and it is upon the direction in the decree to hold and enjoy that the purchaser relies. To the inconveniences which have been mentioned, the transaction having been completed by the confirmation of the Master's report, the

purchaser is not permitted to object ; because he purchased with a full knowledge of his situation, and pays a price which is regulated by all the circumstances of the sale.

The established course of the Court, on sales of freehold property, is to direct the immediate distribution of the purchase-money ; not a single instance can be found in which any portion has been sequestered. In *Blatch v. Wilder* (1 Atk. 420) a similar decree was made as in the present case ; the same doctrine is found in *Uvedale v. Uvedale* (3 Atk. 117).

[565] It appears, therefore, to be the constant practice of the Court to distribute the purchase-money *instantly* ; and of this practice the purchaser, as it was said by Lord Eldon in *Noel v. Weston* (Coop. 138), has no reason to complain, because he purchases with notice of the infancy of the heir, and offers a proportionate price. The rule and the reason are equally applicable to sales of copyhold estates.

If it had been stated to the purchaser before the sale, that the money was to be immediately distributed, although the infancy of the heir prevented an immediate conveyance to him, could he then have urged this objection ? Though that statement was not made *totidem verbis*, yet he bought with full notice of the fact, and it cannot be expected that the Court should now for the first time relax its rule. The very object of the decree, the payment of the debts, would be frustrated by detaining the money. Suppose infancy after infancy or absence from the kingdom ; there would be no limit to the suspension of the benefit of the sale for payment of the debts ; and this in favor of a purchaser who bought with notice of the fact of infancy, and of the established course of proceeding. There is inconvenience on both sides, but a change in the practice of the Court would introduce greater evils than it would prevent.

The rule being thus settled in judicial sales of freehold property, the question is, whether it applies to sales of copyhold ? The risk and the inconvenience are certainly greater ; the necessity of admittance, and the liability to a fine on being admitted, are peculiar to that species of property. The effect of the rule is to impose on the purchaser the obligation of paying the fine, without [566] which he could never procure a surrender and admittance. Upon that payment the heir may, under the decree of the Court, be compelled to be admitted, and to surrender. It is, therefore, a question of expense. In the case of copyhold the expense may be greater ; but that can never afford a practical distinction : the principle applies to both. The purchaser bought with notice. He certainly incurred the hazard of paying an additional fine, if the infant dies before admission ; but on the other hand, if he himself should die in the mean time, the fine that would have been payable if he had been admitted will be saved. In this respect there is risk against risk ; and if the life of the infant is better than this, the advantage is on his side. But in all events he has that which he bought.

The objection is properly an objection to title. It was so alleged in the case under Lord Waltham's will (*Sugd. Law of Vendors*, 318), and was there overruled. Here the purchaser has accepted the title, and what right can he have after that to claim indemnity against a risk of which he had notice before acceptance ? If dissatisfied with the title, he should have objected to it. He cannot both hold possession of the estate and reserve a part of the purchase-money as a guarantee against further contingencies. In the ordinary case between vendor and vendee, the purchaser might, as in *Noel v. Weston* (Coop. 138), have the option of declining the purchase, but he cannot claim, while he takes the whole of the estate, to impound a portion of the price. A purchaser buying with notice has no right to such an interposition of the Court. It must be presumed that, in the price given for the estate, allowance was made for the infancy of the heir. How can the [567] Court now ascertain that fact, or determine what the estate would have produced had the heir been adult ?

On general principles, I think that no distinction can be made between purchases of freehold and of copyhold estates, but that both must rest on the same foundation. In both, the purchasers rely on the decree of the Court ; they must be supposed to be conusant of all the circumstances on which the decree is founded ; and they cannot interfere to stay the distribution of the purchase money among the creditors, for whose benefit the sale was ordered. I have no inclination to make a precedent of impounding part of the purchase money. The principle which could justify such a

measure would require the whole proceeding to be suspended until the purchaser obtained a marketable title.

The order directed distribution of the fund in court among the parties entitled under the testator's will.—Reg. Lib. B. 1818, fol. 1536.

The Princess of WALES v. The Earl of LIVERPOOL. June 29, 30. July 26, 1819.

[See S. C. with note. 1 Swans. 114, 580.]

After an order that the Defendants should have a fortnight's time to answer, after the Plaintiff had produced an instrument stated in the bill, fifteen months having elapsed without production, the Plaintiff was ordered to produce the instrument on or before a day named, and production not being made, the bill was dismissed with costs.

The promissory note described in the order of the 17th of March 1818 (1 Swans. 114, 580) not having been produced, the Defendants now moved that the bill might be dismissed with costs.

[568] The *Solicitor-General* [Sir Robert Gifford], Sir *Arthur Piggott*, and Mr. *Heald*, in support of the motion. Since the last proceeding in this cause, the time has elapsed which would entitle the Defendants, if they had answered, to dismiss the bill for want of prosecution. Under the order of March 1818, it was incumbent on the Plaintiff to enable the Defendants to answer, by making the production which that order requires, and which is the necessary preliminary of an answer. The want of an answer is, therefore, imputable to the Plaintiff; and this case, although the Defendants have not answered, is within the principle which entitles a Defendant, after answer, to dismiss a suit not duly prosecuted. The mischief which that principle remedies exists in the present case; the pendency of this suit prevents the administration of the assets of the Duke of *Brunswick*. The Defendants have filed a cross bill to which they have not obtained, nor possess any means of compelling, an answer.

Mr. *Martin* and Mr. *Shadwell* against the motion. An order so novel as that which has been pronounced in this case cannot be enforced by the summary process which the Defendants propose. The terms of the order were not mandatory on the Plaintiff, and imposed no peremptory obligation to produce the instrument. The Defendants should have required production within a limited time; not the dismissal of a bill which they have not answered. The Defendants have the option of answering, and may then compel the prosecution of the suit at the peril of dismissal, in the ordinary course. The order prayed would not much facilitate the administration of the assets; a new bill, which the Plaintiff may file immediately, will produce the same effect as the present. There has been no time for communication [569] with the Plaintiff since the service of notice of this motion.

The *Lord Chancellor* [Eldon]. This motion arises on a bill filed by her Royal Highness the Princess of *Wales*, stating herself to be a creditor of her late brother the Duke of *Brunswick*, against the Earl of *Liverpool* and Count *Munster*, as executors of the Duke, and praying payment out of his assets of a sum of money, alleged to be secured to her Royal Highness, by two different instruments described in the bill. Shortly after the institution of the suit, an application was made by the Defendants, in support of which Count *Munster* filed an affidavit, questioning the reality of the debt (which might be questioned without any imputation on the Plaintiff), and arguing on the nature and contents of the instruments, to the conclusion that there was no real debt; and stating, that for reasons there assigned, the executors could not prepare their answer till the instruments had been produced. It was then alleged, that the instruments were not in this country, and the application was, that the Defendants might not be compelled to answer the bill, until a certain time had elapsed after the production of the instruments required.

In one sense, undoubtedly, that application was novel; and as no duty is more imperative on an *English Judge* than this, that he shall look on all persons suing in his court merely as subjects of his Majesty, the motion could receive no other consideration than must have been given to a similar motion in any other case of the same nature. I remembered no instance of such a motion; and it was then stated to me, and the statement was supported by my own recollection of the practice,

that it is not usual, on motion, to require a plaintiff, by [570] the production of documents, to aid a Defendant in the preparation of his answer. I satisfied myself on principle, and the authority of text writers, that where a Defendant pledges himself by his oath, assigning reasons fairly affecting the judgment of the Court, that he could not answer the bill, as it is his duty to answer it, as well for himself as for those in whose behalf he is entrusted with the distribution of the property, unless the Plaintiff produces instruments stated in the bill, he is entitled to compel from the Plaintiff that production which was necessary to the preparation of a full answer; and I had the less difficulty in the present case, because the instrument of which production was required was one of the securities on which the demand was made, and the Court would not make a decree for payment of that demand, until all the securities were delivered up, and would not allow a duplicate to remain in the hands of any but the Defendants. On this principle the order was made.

It has been mentioned, and I refer to it merely for the sake of stating that I pay no particular attention to it, that the executors have filed a cross bill to compel a statement of the nature of the demand and the securities, and that no answer has been put in; but on that I do not lay much stress in my view of the case.

When I have stated that I thought it my duty to produce the order, in the absence of precedent, though I explained the principle on which I proceeded, it follows that I cannot state the practice of the Court relative to such an order. A motion arising out of an order which is justified, I think, by principle, but not sanctioned by authority, must itself be decided rather by principle than by precedent.

[571] The rule of the Court unquestionably is, that if the Plaintiff takes no step during three terms after the Defendant has placed himself in a situation to require the Plaintiff to proceed, the bill may be dismissed for want of prosecution. It is true that in this case the Defendants are not in the ordinary situation in which a Defendant applies for a dismissal of the bill; but the distinction between the two situations is not substantial; they are entitled to require the Plaintiff to proceed; and the question then is, whether the Plaintiff is not bound to proceed within the time, and under the circumstances, in the same manner as in the ordinary course?

At the same time, it must be recollected, that the want of a known rule of practice may have occasioned some mistake. I shall therefore order the instrument to be produced on or before the third seal, or the bill to be dismissed with costs; but with liberty to the Plaintiff to make, at the first or second seal, an application founded on affidavit, for an enlargement of the time. Considering the importance of this case as a precedent, I shall pronounce the order in that form.

*June 30.* The *Lord Chancellor*. I retain the opinion which I expressed yesterday, and which I think confirmed by the circumstance that the cross bill has not been answered.

The order, after reciting the order of *March* 1818, and an affidavit that the deponent on the 15th of *June* instant, with Mr. *R. W.*, the clerk in court for the Defendants, applied to Mr. *B.*, the clerk in court for the Plaintiff, and inquired of him whether the promissory note or instrument in writing bearing date [572] the 24th day of *August* 1814, in the bill and in the said order mentioned, was in the hands of Mr. *B.*, or had at any time since the date of the order been deposited in his hands; and that the deponent and Mr. *W.* were informed by Mr. *B.* that the promissory note or instrument in writing was not in his hands, and that it never had been produced or left with him since the date of the order; proceeded thus: "This Court doth order that the Plaintiff, Her Royal Highness *Caroline Augusta* Princess of *Wales*, do produce and leave with her clerk in court, on or before the third seal after this term, the promissory note dated, &c.; and in default thereof that the Plaintiff's bill be dismissed out of this Court, with costs to be taxed, &c.; but the Plaintiff is to be at liberty in the meantime to make an application to this Court, founded upon an affidavit, for farther time to produce the same."—Reg. Lib. B. 1818, fol. 1290.

*July 26.* The *Solicitor General* stated that no affidavit had been filed, and applied for an order that the bill might be dismissed.

The *Lord Chancellor* declared that the Plaintiff must have the benefit of the whole seal; but Mr. *Shadwell* intimating that no affidavit would be filed, an order was pronounced, dismissing the bill with costs.(1)

(1) The principle of the order for production by the Plaintiff of documents constituting the foundation of the demand, before the Defendant can be compelled to answer, seems to have been recognised, though not, under the circumstances, applied, in *Pickering v. Rigby*, 18 Ves. 484, and *Micklethwait v. Moore*, 3 Mer. 292.

[573] APPENDIX.

MORRICE v. The Bank of ENGLAND. *In Chancery*. Mich. 1736.

[See *Dolland v. Johnson*, 1854, 2 Sm. & G. 303.]

3 Swans. 542.—The priority of creditors by decree over subsequent judgment creditors, established.

The Lord Chancellor began by saying that it would be more agreeable to natural equity and justice to have the assets distributed *pro rata*, as one debt is as much a debt in conscience as another; and that he could have been glad that all the creditors would have had temper enough to consent to so equitable a rule, but that not being consented to by some creditors who thought they had the advantage, he considered it a defect in the law, that it should not be in the power of either a court of equity or a court of law to enforce a distribution of assets *pro rata*, among the creditors, without consent. This Court, in the distribution of legal assets, follows the rule of law that allows a preference to creditors who have made use of legal diligence in getting in their debts. Here, courts of equity and courts of law have concurrent jurisdictions; a legal creditor may bring a bill for a discovery of assets; and the more ancient way might be to bring a bill for a discovery alone, but now bills are brought for a discovery and a satisfaction too: only in a court of equity there is this advantage, that the parties may have the oath of executor with respect to the distribution of [574] assets, which cannot be had at law, and an account may be more conveniently taken in this Court; and in cases of debt or account against an executor, this Court has a concurrent jurisdiction with courts of law; but if this Court should not follow the same rules in the administration of legal assets as courts of law, there would be the utmost confusion, and executors would not know how to act. In the present case, these assets are legal not equitable.

The 1st question will be, whether any of these creditors who stood upon an equal footing at the death of Mr. *Morrice*, have gained a preference by what has happened since?

2d. What will be the consequence?

3d. Whether the executrix can have any, and what relief in this Court?

In the present case some are simple contract creditors, others are creditors by judgment, and others by decree, and the general question which has been so much spoken to at the bar is, whether a decree of this Court is equal to a judgment at law? And in the consideration of this point several gentlemen have gone into the antiquity and extent of jurisdiction of the several courts of equity and law; but questions of this kind are, I think, greatly to be avoided, unless they are required to give some light to the matter in dispute. The contentions that have been between the several courts are now, happily, laid asleep, and I have no desire to revive them: but I cannot see why a decree of this Court is not equal to a judgment at law. This Court does not review judgments, nor does a court of law review decrees; yet when a judgment at law is obtained, and the party who ob-[575]-tains it would make an ill use of it against conscience, this Court will then interpose. Judgments are in their nature equal till they are reversed, in what court soever they are obtained; a judgment in a court of record by grant, is equal to a judgment in a court of record by prescription; and a judgment in a court of piepoudre is equal to a judgment in any of the superior courts.

This is an evident demonstration, that, in consideration of law, it is not the antiquity or extent of jurisdiction of any court that will determine the rank wherein judgment creditors may stand; but in decrees and judgments the obligation upon the party to perform is the same. A judgment of law is executed by a writ of *capias ad satisfaciendum*; and cannot a man in this Court be taken upon an attach-

ment, for not performing a decree? A judgment at law may be executed by a *fieri facias* or *elegit*, given by statute. So may a decree of this Court by a sequestration; only in this respect this Court is more effectual in its execution than a court of law; for if the party remains in prison for non-performance of a decree, his goods and lands may be sequestered at the same time; but at law, the party having once made his election to take the body in execution, could not have recourse to the land.

Some decrees in this Court bind lands, as in *Lord Carteret v. Paschal* (3 P. W. 197; 2 Bro. P. C. ed. Toml. 10), which case, as far as is material to the present, is as follows. The lady, by articles before marriage, was entitled to an annuity of £500, out of the intended husband's estate, but the husband died without executing the articles, leaving several large incumbrances on his estate. After his death the lady brought her bill against the heir to compel an execution [576] of these articles, and the several incumbrances being before the Court, it appears that the estate was so entangled that she could not have a settlement made in pursuance of the marriage agreement; therefore it was decreed, that the lady, if she was minded, might redeem the incumbrances, and that she should hold the land till she should be satisfied what she should advance in paying off the securities, and all arrears of her annuity, and that she should be let into possession of the lands; and it was referred to the Master to take an account of the debts, &c. But before the Master had made his report she married Dr. *Herbert*, who assigned the profits to a third person, and he dying, and she too some time after, then the dispute lay between the administrator of the wife and the assignee of the husband; and the decree was to hold till her representative was satisfied; which was similar to the estate or interest of a tenant by *elegit*.

This shews that decrees of this Court are similar to executions of law. Decrees and judgments are equally conclusive upon the parties till reversed, and therefore I cannot see why they should not stand on the same footing, though I am at the same time apprised, that the uniform judgments of courts of law have been otherwise. If an action of debt be brought upon a bond, a decree of this Court is not pleadable; this opinion hath obtained for law, but this Court hath been of another opinion with regard to its own decrees. In the case of *Searle v. Lane* (2 Vern. 37), this Court, in justice to its own decrees, was of opinion that a decree was equal to a judgment at law, and the filing a bill in this Court equal to the filing of an original at law, to prevent the alien-[577]-ation of assets. So, in *Shafto v. Powell* (3 Lev. 355), in the Exchequer, which was said at the bar to be an impartial Court, as being both a court of law and equity; *Bishop v. Godfrey* (Prec. in Cha. 179), *Sims v. Murray*, and *Harding v. Edge* (1 Vern. 143). And it is not to be wondered at that this Court hath found means to enforce its own decrees. If this Court hath a jurisdiction, a decree must have the same lien on the assets as a judgment; if it should be otherwise, either the parties must be ruined, or a subsequent judgment must in effect be a reversal of a former decree. The case of *Joseph v. Mott* (Prec. in Cha. 79) is in point; that a prior decree must be preferred to a subsequent judgment. The case was, a man made his will, and died indebted to several persons by bond, more than his personal estate would pay. A bond creditor of the testator brought a bill against the executor to have a discovery and account of the personal estate, and satisfaction for his debt; at the hearing the executor made default, and there was a decree against him for an account and satisfaction out of the assets *nisi*. Before the decree was made absolute, another bond creditor of the testator brought an action of debt against the executor upon a bond, who, because he could not plead this decree at law, suffered judgment to go against him by default; and the account being carried on before the Master, the question before him was, whether he should allow this judgment in the account; and he being in doubt reported the matter specially to the Court for their direction. The Master of the Rolls was of opinion that the decree must be preferred; and it coming on to be reheard before the Lord Chancellor, he was of the same opinion.

[578] In *Abbis v. Winter* (1) the bill was brought by the bottomry creditors against the executor, and the contention was between creditors under two decrees; it [579] was held, that the executor was to be charged but once, and the creditors who had obtained the first decree were to be paid first, and that the executors were not [580] to be liable to the demand of the creditors further than the assets would extend. This confirms me in the notion that a decree binds the assets from the time

of [581] pronouncing it. There is a case mentioned by Mr. Green, of *Jones v. Bradshaw* (2 *Freem.* 153 ; 3 *Rep. in Cha.* 2 ; *Nels.* 74), 4th May 1661, where an executor had paid a sum of money, pursuant to a decree of this Court, and upon a plea of *plene administravit* they would not permit him to give that payment in evidence at law ; but the Court decreed that it should be allowed ; decrees and judgments, therefore, in the administration of legal assets, must stand on an equal footing ; that which is prior in time, be it a judgment or a decree, must be first satisfied out of the assets.

The next thing to be considered under this head is, what is said by the judgment creditors, that though in fact the decrees were prior in time to the judgments, yet the judgments having relation to the first day of the preceding term, must in contemplation of law be con-[582]-sidered to be signed on that day, and then they will be before the decree. But certainly this Court must attend to the truth of the fact ; into which even the courts of law may examine ; *Prodger's case* (*Sid.* 432), *Co. Litt.* 150, *Anon.* (*Gillb. Rep. in Eq.* 142). In the first case the Court interposed to prevent the doctrine of relation from working an injury ; and it is a maxim in law, in *fictione juris semper subsistit equitas*. Courts of law admit of relations to substantiate their own judgments, but do not admit of them when they become injurious. Why may not a court of equity do the same with regard to its own decrees ? Shall a judgment *ex post facto* by relation take away those very assets which before were bound by a decree ? It would be absurd ; and no fiction of law ought to be admitted to give priority among creditors. But it is said that these decrees were obtained *per fraudem*, and by collusion between the parties, in order to give an undue preference to such creditors as the Plaintiff chose to favour. Whatever is done by fraud is to be sure a nullity ; and nobody ought to be injured by it. It must be owned that Mrs. Morrice put in her answer before she was, by the rules of the Court, obliged to do it. That her answer is an admission of the bill ; that she appeared gratis without a subpoena to hear judgment ; and I could wish that the decrees had been obtained in a more adversary manner. But suppose these are decrees by confession, what will be the consequence ? Will the consequence be that fraud has been made use of in obtaining them ? When a judgment at law is confessed, is the confession of it evidence at law of a fraud ? Was such evidence ever allowed ? If not, why should a decree by consent be thought so ? And as this cannot be admitted as evidence of a fraud,

[583] 2dly. The consequence of all this is, that the demands of all creditors under the two decrees must be established, and that those who have performed the decrees may oblige Mrs. Morrice to perform them.

As to the third question, whether the executrix can have any and what relief, as Mrs. Morrice is bound to perform the decree, so also she is liable to the judgment, unless this Court interpose. It has been said, and it is true, that bills brought by executors that there should be a rateable distribution among creditors, though anciently allowed, are not now countenanced, the Court having no right to take away the preference that one creditor gains over another by his legal diligence ; besides such bills may be made use of to keep people out of their money : but in this case the executrix cannot be said to give preference, but wants to have it determined who hath gained a preference according to the rules of law and equity. Mrs. Morrice comes here for protection, and if this Court does not protect her, she will be liable to make a double satisfaction, first to pay the assets to the judgment creditor ; and it is certainly proper for the executrix to come to be protected by this Court when she finds herself embarrassed by yielding obedience to the decrees of it. But then it is said, on the other hand, that she hath brought herself into this dilemma, and therefore ought not to be relieved ; yet, with regard to the law, it must be owned that what she hath done is strictly legal, that is, that an executor might confess judgment to one, pay him, and plead that judgment in bar of another's demand ; and the original foundation for such a liberty might be given, to prevent an executor being liable to two demands, when the assets were sufficient to pay only one of them. By parity of reason, an executor may confess decrees. This Court hath never controuled [584] parties in that liberty, nor hindered the executor from retaining, if he insisted upon it. As this hath not been condemned in equity, what Mrs. Morrice hath done is neither contrary to the rules of law nor equity ; and though it had been much clearer had these decrees been obtained in a more adversary manner, yet as they are just debts, they must be paid according to their priority.

But then again it is said the Court will not take away the benefit of the law :



but that rule takes effect where the demands and the equities are of an equal value ; and in this case the debts were equal before the decrees, the creditors standing then upon an equal footing ; but as soon as the decrees were made the assets were bound ; as in *Taylor v. Wheeler* (Salk. 449 ; 2 Vern. 564), where a surrender of a copyholder in fee was void in law for want of a presentment, yet the surrender was a lien and bound the land in equity, though a defective conveyance. The equity of the judgment creditors is to be paid out of the assets. Mrs. *Morrice's* equity is to pay no more than so far as the assets will extend ; and as it is impossible for her to pay any more, and as the assets were first bound by the decrees, her equity must prevail against that of the judgment creditors.

Therefore an account must be taken of what is due to the several creditors, both by decrees and judgments, and also an account of what is due to the other creditors who have not obtained either decrees or judgments. An accounts must also be taken of the personal estate of *H. Morrice* come to the hands of the Plaintiff, or any other person for her use ; and let the same, together with what shall come to her hands thereafter, [585] be applied in the first place to pay what shall be found due to the several Plaintiffs under the decree of 25th *January* 1731, and then to pay what shall be found due to the several Plaintiffs under the second decree of the 2d *February* 1731 ; and after payment of what shall be found due upon the said decree, let the residue of the assets be applied to the payment of the several judgments according to their priority ; and if any thing should remain, to be paid in a course of administration. Lord *Colchester's* MSS.

(1) *Abbis and Others, Creditors of Winter v. Winter, the Executors.* 16th *July* 1733. Creditors under successive decrees, are entitled to payment according to their priorities.

*Winter* was a supercargo to *Buenos Ayres* ; the Plaintiffs creditors by bottomry bonds. The bill prayed discovery of assets and payment. The Defendants, by answer, admitted the bonds ; set forth an account of the estate, which was not near sufficient to pay the debts, and submitted to account.

The decree directed an account of assets, and of debts due to the Plaintiffs, and that they should be paid in a course of administration.

In *Moore* and others, creditors of *Winter*, the bill prayed an account and reference to Master ; and the decree was made 30th *July* 1731.

8th *June* 1732. The Master made his report in both causes, and certified the debts due to the Plaintiffs in both ; and the assets, the same to be paid to the Plaintiffs and their administrators ; but that the monies specified to be remaining in the Defendant's hands are the same estate of the testator which the Master had mentioned in his report of even date in a cause of *Moore v. Winter*.

2d *May* 1733. The executors took exceptions to both reports.

The Lord Chancellor [King]. At law, after an action is brought, executors cannot pay any debts of an equal nature ; it is no plea that he hath not assets *præter* sufficient to satisfy a debt of equal nature ; therefore, by suing out a writ, the Plaintiff obtains preference to all other creditors of an equal nature, and is to be paid before them. according to a legal course of administration ; serving a subpoena and filing a bill are equivalent in equity to writ and declaration ; and as equity follows the law, it must give the like preference to the Plaintiffs as an action doth at law to all debts of like nature. Therefore, the Plaintiffs having first filed their bill, as the decree is to be paid out of assets in the course of administration, are entitled to be paid before other creditors of an equal degree ; for that is the legal course ; and therefore the decree hath determined what is now disputed.

After a judgment by confession, an executor is ever excluded to say he hath not assets to pay that judgment ; neither can he set up any debts of what nature soever to postpone or hinder the Plaintiff from a satisfaction. The law gives no opportunity of setting up a debt of a superior nature to that of an inferior, except before a plea pleaded ; because the Plaintiff may reply *per fraudem*, &c., but could never otherwise controvert the debt ; and if a court of equity should give time for an executor after a decree to set up a debt, not only of a superior nature, but equal, which in no case by law can be done, it would open a large gap for frauds.

2d *May* 1733. Between *James Abbis, John Chanwell, Anthony Lubier, Mary Hanger* and *Elizabeth Hanger*, executrixes of *John Hanger, esq., Henry Lapostre.*

*John Saller, Thomas Lane, Robert Brooke, Thomas Saller, Thomas Claphamson, and Jonathan Hooper*, creditors of *Nehemiah Winter*, deceased, upon bottomry bonds, Plaintiffs; *Phæbe Winter*, widow, and *John Cook*, gentleman, executors of the said *N. Winter*, Defendants.

Between *Ambrose Moore*, esq., *Charles Brime, James Goodchild, John Merry, and James Farnaby*, creditors of the said *N. Winter*, deceased, on bottomry bonds, Plaintiffs, and the said *Phæbe Winter* and *J. Cook*, executors of the said *N. Winter*, and others, Defendants.

The matter of the several exceptions taken by the Defendants, *Winter* and *Cook*, to two several reports made in these causes by Mr. *Allen*, one of the masters of this Court, dated respectively the 8th of *June* last, coming this present day to be argued before the Right Honourable the Lord High Chancellor of *Great Britain*, in the presence of counsel for the said Defendants and Plaintiffs in both causes, and the first and second exceptions to both the said reports being opened, upon debate of the matter, and hearing an order of the 11th of *October* last for setting down the exception taken by the said Defendants in both causes to be heard at the same time; the decree in the cause *Abbis and others v. Winter and others*, dated the 16th day of *July* 1731; the decree in the cause *Moore and others v. Winter and others*, dated the 30th *July* 1731; the Master's report made in the cause *Abbis v. Winter*, dated the 8th of *June* 1733, and the schedules thereto; the objections taken by the Defendant to the said Master's report; the bill exhibited by the Plaintiffs, *Abbis and others*, against the Defendants; and the bill exhibited by *Sir John Eyles and others* against the Defendants, read; and what was alleged on both sides; His Lordship held the first and second exceptions to both the said reports to be insufficient, and doth order the same to be overruled: and the two third exceptions taken by the said Defendants to both the said reports being opened, and the said Defendants' third exception to the report made in the cause wherein the said *Moore* and others are Plaintiffs, being for that the said Master hath certified that the money reported to be remaining in the Defendants' hands, and to be liable to the Plaintiffs' demands in that cause, is the same money which he hath mentioned in his report made in the said *Abbis's* cause, and to be liable to the Plaintiffs' demands in that cause, whereas the said Master should have certified that the said money ought to be applied in satisfaction of what was reported due to the Plaintiffs in each of the said causes, the said money not being near sufficient to discharge what is found due to the Plaintiffs in the said other cause alone, which is prior to the cause wherein the said *Moore* and others are Plaintiffs, and by reason thereof the said Defendants are in danger of being doubly charged with the same sum, upon debate of the matter, and hearing the decree made in the cause wherein the said *Moore* and others are Plaintiffs, and *Winter* and others Defendants, and the report made in the cause wherein the said *Moore* and others are Plaintiffs, read, and what was alleged on both sides, His Lordship held the third exception taken by the said Defendants to the report made in the said *Abbis's* cause, to be insufficient, and doth order that the same be overruled; and held the third exception taken by the Defendants to the report in the said *Moore's* cause, to be sufficient, and doth order that the same do stand and be allowed; and that the Plaintiffs, *Abbis* and others, have the £5 deposited by the Defendants with the registrar, on filing the said exceptions to the report made in that cause, and that the Defendants do take back the £5 deposited by them on filing the exceptions to the report made in *Moore's* cause.—Reg. Lib. A. 1732, fol. 294.

#### COOK v. FOUNTAIN.(1)

The bill prayed that the Defendant might be compelled to deliver all the deeds, evidences, and writings concerning the estate of *John Cook* deceased, and that the Plaintiffs might be relieved against several actions at law brought, and distresses taken by the Defendant upon a rent-charge, and two leases of *F.* and *M.* granted to him by *John Cook*; and that the rent-charge and leases, and all other leases and estates made to him by *John Cook* might be surrendered and delivered up to be cancelled.

1st *July*, 27 *Car.* 2, 1672. In the case between *Cook* and *Fountain*, which was largely heard this day, the Defendant took two exceptions against the evidence of *Guavas* for a witness.

[586] 1. The suit was to avoid a rent-charge of £1000 *per annum*, and a lease of

*Farnam* royal, granted by *Cook* the testator on pretence of a trust : now *Guavas*, who would prove this trust, was an executor to *Cook*, and so endeavours to make this liable to debts : but this was overruled ; because the lease will not be assets however, for the legal estate being in a stranger upon a trust to attend the inheritance, the Chancery will not make this assets in equity ; but if such a term had vested in the executor, and so been assets in law, the Chancery would have severed the attendancy, and not taken away assets in law until debts paid, &c.

2. The lease had a covenant that Mr. *Fountain* should quietly enjoy, and there were six shillings and two-pence more to be paid to the king than Mr. *Cook* had reserved to himself to discharge it with, so there was a likelihood of damage to be made good by the executor ; but the executor having no assets beyond £4000 which he has paid out, this was overruled ; although it was replied that an executor without assets is liable to be sued, though not to pay ; for notwithstanding this objection he was heard at law.

Then it was further urged that *Guavas* sues *Fountain* in the Exchequer for all the money he received from the testator, and would make that a trust too ; to which it was answered, that this does not make him an incompetent witness, though it shows him to be an earnest one, unless he had recovered there, and then that money would be assets ; in the mean time six shillings and two pence *per annum* seem no such great matter as should bias the witness. Lord *Nottingham's* MSS.

24th May, 28 Car. 2, 1676. In the great case between *Cook* and *Fountain*, the Court did this day deliver their opinion.

[587] The Lord Chief Justice *North* began, and held the leases to be a trust ; for if they were intended as a bounty to Mr. *Fountain*, why were they not a present bounty in the enjoyment ? It is plain all the evidences of enjoyment went with Mr. *Cook*, and ought to prevail as evidence of a trust ; for the kindness between Mr. *Cook* that died and Mr. *Fountain*, rather fortifies than weakens the presumption of a trust ; for men usually trust them most whom they love best : uses at common law were nothing else but secret confidences ; but then it is observable that the law did not put the proof of the trust upon him who claimed the secret confidence, but it put the proof upon him who claimed the estate, to show for what consideration he held it, else a use did arise to the donor. The rent-charge, he said, stood upon other measures, for there a bounty was intended, and Mr. *Fountain* is not to be blamed that he did not sue for it in Mr. *Cook's* lifetime ; for to commence a suit against his benefactor had been ungrateful ; and the Plaintiff's counsel admits it was a gift at first, but would have it afterwards a trust to be discharged by other provisions ; wherein he distinguished what he believed from what he would advise ; he seemed to believe it might be so, for else he could not choose but wonder why Mr. *Fountain* never brought the rent to account, why Mr. *Cook* should be so very preposterous in his bounty, as thus to encumber his estate and his person, why *Fountain* made privy to all the diminutions of the security, why the letter to provide for *Andrew Fountain*, &c., did not mention the rent-charge, why the grand settlement did not expressly save it ; for it was a considerable question whether he, being a party to the conveyance, and taking an estate to uses, had not extinguished his rent-charge, though now it be adjudged that he has not ; why the money raised by sinking the value of the land charged, should be given to *Fountain*, [588] if it was not intended that the rent-charge itself should be dissolved into money ; why did *Fountain* in his answer in the Exchequer say *Cook* meant him £20,000, for it is natural to believe this a satisfaction ; why did *Fountain* send a complaining answer when Mr. *Cook* sent for the deed ; but this cannot well be examined, unless *Guavas*, who was Mr. *Cook's* executor, was party, and then if it should be made to appear that Mr. *Cook* intended to redeem it by the payment of £20,000, though Mr. *Fountain* did not intend it, yet surely he must refund the money to the heir, and cannot have it double ; why did not Mr. *Fountain* commence a suit in Mr. *Cook's* lifetime, that so *Cook's* answer might appear ? ("Note : This question *North* himself answered before."—Orig.) But if an account could be taken, and there were proper parties for it, lying still so long would be some evidence of an agreement to take a compensation for it.

Lord Chief Justice *Raynsford* agreed that the leases were a trust, and not a bounty ; for the grant of the rent-charge was presently after the father's death, and two years before the leases, when no cause of additional bounty appears : and

as to the rent-charge, he also agreed that it might grow up into a trust afterwards, if money was given in recompence; but that could not be examined now for want of apt parties.

I said, this case has long depended in court; it had great agitation when I was at the bar, and it has waited for judgment a great part of the time since I came to the bench. The deliberation has been very necessary, for there were once some hopes of a compromise, and when they ceased I appointed a rehearing before the two Lord Chief Justices now present, who were not here [589] at the first debate; and now it appears to be the greatest case in court. It is great in value, great in expectation, and greatest of all, in the consequence of it; it is a case of great variety in the proofs, and of very new circumstances; it is a case wherein the Court may be in danger of taking too much or too little latitude for the future, according to the event of this precedent. In short, it is a case so full of argument on both sides, and has been so elaborately pressed at the bar, that a man who shall err in his judgment, shall do it at least very excusably. In the delivery of my opinion, I shall endeavour to make it appear to you that all which has been said on each side, has been sufficiently considered and ruminated upon, as far as my meditations were able to carry it.

The matters in question are two, the leases, and the rent-charge; and the point controverted is, whether all, or any, or none of these, be in trust for the plaintiff, who is cousin and heir of the grantor? The Plaintiff contends for all; the Defendant would keep all: the truth lies between them.

1st. To avoid repetition of matter of fact, I will first take notice of such general proofs as go to *both* leases and rent-charge, and tell you my opinion of them; 2d, then I will observe the particular proofs and circumstances, wherein the leases and the rent-charge are not distinguished; 3d, lastly, I will state the several and clear differences between them.

The Defendant has taken pains to prove these things in general: 1st, that Mr. *Cook*, the grantor, had great kindness for the defendant, and a settled and constant intention to advance him; 2d, that there were great reasons for these intentions, and great merit in the Defendant and his father by many acts of friendship; [590] 3d, so great, that the Defendant tells him plainly in a letter, if you have given *Andrew* sixpence, he has gained you eighteen pence for it; and it is not hard to guess what was meant by that expression; 4th, he proves many kind letters and sayings of Mr. *Cook*; once to the Defendant's father, you need not take care of your son, I will provide for him; another to *Guavas Daubb*, your care in the settlement is, that if any trouble *Andrew*, his estate may be forfeited; and at another time he said, as *Andrew* has had part of the sour, so shall he have some part of the sweet: together with a multitude of fond and familiar letters; 5th, the continuance of this kindness, in a great measure, till within few days of his death; during all which time he continued Mr. *Cook*'s executor; and upon this account it is, that the Defendant excuses his not contesting with Mr. *Cook*, but suffering him to do several acts which carried with them the badge of ownership; 6th, and lastly, he has endeavoured to insinuate that Mr. *Cook* had no extraordinary concern for his next heir, but had always an extraordinary care to conceal his bounty.

These things make a mighty show on the Defendant's side, especially when the weight and eloquence of the counsel at the bar come to declaim upon them; but I, for my part, have little or no regard of any such kind of proof in this case; and the reasons why I do not regard it are these: 1st, because it proves too much, for it goes as well to the leases as to the rent-charge; now, I that hold a manifest difference between the two cases, stand obliged not to ground my opinion upon any proof or reasons that are common to both; 2d, because *Fountain* is Defendant, and in possession of an estate given him by deed under hand and seal, and he that is so need not bring proofs to keep his estate, it is the Plaintiff must bring proofs to take it from him; 3d, the De-[591]-fendant's case is never to be favoured in Chancery. and so all general proofs of equitable circumstances are vain; if he were Plaintiff and needed the relief of this Court, he ought to be dismissed, for his title being only *donum gratuitum* must take its fortune at law, and cannot be assisted here; and when he is Defendant, he must keep nothing which the Plaintiff has any equity to demand against him; and for these reasons, I throw all these general proofs quite out of the case.

I should now come to particulars, and consider where and in what part of the case a general or a qualified trust may be found, and where the case stands free and clear from being affected with any kind of trust at all ; but before I do this, I hold it necessary to lay down some rules and distinctions touching trusts, which I must keep to, and by which I must govern myself in all cases whatsoever.

All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law ; again, express trusts are declared either by word or writing ; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts ; and that is, when the Court, upon consideration of all circumstances presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant. In the case in question there is no pretence of any proof that there was a trust declared either by word or in writing ; so the trust, if there be any, must either be implied by the law, or presumed by the Court. There is one good, general, and infallible rule that goes to both these kinds of trusts ; it is such a general rule as never deceives ; a general [592] rule to which there is no exception, and that is this ; the law never implies, the Court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred ; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is opened to the *Lord Chancellor* to construe or presume any man in *England* out of his estate ; and so at last every case in court will become *casus pro amico*.

It will not be amiss to illustrate this rule by putting some three or four cases upon it. A devise of land to be sold implies a trust in the heir to join in the sale for necessity, to avoid scruples, and to raise the price : *Pitt v. Pelham*.(2) A devise of all the estate real and personal for payment of debts, implies no trust for the heir for the surplus ; for there is no necessity of such an implication : *Crompton v. North*. (*North v. Crompton*, 1 *Ca. in Cha.* 196.) A devise to the eldest son, upon condition to pay money to the daughter, implies a trust of necessity, for else the condition would be void : *Lord Mohun's case* (not reported). A purchase of land in the name of the eldest son implies no trust, for it is not necessary to imply a trust where an advancement may be intended : *Wyndham's case*. (*Vide Grey v. Grey*, 2 *Swans.* 594. *Murless v. Franklin*, 1 *Swans.* 13.) On the other side, in my Lady *Petty's case* (*Oakover v. Pettus*, *Rep. temp. Finch.* 270), the Court did presume that all the deeds and conveyances she had were in trust for her daughter, Mrs. *Okeover*, because the presumption was violent and necessary ; else why did she endeavour to get a deed and fine from her infant [593] daughter ; if the estate was her own already, why did she confess the trust to the tenants, and why did her husband speak of it to strangers ?

II. Having shown you what proofs I do not regard, and what rules I must ever proceed by, I come now to the several parts of the case, and will examine the proofs upon which they stand, and the presumptions which may arise upon those proofs.

First, then, for the leases. I am clear of opinion that Mr. *Fountain* has no estate in the leases but what this Court ought to presume to be in trust for Mr. *Cook* ; for it is impossible to be otherwise, when a man considers the several badges of ownership, and how Mr. *Cook* acted all along as lord and proprietor of this estate, notwithstanding the Defendant's conveyance. 1, No possession ever went with this lease ; 2, Mr. *Cook* kept the courts, his steward granted the copyholds ; 3, the Defendant sold woods in Mr. *Cook's* name, and in his name took security for the money ; 4, the rents and monies for wood sales were always received by Mr. *Cook* ; 5, Mr. *Cook* repairs the houses, gives directions to new build, sends down surveyors, and is encouraged so to do by the defendant ; 6, the tenant desired of Mr. *Cook* a new lease, and was refused, because he intended to build there ; 7, yet the Defendant did afterwards promise to procure him a lease upon security ; why so, if he alone had power to make one ? 8, when *Richardson* intruded upon part of the manor, the defendant advised Mr. *Cook* to bring ejectments in his own name ; 9, Mr. *Cook* and those in the remainder by the grand settlement had power to commit waste, and make jointures of the lands demised ; 10, Mr. *Fountain* sealed no counterpart, and yet there were some covenants on his part to [594] perform ;

11, the lease of *Farnam* was no part of Mr. *Fountain's* particular when he treated a marriage ; 12, it was made seven years before Mr. *Cook's* death, yet the Defendant never entered till after, viz. after *August 1671* ; 13, and upon the lease *Milam*, Mr. *Cook* reserved a less rent than he was to pay to the king.

I do not mention the proposal of a new lease at Mr. *Raymond's* chamber, which implies he had not before, because it may be answered ; but all the rest of the circumstances are unanswerable, and if it were left to a common jury, they ought to presume a surrender in this case, and doubtless they had been directed so to do when it was tried before my Lord Chief Justice *Hale*, but that they and all the Court thought that the Chancery would presume a trust ; and now it would be very strange if the Defendant should escape a verdict for a surrender because of the presumptive trust, and escape a decree for the trust here, because of the presumptive surrender. Therefore I make no difficulty to declare the Defendant's estate in the lease to be a trust attending the inheritance.

I come now to the rent-charge of £1000 *per annum*, and herein will observe, 1, how many of those circumstances which are found in the lease, are likewise found in the rent-charge ; 2, how many more circumstances there are tending towards a presumptive trust ; 3, what are the true reasons and differences by which they are distinguished.

I. The case of the rent-charge agrees with the leases in these particulars ; I. there was never any possession of it ; for that which is pretended by Mr. *Fountain* to be had by the payment of himself when he received the rents, will not do for several reasons ; 1, because it was [595] a possession not given but stolen, and accompanied by surprise, for Mr. *Cook* never knew it nor took notice of it ; 2, it was not possible for him to take notice of it, for the rent-charge was neither brought to account nor demanded as an allowance, but the sums received were extinguished by the bounty of a general release ; 3, the nature of the release shows that there could be nothing in it like a claim or possession of the rent-charge, for then Mr. *Fountain* should have given, not taken a release ; II. the rent-charge was no part of Mr. *Fountain's* particular upon his treaty with his first wife ; III. Mr. *Fountain* never sealed a counterpart, yet it was by indenture ; IV. the differences between *Cook* and *Fountain* happened in 1669, yet the Defendant never offered to enter till two years after, viz. *August 1671*, when *Cook* died ; V. Mr. *Cook* and those in the remainder had a power by the grand settlement to make jointures of the land charged, viz. *Minster level*, and a power to make leases at what rent they pleased, and to this settlement Mr. *Fountain* was party and privy to the directions concerning it.

II. There are other circumstances in the case of the rent-charge which are not found in the case of the leases, and yet have a farther tendency towards a presumptive trust ; viz. 1, in *July 1663* *Fountain* accepts an authority from Mr. *Cook* to contract for estates in *Minster level*, part of the land charged, and he does so by reducing £280 *per annum* to £80, by taking a fine of £1200, which was secured by a re-demise to Mr. *Cook*, to which *Fountain* was a witness, and Mr. *Cook* received the money ; 2, in *January 1664* Mr. *Fountain* took a lease for life in the name of *William Pawlett* ; 3, Mr. *Fountain* took the assignment of a lease for forty years of *Flitcham* to himself, which was also a part of the land charged, and works a suspension ; so by the [596] first act the value of *Minster level* abated ; by the last, in *Flitcham* the rent-charge was suspended ; so there remained only *Apleton* of £80 *per annum* to answer £1000 *per annum* ; 4, *Wheeler's* re-demise to *Cook* was assigned to Mr. *Fountain* for the residue of ninety-eight years, so there is another suspension in *Minster level*, and this suspension was pleaded by the Plaintiff in bar of Mr. *Fountain's* avowry, and it is not enough to say, that however the arrears will charge the reversion ; for, as Mr. Attorney says well, where the suspension is by act of the parties, there the rent ceases *pro tempore*, and does not run on in arrear ; and who that was in his wits would put off his money so long, if it was not a trust ? 5, Mr. *Cook*, when he thought Mr. *Fountain* well enough settled, writes to have the deed of the rent-charge delivered up, and Mr. *Fountain's* first answer seemed to promise it, at least did not refuse it ; and this has weight in it.

III. It remains now to be considered, what are the circumstances which differ the case of the rent-charge from that of the leases, and what grounds and reasons the Court has to make a different decree. It cannot be denied that the arguments

used to make the rent-charge a trust or a security are very considerable ; and though advocates may think themselves obliged to give some kind of answer to every argument, the Judge who holds the scale is not so ; for the lightest scale has always some weight in it ; but the duty of a Judge is to cast the balance on that side which ought to preponderate. This will best be done by observing the differences between the case of the leases and the rent-charge, which are these : I. the rent-charge was expressly given, and given with great deliberation, and with many preparatory circumstances ; the leases were no otherwise given than every estate which is conveyed in trust is [597] given, that is, by sealing and delivery of the deed. II. The circumstances in granting the rent-charge were these three : 1, a letter sent to Serjt. *Fontayn*, with directions to draw a deed with a blank for the sum ; 2, the filling up the blank with his own hand, when the deed was drawn by another, finding it agree with his directions as to parcels ; 3, the strict and unusual clause in the deed, viz. not only a distress, but a re-entry and retainer of the profits without account till the rent-charge be satisfied ; and after all, a covenant on Mr. *Cook's* part to pay the rent-charge constantly : nothing of all this can be found in the lease. III. Again, the testimony which arises from the nature of the thing. Leases are often made upon trusts to indemnify sureties, and for other like purposes, but who ever heard of a rent-charge created *de novo*, and then granted in trust ? Certainly nothing can be more unnatural and unusual. Had it been a right *in esse* granted over, a trust might have been averred, but to grant a rent *de novo* in trust, or upon security, is foolish ; for the trust for the security will be better served by fixing it upon the land itself. IV. The weight of these reasons is such, that the counsel for the Plaintiff have all along confessed that the rent-charge was not originally a trust, as the leases were ; but they have endeavoured to urge that the rent-charge should be a temporary security, till a competent provision was made for Mr. *Fountain*, and after that it became a trust ; and, without doubt, if there be any reason to take this rent-charge for a security, the consequence is infallible, that it must be a trust, after satisfaction ; so that the Plaintiff's counsel had great reason to employ all their skill in pressing the Plaintiff's case in this manner. V. But then to show that this surmise can have no place, these things are to be observed ; 1, the case is not so laid in the bill, nor charged in the pleadings, nor offered at in the proofs, but the wit of [598] counsel has found out this invention at the bar, only to solve the phenomena, and to make the case consistent with itself, and so confess and avoid the Defendant's proofs ; 2, no intention of Mr. *Cook* to re-purchase the rent can turn an estate into a security, no, nor make *Fountain* accountable for the money given, unless Mr. *Fountain* was privy to the intent, and consenting to it, and yet there is no proof of any such intention in Mr. *Cook*, much less of Mr. *Fountain's* agreement to it ; all is but fancy and conjecture ; 3, the Plaintiff's counsel did not go this way at the first hearing, but insisted generally upon a presumptive trust, and laboured to show some kind of practice in obtaining it, which they could not make out ; indeed at the second hearing this notion was taken up, and the state of the case varied ; 4, if the rent-charge was only intended as a security until a competent provision made, then I ask these six questions, 1, What was the sum intended to be secured ? was it £20,000, as adequate to the rent-charge, and suitable to the Defendant's answer in the Exchequer, if you have not yet had, I will make it up £20,000 ? This is mere conjecture, for that answer did not relate to the rent-charge, but to Mr. *Cook's* releases of accounts. 2, Why did not Mr. *Cook* limit his own bounty in the deed itself ? 3, Why did not Mr. *Cook* direct Serjeant *Fontayn* to add such a proviso to the deed, for it is usual to grant rents or annuities until a man be convenably promoted ? 4, Why did not Mr. *Cook* take account from time to time what he had done towards it ? why did he give Mr. *Fountain* releases by way of provision, and take none from him to show how far the matter was advanced ? 5, Why a rent-charge by way of security without defeasance, why not rather an estate upon part of the land, or a mortgage ? 6, Lastly, whether, if this rent-charge had been but £100 a year, any man would think fit to make a strain and turn it to [599] a security, then how can the quantity of the rent alter the quality of it ? VI. If I should leap over all these difficulties, and make a strain for the Plaintiff by supposing it a security for £2000, yet there can be no decree for the Plaintiff, without decreeing him to pay the money ; for there is no proof in this case of one penny satisfied, all the receipts proved, are proved to be disbursed again, and all that is released is questioned in

the exchequer ; so there is no uncontroverted provision in the case. VII. Therefore, to turn a fixed estate into a security, in hopes that it may end in a trust upon account, is more than I dare do without some better ground for it than conjecture and inferences. God forbid that such proofs which are not convincing, should take away any man's estate. VIII. All this while you see I lay no weight upon the testimony of Mr. *Raymond*, though I hold him to be a very valuable person, nor upon the discourse at his chambers, where no trust nor security was mentioned ; and yet if *Guavas*, who was no friend to *Fountain*, had ever heard of such a thing, it is likely it would have come out then. IX. Again, I lay no weight upon it, that the Defendant in his answer has sworn there was neither fraud, trust, nor security in the matter, and that the Defendant has in a manner waged his law upon this point, and brought six witnesses along with him, who swear the same thing ; the reason is, because the discourse at Mr. *Raymond's* chambers, and the Defendant's answer and witnesses, may as well be applied to the leases as the rent-charge, between which I hold a manifest difference. X. On the other side I am not much moved with it, that Mr. *Cook* required his deed again and his letter, and that Mr. *Fountain* at first sent a wary and a suspicious answer ; for though some weight be laid upon it, yet as Mr. *Cook's* own letter cannot make himself a title, so neither can Mr. *Fountain's* cautious answer turn an estate into a trust or a security ; and, [600] beside, if sending for writings could make a trust suspicious, the not insisting further on it clears the suspicion again : and it is evident there did not remain a kindness between them ever after that letter. XI. Nor am I moved with the several suspensions, for let them prevail at law as far as they can, yet they are no argument in equity to prove the rent-charge a security satisfied, and consequently a trust ; for the first suspension was within a year after the grant, when no satisfaction can be pretended. XII. Though this rent-charge be neither a trust nor a security, yet I do not see that Mr. *Fountain* is like to be much the better for it : for 1, he pretends to no arrears while Mr. *Cook* lived, and that is fit to be decreed ; 2, the arrears since are not leviable in law, if there be a suspension in the case ; 3, Mr. *Fountain* is never to have any relief in equity, if he need it as Plaintiff ; 4, therefore, if the land be suffered to lie fresh, this Court will never oblige Mr. *Cook* to put a distress upon it, as sometimes in other cases it has been done ; 5, it will always be in the power of Mr. *Cook* to defeat this rent-charge for a time, by making such jointures and leases as shall be according to the powers in the grand settlement. XIII. If after all this a man will still suppose that there was a secret trust, security, or agreement between the parties to re-purchase this rent, which no bill charges, no proof can make out, and the defendant denies upon oath, then it must be such a trust, security, or agreement as is only between a man and his confessor. With such a conscience as is only *naturalis et interna*, this Court has nothing to do ; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures ; and it is infinitely better for the public that a trust, security, or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor. The rule [601] of *nullus recedat a cancellaria sine remedio*, was never meant of *English* proceedings, but only of original writs, when the case would bear one ; and so the Chancellor in 5 *Hen. 7*, understood it (3) ; for otherwise says he, no man need to be confessed.

Therefore, upon the whole matter, I am ready to make any decree for the Plaintiff which will consist with these three propositions : 1, all the leases are in trust ; 2, the rent-charge is not so, nor yet a security ; 3, yet no arrears incurred in the life of Mr. *Cook* shall be levied ; and the Plaintiff ought to have his costs, because he is relieved for part though not for all.—Lord *Nottingham's* MSS.

“ His Lordship declared, as to the two leases of *F.* and *M.*, that there appeared a full and clear evidence of a trust therein for the said *John Cook*, his heirs, and assigns, and doth therefore think fit and so order and decree, that the Defendant do forthwith surrender and deliver up unto the Plaintiff *Robert Cook*, those two leases last mentioned, and all his estate, terms, and interest therein, and in and to the lands respectively thereby demised ; and it is further ordered and decreed, that the said *R. C.*, and all other persons to whom the freehold and inheritance of the same lands and premises shall come or descend by virtue of the said settlement made by the said *John Cook*, shall and do quietly hold and enjoy the same lands and premises against the Defendant, and all other persons claiming under him since



the bill exhibited ; but as to the rent-charge, his Lordship declares that the same not appearing to be either a [602] trust, or security for money, or fraudulently obtained, he could not relieve the Plaintiff, and doth therefore order that the matter of the said Plaintiff's bill, as to the said rent-charge, be dismissed ; but as to the arrears of the rent-charge due or payable before Mr. *Cook's* death, the same are not to be paid, but are thereby absolutely discharged ; and it is ordered, that a perpetual injunction be awarded against the Defendant to stay all proceedings at law for the same ; and whereas, in obedience to an order of the 9th of *December* 1672, the Defendant has delivered unto the Plaintiff *R. C.'s* use, the said settlement, made by the said *J. C.*, and also produced before Mr.                    divers deeds, evidences, and writings touching the estate late of the said *J. C.*, it is farther ordered, that the Defendant do produce on oath before the said Master, all other deeds, evidences, and writings whatsoever concerning the said estate or any part thereof, except only the deed of grant of the said rent-charge ; and the said Master is to look into the said deeds, evidences, and writings, and to see what part thereof does concern the rent-charge solely, and such thereof are to be delivered back to the Defendant ; and all the rest of the said deeds, evidences, and writings, the said Master is forthwith to deliver to the Plaintiff *R. C.*, or his agent, for his use ; and it is farther ordered, that it be referred to                    to tax the Plaintiff's costs of this suit, which are to be paid by the Defendant." Reg. Lib. A. 1676, fol. 606, 607.

(1) *Vide* 3 Swans. 296, 297. The following references comprise, it is believed, the principal passages in the printed authorities connected with this case. 1 *Vern.* 413 ; 1 *Eq. Ab.* 227 ; 1 *Vent.* 347 ; 9 *Mod.* 187 ; 2 *Vern.* 645 ; *Lords' Journals*, xiv. 55, 79, 356, 407, 409, 425, 449, 462, 464 ; *Bac. Abr.* tit. *Lease* R.

(2) 2 *Freem.* 134 ; 1 *Ca. in Cha.* 176 ; 1 *Rep. in Cha.* 149 ; *T. Jones*, 25 ; 1 *Lev.* 304 ; *Lords' Journals*, xii. 392. See *Bentham v. Wiltshire*, 4 *Madd.* 44.

(3) The passage intended seems to be 4 *H.* 7, 4 & 5, *pl.* 8, where may be found a curious dialogue on the maxim cited, but not precisely to the effect represented in the text.

[603] THORN v. NEWMAN. 14th November, 25 Car. 2, 1673.

3 Swans. 608.—A trust term is not merged in equity by the marriage of the trustee to a woman entitled to the freehold.

In this case a point was moved : *Baker* lessee for years in trust for the Plaintiff, married a wife to whom an estate of freehold was limited of the same land ; this was said to be a merger of the term, because a freehold in *auter droit* cannot stand with a term in his own right, though it may *e converso*, where the term is in *auter droit* ; according to the difference, 1 *Inst.* 338.

I said the difference was not clear in law, nor founded upon solid reason, for both parts of the difference have been otherwise resolved ; but whatever the law be, it ought to be no merger in equity.—Lord *Nottingham's* MSS.

BLAD'S Case. Privy Council. 21st November, 25 Car. 2, 1673.

[See *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 29.]

*Peter Blad*, a Dane, seized an estate of *English* subjects in *Iceland* as confiscate for fishing there in derogation of letters patent granted to him by the King of *Denmark*, and then comes into *England*, and is arrested and forced to put in bail. He petitions the Council to have all proceedings staid, and would make this a case of state. The *English* insisted upon it, that they had a right of fishing there, which they had used for fifty years before the seizure in 1668, and ever since ; [604] and that this patent was never heard of till now ; the *English* having always traded thither, and keeping constant warehouses there.

I stood up and said, this was not a question of state, but of private injury ;

that the king could not now demand justice of the King of *Denmark*, because he had the wrong-doer in his own power, and *ergo* if he let him escape, there could be no reprisal; that it was an injury to the subject to stay his proceedings at law, and no injury to the *Dane* to let the suit go on, for whatever was law in *Denmark*, would be law in *England* in this case, and would be allowed as a very good justification in the action: but if the wrong were done without colour of authority, it was fit to be questioned: and if the *Dane* wanted his authentic proofs, I offered him, upon a bill exhibited before me, to grant him an injunction till the commission returned. He chose rather to pay the money, so was dismissed; but afterward brought his bill, and had an injunction *donec*.—Lord Nottingham's MSS. (See the next case.)

BLAD v. BAMFIELD. *In Chancery*. 21st November, 26 Car. 2, 1674.

Perpetual injunction to restrain proceedings against a *Dane*, for the seizure of property of *English* subjects in *Iceland*, the seizure being sanctioned by the *Danish* authorities.

The case of *Peter Blad*, a subject of *Denmark*, against *Bamfield* and Others, came now to be heard (of which see the beginning before at the council board (see the preceding case [and note])), and the scope of the suit was to stay several actions commenced at law in trespass and trover, for seizing certain [605] goods of the Defendants for trading in *Iceland*, contrary to certain privileges claimed there by the Plaintiff and others. The Defendants insisted that this was no cause of state, and was *ergo* dismissed from the council table; that the injuries they had suffered were great, and such as were done with some kind of affront to and contempt of the *English* nation; that they had a most undoubted right of trade in *Iceland*, and by the articles of peace with *Denmark*, were to use their commerce with the subjects of *Denmark* without molestation; that if the King of *Denmark* had granted any patents of privilege contrary to the freedom of trade, they were illegal, and a breach of the treaty in question; and if the patents were of ancients date, they had been dispensed with by the contrary practice, which had suffered *English* to trade there, and so invited the Defendants; that, however, the Plaintiff had already had all the benefit of this Court which he could reasonably expect, for he obtained an injunction till he had examined his witnesses, and now having perfected his proofs, whatever could avail him here, would also avail him at law; wherefore they prayed leave, that now, at last, they might go to their trial at law.

I said never was any cause more properly before the Court than the case in question; first, as it relates to a trespass done upon the high sea, which though it may seem to belong to the cognisance of the admiral, yet I took this occasion to show that the Court of Chancery hath always had an admiral jurisdiction, not only *per viam appellationis*, but *per viam evocationis* too, and may send for any cause out of the Admiralty to determine it here; of which there are many precedents in *Noy's MSS.* 88; and in my little book, in the preface, *de officio Cancellarii*, sect. 18; and in my parchment book in [606] octavo, tit. *Admiralty* (3 Swans. 664); secondly, as it had relation to articles of peace, all leagues and safe conducts being anciently enrolled in this court. That it is very true this cause was dismissed from the Council Board, being not looked on there as a case of state, because for ought appeared to them, it might be a private injury, and unwarrantable, and so fit to be left to a legal discussion; but now, the very manner of the defence offered by the Defendants had made it directly a case of state; for they insist upon the articles of peace to justify their commerce, which is of vast consequence to the public; for every misinterpretation of an article may be the unhappy occasion of a war; and if it had been known at Board that this would have been the main part of their case, doubtless the Council would not have suffered it to depend in *Westminster Hall*. But in truth this pretence of articles of peace must needs fail the Defendants; for the articles of free trade are reciprocal, and are understood on both sides, with exception to the laws and customs of each kingdom. Put the case then that a *Danish* ship should trade to the *Barbadoes*, or any other of his majesty's foreign plantations, and were thereupon taken and seized; or should break in upon the privileges granted by his majesty to the

*East India Company*, and were there arrested at *Bantam* or *Fort St. George*, doubtless this were no breach of the treaty on our part ; and if any of his majesty's subjects who seized that ship at the *Barbadoes*, or judges, should be then molested and prosecuted in *Denmark*, in a private action, for what they did in obedience to the laws of their king and country, it would look like such a breach on their part as might well occasion a further rupture on ours. *Ergo*, to come now to the present case, certainly no case was ever [607] better proved ; for the Plaintiff hath proved letters patent from the King of *Denmark* for the sole trade of *Iceland* ; a seizure by virtue of that patent ; a sentence upon that seizure ; a confirmation of that sentence by the Chancellor of *Denmark* ; an execution of that sentence after confirmation ; and a payment of two thirds to the King of *Denmark* after that execution. Now, after all this, to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in *Denmark*, or of the exposition and meaning of the articles of peace ; or that a common jury should try whether the *English* have a right to trade in *Iceland*, is monstrous and absurd.

Wherefore the whole state of the case appearing now before me, as much as ever it can do in any other place, I thought fit to put an end to it, and decreed that the Plaintiff should have a perpetual injunction to stay the Defendant's suit at law ; and that satisfaction should be acknowledged upon that judgment which the Plaintiff had acknowledged to the Defendants as a temporary security till the hearing of the cause.—Lord Nottingham's MSS.

COOK v. BAMFIELD. 10th February, 26 Car. 2, 1673—4.

1 *Ca. in Cha.* 227.—Bills of review classed. After a demurrer to a bill of review for error overruled, the decree is reversed without further hearing.

There are three sorts of bills of review to reverse decrees : 1. Such as are grounded upon new matter discovered since the decree : 2. Such as seek to reverse a decree, as being partly for the Plaintiff and partly against him, and so not large enough ; if [608] either of this kind of bills be demurred to, and the demurrer overruled necessarily, the Defendant is to answer, because fact is in issue : 3. Such as assign errors in the body of the whole decree ; if this bill be demurred to and the demurrer overruled, the decree is reversed, and the errors allowed, and no further answer or hearing needs, *per course de Court*. But some object, that as a bill of review of this kind may be answered at first, why not after a demurrer overruled ? Solution, because no answer can be but *in nullo erratum*.—Lord Nottingham's MSS.

NURSE v. YERWORTH. 28th July, 26 Car. 2, 1674.

*Rep. Temp. Finch.* 155 ; 2 *Mod.* 8. See *Trower v. Butts*, 1 *Sim. & Stu.* 181.—An infant *in ventre sa mere*, under a devise to heirs of the body of the devisor begotten and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him ; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law.

The case of *Nurse* and *Yerworth*, which upon the 22d November last was directed to be stated, came now to be argued, and was thus : *Richard Yerworth* senior, was seised in fee of *Snowston*, and other lands in *Leicestershire* ; and upon his marriage with the Plaintiff *Mary*, daughter of the other Plaintiff, *Thomas Nurse*, settles them on himself for life, remainder to his wife for a jointure, remainder to his own right heirs ; but this marriage settlement, supposed to be made 1st May 1649, was out of the case, and waved, because not extant nor proved ; so the case arose upon the subsequent matter, and was this : *R. Yerworth* senior, being seised in fee, 1st March 1649, makes a lease to the Defendant for ninety-nine years, in trust for such persons as he by his will should appoint, and 9th March 1649, [609] makes his will, and limits the profits for twenty years, to go towards debts and legacies ; and after twenty years, to the use and behoof of the heirs of my body on the body of *Mary*, my now wife, begotten and to be begotten, for ever ; and for lack of such issue to the Defendant in fee . and upon the 24th March 1649 the

testator died, leaving his wife *grosment enceint* of a son, which within one month after was born, and named *Richard Yerworth*.

Differences happening, and an award being made, that the deeds and writings should be delivered to the Defendant, and also the possession of all the child's lands when he died ; after this the child comes of age, and in *May 1671* suffers a recovery, and by his will devises to the Plaintiff for life, with several remainders over : then *R. Yerworth jun.* dies ; the Defendant enters upon the lands not in jointure, but to aid the trial the Plaintiff exhibits a bill, and confesses a judgment in *eject. firm.* with a *cesset executio* till hearing in Chancery ; but by his answer claimed only the residue of the term for ninety-nine years, whereof the legal estate was in him, and seemed to rely upon the award and bond for possession ; but at the hearing his counsel claimed the fee simple, and insisted, that *R. Yerworth junior* had no estate to devise, but that the will of *R. Yerworth senior* was void, wherein were these questions : 1. Whether an infant, born within a month after his father's death, can take by the will of *B. Yerworth senior*, of 1649, as it is penned ?

It was agreed, that at common law a devise to an infant *in ventre sa mere* was good of customary lands. (11 H. 6, 13.) The doubt since the statute of 32 H. 8, c. 1, is, because [610] that statute enables a devise to any person or persons, which an infant *in ventre* is not ; whereupon the books are divided. To kill a child *in ventre sa mere*, though the mother be *grosment enceint*, is not murder, because the person is not *in rerum natura*. (3 Inst. 50.) So in 13 & 14 Eliz. (*Dyer*, 303, 304), a devise to his four younger children, and if the fifth *in ventre* be a son, he to have a fifth part ; adjudged the son born after his father's death took nothing by purchase, because not in being when the will took effect. In 13 Jac. *Simson v. Southern* (Cro. Jac. 376 ; 1 Rolle, 109, 137, 253 ; 2 Bulstr. 272), and 37 Eliz. *Church v. Wyat* (Moor, 637), a devise to an infant *in ventre* was held void, unless by way of remainder ; 20 Car. 2. *Snow v. Cutler* the Court was divided (1 Lev. 135 ; 1 Sid. 153 ; *Sir T. Raym.* 162 ; 1 Keb. 567, 752, 800, 851 ; 2 Keb. 11, 145, 296) ; *Wyndham* and *Morton* held the devise void ; *Keyling* and *Twisden* held it good. Upon the whole matter the law seems to be, that a devise to an infant *in ventre sa mere* is good, if it be by words of express description, for then it works by way of executory devise, and in the interim the land descends, so there is no inconvenience ; and so it was said to be ruled in the C. B. in 1656, in *Basset's case*, per *Hale*, then Justice, et *Curiam* ; and again, P. 17 Car. 2, C. B., *Shelton v. Bide*, per *Orlando Bridgman et Curiam* (*Bannister's Rep. temp. Bridgm.* 390) ; but there, because the devise was only in these words, viz. to his issue *procreat. et procreand.*, it was held, that these words were no sufficient nor express description of an infant *in ventre*, and the will was void as to such issue, not *in esse* when the father died ; so here the words of the will in question are no sufficient description of an infant *in ventre* ; and ergo the will cannot work by way of executory devise, but only by way of contingency. [611] The consequence whereof is, that seeing the contingency did not happen at the time of the testator's death, at which time the will ought to take effect, ergo for want of an heir of the body then in being, the remainder in fee to the Defendant vested presently by purchase, which no after-born son could divest ; and of this opinion I was.

2. What should become of the term for ninety-nine years ? It was said for the Defendant that this term was merged in law by the accession of the remainder in fee to it ; and that by the original trust this term was to attend the inheritance, so that upon both these accounts the defendant ought to keep it, the rather, because the Defendant's case, as to this point, was much better in equity by being Defendant, and not Plaintiff ; and especially by being Defendant at the suit of *Nurse*, and not at the suit of *R. Yerworth junior*, who, as it appears, enjoyed it all his life, and now by his will hath given it away from the family ; and it was farther pressed, that to set up this term in equity against the Defendant were contrary to the testator's will, who appointed that after his death, without issue, it should remain to the Defendant, which accident hath now happened.

I said that so long as the Plaintiff had a good opinion of his title in law to the inheritance which should attract the term, it was in vain to enter upon the second question, and ergo to the law I would leave him ; but supposing, as I do, the law to be against him, then there would arise two questions in equity ; first, whether if *R. Yerworth junior* were alive and Plaintiff, this Court would suffer him who

had lost the inheritance by rigor of law, to lose the trust of the terms in equity ? secondly, whether the Plaintiff has not the same equity which *R. Yerworth* junior had ? for as to the merger [612] of this term by act of law that was not material, nor would it change the case here.

For the first part of the question, to break it a little, I said that the attendancy of long leases upon the the inheritance, is always governable by the conscience and discretion of the Court ; and *ergo* we see that in cases of debts, and to preserve assets, this Court will sever the attendancy ; and it is reasonable that in cases of accidents unforeseen, they should use the same power in governing and disposing of trusts, according to the presumptive intent of the parties, notwithstanding the strict penning of any declaration. So we find it of old, *Fitzh. (Subp. 23)* ; a man being sick appoints his feoffees to convey to his only daughter, and recovering, hath a son, and dies without other appointment ; adjudged in this Court the feoffees should be compelled to convey to the son. So by the equity of the spiritual court, too ; for in *Mich., 5 Car., B. R. Jones, J.*, said, when he was at the bar this case happened ; a man made his daughter executrix, and left his wife with child of a son, and died ; the spiritual court granted administration to the son, presuming the testator would have given the estate to his son had he been born sooner ; and this was an equity so far allowed by the common law, that when *Jones* moved for a prohibition it was denied. And this seems to be the law of equity through all the world ; for *Tully* puts the case in his *De Oratore* (Lib. i. c. xxxviii.), *quidam filium suum mortuum falso credens, alium instituit heredem* ; and *Grotius*, in his book *De Jure Belli*, resolves it thus, *Hujus institutionis naturaliter vis est nulla quia fundatus in presumptione facti quod non ita se habet.* (Lib. ii. c. xi. s. 6.) *Ergo*, I am not much taken with the old book case in 47 *E. 3*, cited in [613] *Cheney's* case (5 *Co.* 68), where it is held that if a man have two sons *John*, and devises to his son *John* generally, this shall be capable of an averment that he meant the youngest, and it shall be good evidence to prove that averment, that the testator thought his eldest son dead, because long absent. Surely it had been more just to adjudge the will void for the uncertainty, on purpose to prevent that disherison which it is evident the testator did not intend.

Now to return to the principal case, it is plain the testator when he made his will was not ignorant that he had a child *in ventre sa mere*, for it was born within a month ; and it is as plain he meant to provide for it when he gave his lands to the heirs of his body begotten or to be begotten. It falls out in law that this is no sufficient description to work by way of executory devise to an infant *in ventre, &c.* ; which kind of resolution hath now obtained, though it might fairly have been adjudged otherwise. But then the trust of the term, as far as equity hath power over it, ought not to attend the inheritance, where it is carried away by a rigorous construction for want of a legal expression of his intent, but ought, in conscience, to go to the child according to the true and natural meaning of the testator ; for equity may mitigate, but shall never assist, an unintended disherison.

As for the second part of the question, the Plaintiff surely ought to stand in the place of *R. Yerworth* junior ; for since the law of this Court hath severed the inheritance and the term, and *R. Yerworth* did by deliberate acts dispose all that lay in his power, it is fit the disposition which it seems cannot be good for the [614] whole, as he thought it would, should at least remain good for so much as was in his power, viz. the trust of the term.

3. The award to deliver the writings and possession to the defendant, and bond to perform it, change not the case, for equity will not suffer a suit upon that award and bond, which when it is performed and the writings delivered, yet the writings which ought to follow the title may be again recovered in equity ; for that were a mere circuit of action.

Hereupon the Plaintiff took time to advise whether he would try the law first, and resort afterwards to equity, or rest only upon equity.

16th December, 26 Car. 2, 1674. The case of *Nurse v. Yerworth* had been at reference, and the parties not agreeing, it now came back to equity, the Plaintiff being unwilling to try the point of law. And this day I delivered my opinion solemnly and upon argument.

First, I observed, that as to the *Gloucestershire* lands, *Longhope* and *Cowley*, there could be no question, for *Longhope* was conveyed away, and *Cowley* was not

comprized in the recovery by *Richard Yerworth* the younger ; so it stood only upon the father's will, of which the words are these : "*Item, if at my decease I have no issue, I give my Gloucestershire lands to my executors in fee*" ; which words are not capable of any dispute ; so far, therefore, the evidence must either be brought into Court, or delivered to the Defendant, he first confirming the jointure.

[615] The main controversy rises upon the *Leicestershire* lands, *Snowston, &c.*, for which the case is this. There were two *Richard Yerworths*, viz. the father and the posthumous son ; the father having married the daughter of *Nurse*, the Plaintiff, 1st *March* 1649, demised *Snowston, &c.*, to *Christopher Yerworth*, the Defendant, for ninety-nine years, in trust for such as he by will should appoint ; and 9th *March* 1649, by his will appoints the profits for twenty years for debts and legacies ; then to the use of the heirs of the body of *Mary*, my now wife, begotten or to be begotten, for ever ; and for want of issue, remainder to the Defendant in fee ; 24th *March* 1649, the father died ; *April* 1650, the posthumous son, *Richard Yerworth*, is born. During his minority differences arose, and an award was made, that when the child died, the writings and the possession of the child's land should be delivered to the Defendant. So long since hath the Defendant reckoned upon this estate, for I do not take it (as Mr. Attorney pressed it), to be a contentedness in the Defendant to let the heirs enjoy, but a perfect ignorance of his own strength till now.

In *Michaelmas* term 1671, *R. Yerworth*, the posthumous son, being twenty-one, suffers a recovery, and devises all to the plaintiff, *Thomas Nurse*, his grandfather, for life, with several remainders over to *Yates*, his brother-in-law, by his mother's second husband ; and dies. No wonder he was so willing to defeat the Defendant's expectation, who though he were not his heir but his cousin, yet had appeared so forward to succeed, and so careful to provide for it. The Plaintiff exhibits a bill and demands a conveyance of the leases as attendant upon the inheritance, whereof he seems secure ; the Defendant, as despairing of the inheritance, contends to keep the lease, wherein he hath a legal [616] estate ; both are like to be deceived. In this case I make five questions ; one of law, four of equity.

1. Whether the will in 1649 did pass any thing to the infant then in *ventre sa mere*, as it is now penned ? And this is a question of law.

2. If not, then whether the remainder in fee vesting in the Defendant by purchase, and so vesting, that no after-born son could divest it ; the term be not now so extinct, that no further consideration can be had in equity ?

3. If the Court may consider of the term still, then whether if *R. Yerworth*, the posthumous son, were alive and Plaintiff here, the Court might not relieve him as to the term ? Of which point there are two branches, 1. What relief the son would have had if his father at the time of this will had been *cestui que trust* in fee ? 2. What relief he must have, had his father been *cestui que trust* of the term only ?

4. Whether the Plaintiff have not the same equity which the posthumous son had ?

5. What the award and bond work in this case ?

These questions, such as they are, were never stirred in twenty-two years ; the family thought it a good will, and acquiesced under it ; no man dreamt that by limiting a remainder to the Defendant, the father had disinherited his only son, nor did the bill or answer look that way ; but the wit of counsel at the bar hath raised these new and unexpected questions.

[617] For the first point, whether the devise in this case do carry any thing to the infant in *ventre sa mere* ? There seems to be no need of debating that at this time, because the Plaintiff admits the law against him. But yet, for the better opening of those reasons upon which I ground my opinion in equity, it will be necessary for me to observe by what degrees the law came to be settled in this point, and upon how hard terms it stands at this day.

By the ancient simplicity and integrity of the common law, there was no doubt that a devise of customary lands to an infant in *ventre sa mere* was good enough, 11 H. 6, 13. When the statute of 32 H. 8, c. 1, enabled a devise to any person or persons, then the lawyers began to introduce subtlety, and to refine upon these words, and said an infant till born is not *in rerum natura* and so not within the word person or persons. Presently the books begin to wrangle, 14 El. (*Dyer*, 303

304). A devise to his four sons, and if the fifth *in ventre* be a son, he to have a fifth part, was held void as to the fifth son; yet this, one would think, were a sufficient description; in 24 *El. (Anon. Moor, 177, pl. 312)*, on a devise to a child *in ventre*, Mead and Periam say it was resolved good, only the doubt was, whether the new born son should take jointly or in common; 17 *El. (Dyer, 340)*, it is admitted a devise to an infant *in ventre* is good, but there no infant was born; 37 *El., Church v. Wyatt (Moor, 637)*, a devise to an infant *in ventre* held void, unless it be by way of remainder; 13 *Jac. B. R. Simson v. Southern (Cro. Jac. 376; 1 Rolle, 109, 137, 253; 2 Bulstr. 272)*, the devise of a copyhold to an infant *in ventre* held void; yet that devise depends not on the statute, but is merely a declaration of the use [618] of a surrender. This was a little too strict and too gross to hold long; and hereupon readers have made it a moot point in their cases, and held it *pro* and *con* as it pleased them.

Therefore, in 1656, C. B., in *Basset's case*, when Justice Hale sat there, and in 17 *Car. 2, C. B., Skelton v. Bide (Bannister's Rep. temp. Bridgman, 390)*, the Judges came to this resolution; that a devise to an infant *in ventre* is good if it be by words of clear description; for then it works by executory devise without inconvenience, because in the interim the land descends. For all this, in 20 *Car. 2, B. R. Snow v. Cutler (3 Swans. 610)*, the Judges were divided again.

But the resolutions of the C. B. were just and good, if the Judges would not be too strict in expounding words of description, but would suffer any reasonable description to work by way of executory devise; for in *Skelton v. Bide* they would not allow the words *procreat. et procreand.* to be a sufficient description; which goes a great way toward ruling the case in question, if it were left to the common law.

II. Admitting the law so to be, and that in consequence hereof the term for ninety-nine years is merged by the accession of the fee simple to it, whether any further consideration can be had of it in equity? I conceive there may; for, by the equity of the common law, estates extinguished are still *in esse* to some purposes. *Lillingston's case (7 Co. 37)*. But Chancery suffers no extinguishment; as, for example, lessee for years in trust marries a wife who hath the freehold, and so becomes seised of a freehold *in autre droit*, which is [619] utterly inconsistent with a term in his own right; yet in 25 *Car. 2, Thorn v. Newman*, ruled no merger. (3 *Swans. 603*.)

III. If the case be free for the Court to consider, notwithstanding the pretended merger of the lease, then let us see what relief the son would have had if he had been plaintiff.

And herein, by way of preparation to what is to follow, let us first consider if *R. Yerworth*, the father, had been *cestui que trust*, whether *R. Yerworth*, the posthumous son, could have come into this court to have execution of this trust, notwithstanding such a will? And I think clearly he might, for very many reasons.

1. Because the construction of law to make this will void to an infant *in ventre* for want of apt words of description, is of an infinite rigour and extremity, and, *ergo*, ought never to be followed in a court of equity.

2. It is contrary to the reason and equity of the common law in all other cases of wills. What is become of that legal compassion due to all dying men, who are *inopes consilii*, if once we come to criticise upon their words, where the intent appears? To support the intent of the testator, the law will put words into the will which the testator never spoke; *ergo*, upon a devise to heirs male, the law adds, of the body begotten; a devise to heirs, and if he die without issue, remainder over, the law adds still, of the body begotten; a devise to the son after the death of the wife the law adds a whole sentence, I give it to my wife during her life. Only in this case the law holds the testator to [620] exact words of description, and for want of such words makes him disinherit his son before he is aware.

3. This kind of rigorous construction is against natural and universal justice, and would be laughed at in any other part of the world.

4. It is contrary to piety and good manners; for whereas every man is bound to provide for his own, this construction makes a good Christian die worse than an infidel.

5. The difference is rational and just, where the wife is *privement enceint*, and where *grosment enceint*; if the embryo be not yet *partus formatus*, there ought

to be words of clear description to include him ; and that, because the testator may reasonably be presumed not to intend any thing to him he knew nothing of. But where the wife is *grossment encient*, there, unless the words of description do expressly exclude the child, a little matter ought to serve to include him.

6. For this reason, though the common law be never so strict, yet it shall only prevail in cases where a common law inheritance is in question ; but where a trust in fee simple is in question, this Court shall make any words with a presumptive intent a sufficient description to make the will work by way of executory devise rather than establish a disherison in equity.

For, as it was well said at the bar by Mr. *Stedman*, less artificial words will serve to direct a trust than an estate.

7. In cases of accidents unforeseen, this Court hath power to govern and dispose of trusts according to the [621] presumptive intent, against the express declaration of the party ; *a fortiori*, it may assist and explain a doubtful declaration, *Fitz. Subpœna*, 23. A sick man appointed his trustees to convey to his daughter ; a son is born, and he dies without other declaration ; adjudged the trustees should be compelled to convey unto the son. 5 *Car.* 1. *Jones, J.*, cited this case ; the testator made his daughter executrix, and died ; a son was born ; the spiritual court granted administration to the son, notwithstanding this will, upon the presumptive intent, and no prohibition could be obtained. So the court of conscience and the court christian seem to be agreed in this point ; and so is the court pagan too, as may appear in the case put by *Tully* in his book *De Oratore*. (*Vide 3 Swans.* 612.)

So that I take it to be without scruple, that the posthumous son should have been relieved for the whole, if the father had been *cestui que trust* in fee simple.

The greater doubt is because the father was tenant in fee simple of the reversion, and *cestui que trust* of the term ; so that now if the posthumous son be relieved, the will must work by fractions ; viz. it must be a good will in equity for the term by executory devise, and a void will in law for the reversion ; and another consequence of this is, that the term which was created to attend the inheritance shall now be severed, and become a term in gross. I think these consequences so far from being absurd, that I hold them both to be just and necessary.

First, because every man's will ought to hold as far as it may, if it cannot hold as far as the testator would [622] have it. Now it is plain the testator knew he had a child very near its birth, and it is as plain he meant to provide for it, by the words begotten or to be begotten, and for want of issue, remainder, &c. It is true it hath obtained in law that these words are no sufficient description of an infant *in ventre sa mere*, though it might fairly enough have been adjudged otherwise ; but then let the law take place upon the estate at law, but as to the trust of the lease this Court will admit no such construction ; for 2, though the term were originally to attend the inheritance, yet where the inheritance is carried away by a rigorous construction, the term shall not follow it, but is instantly severed by the law of equity, and becomes in gross.

So that the lease and reversion are not a twisted estate, as Mr. *Pemberton* called it, but the term is untwisted from the inheritance by act of law, the law of this Court ; and *ergo*, though equity revive this term, notwithstanding the merger, yet it cannot revive it as attendant, as he for his client would fain have had it.

3. The attendancy of long leases upon the inheritance is always governed and controlled by the conscience of this Court ; as where there are debts to pay, the lease shall not attend the inheritance, till debts satisfied ; now what greater cause can there be for this Court to sever them, than to mitigate and allay an unintended disherison ?

4. Though the words of the will are only applicable to the inheritance, and do not seem to be intended to work upon the term as a separate estate, as was objected by Mr. *King*, yet there is no doubt that a term may be devised by such words, though it were a term in gross ; then if the testator use such words as he thought proper [623] to pass the whole in law, these words shall not hinder the operation of equity upon the term, if no more than the term can pass in equity.

5. It is said, however, that the term is entailed, and that entail spent, and the Defendant next in remainder ; but if the law of equity have made this a term in gross, then the remainder in tail is void, which was limited by the father's will. And yet perhaps the limitations and remainders of this term, made by the post-



humous son, will be good, though there be never so many remainders in tail, because he disposed of it as a term attending his inheritance, and did not think he had a term in gross, so it was no affectation of a perpetuity, nor like the common cases of a term in gross.

IV. Whether the Plaintiff have the same equity the posthumous son had ? I think the Plaintiff hath the same equity, and ought to stand in the son's place, for it is according to natural equity for every man to dispose of his own, and it is to take away from the posthumous son his property to dispose it otherwise. It is confessed the Defendant hath no equity if he were Plaintiff ; I think the Plaintiff hath good equity against him, especially in this case ; for I differ much from Mr. Attorney, who said there were no circumstances of equity for the Plaintiff, if the law were against him ; and I differ much more from Mr. *Peck* who thinks the Plaintiff to be in ill circumstances ; for, I think, there are many good circumstances in this case, which make the Plaintiff's case very favorable.

1. Here is no fraud or practice alleged, or possible to be proved, in the Plaintiff procuring this will from the son ; for the Plaintiff was absent ; so that if the son may [624] lawfully dispose his own, the Plaintiff, for aught appears, came innocently and honestly by it.

2. Here is no heir male disinherited, no title of honour or dignity unsupported or made less valuable by it.

3. The Defendant claims by a voluntary disposition of the father ; the Plaintiff claims by a voluntary disposition of the son ; so in this they are both equal.

4. Again, the Defendant hath gotten irresistibly all the *Gloucestershire* estate after the death of the jointress, and all the *Leicestershire* estate after the expiration of the term ; and all this by a nicety in law, and picking holes in the settlements ; so that accidental mistakes have made a kind of arbitrement between the parties, and given the Defendant more than was ever meant him.

5. The long admittance of the father's will, and the great acquiescence under it for twenty years together, without any question upon it, is very considerable. So that when the posthumous son disposed of the whole, which is more than he could do, it ought to be good *pro tanto*, viz. the trust of the term.

V. Lastly, no weight can be laid upon the award and bond, for since the Plaintiff hath right to the term and equity, this Court will not suffer a suit upon that award, which when it is performed and the writings delivered, yet the writings may be again demanded by the Plaintiff during the term, and so a mere circuitry of action.

So I decreed, 1. an assignment of the term to the Plaintiff, according to the will of *R. Yerworth*, the son ; [625] for this is sufficiently warranted by the bill, though it be not particularly prayed ; for the whole fact is disclosed, and a general relief prayed. 2. The *Leicestershire* evidences to lie in Court for the security of the reversioner.

3. The *Gloucestershire* evidences to be delivered to the Defendant, he confirming the jointure, else to be brought into Court. 4. A perpetual injunction against all suits upon the award or bond.

5. But no costs *propter difficultatem casus*.—Lord Nottingham's MSS.

VANDEBENDE v. LEVINGSTON. 3d November, 26 Car. 2, 1674.

A bill of review may be sustained by the party in whose favour the decree is made, and who enrolled it. Both the trustee and the assignee are responsible to the *cestuique trust* for profits subsequent to an assignment in breach of trust.

Resolved, 1. The Plaintiff may have a bill of review, to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been.

2. To charge the assignee of a trustee who comes in by breach of trust alone, or to charge both assignor and assignee with the profits respectively received, is error ; for both ought to be liable to the *cestuique trust*, and the assignor must answer the whole if the assignee be a beggar.

3. Though the Plaintiff enrol the decree, yet he may have error ; for he can have no error till it be enrolled, and perhaps the Defendant will never enrol it.

[626] 4. Where the wife of the assignor took an estate in remainder by virtue of the conveyance which raised the trust, the damages for breach of this trust shall charge the wife's remainder when it comes into possession, and follow the estate,

which was gained merely in consideration of this trust, the rather, because the wife in this case, though a feme covert, appeared to be more than ordinarily concerned in the contrivance of this breach.—Lord Nottingham's MSS.

WOODWARD v. Earl LINCOLN. 16th December, 26 Car. 2, 1674.

Assistance rendered to magistrates making restitution after a forcible entry, is a breach of an injunction for quieting possession.

An injunction to quiet possession had been awarded by the Earl of *Shaftsbury*, and *Edward King* attached for breach, and examined and reported in contempt: to which he excepted, 1. because he was only served with a copy, and showed the original, but not suffered to examine it. I said this was good service, for there never used to be any other, and it were mischievous to require it, for where many are concerned, one man might keep the original, and prevent all further service; and it was plain he had notice before he came, and had seen another copy, and said openly it was dissolved, which animated the contempt of others. 2. That the injunction was unduly granted, without order or affidavit, and was also mistaken in the date. This I overruled; for, whatever the mistakes be, the subject must obey below, and dispute here, for a contempt is not to be justified. 3. That the force complained of was nothing but an assistance of the justice of peace to make restitution upon a forcible entry, whereof *Woodward* was convicted upon the view: and it could not be the intent [627] of this injunction to quiet the possession against legal force, and in aid of justice. I said this was the worst of all; for trying of titles by sessions law, that is, by views and convictions of forcible entry, and arbitrary changing of possessions, was become an ill practice, and ought to be reformed; and it is well for the subject that the courts in *Westminster* sit to control the sessions; but, as to this court, the case is much worse, for this pretence puts it in the power of the sessions to dissolve all injunctions to quiet possession or to make them fruitless. for they may always pretend an entry, or at least a detainer by force, and so remove the possession of the party intended to be quieted. Wherefore I overruled all the exceptions, and ordered Mr. *King* to stand committed.—Lord Nottingham's MSS.

BEAK v. BEAK. 2d March, 27 Car. 2, 1674–5.

1 Swans. 507.—A partnership in trade is continued for some purposes after a dissolution.

It was ruled, 1. that if two merchants trade in partnership, and one dies, yet the partnership continues until the debts are paid and received, and until the cargoes are brought in and returned, and until things can be separated; 2. that all compositions of debts after death, and until separation, are for the benefit of the partnership; 3. that where alteration of books is suspected, the Defendant is to answer interrogatories, if the Master sees cause for it; 4. that if a stated balance is found, the Master is to begin thence.—Lord Nottingham's MSS.

[628] THORNBOROUGH v. BAKER. 10th July, 27 Car. 2, 1675.

1 Ca. in Cha. 283; 2 Freem. 143.—The executor, not the heir, of a mortgagee in fee, is entitled to the money secured by the mortgage. Reasons of that doctrine.

*Lawrence Clifton*, in consideration of £500, conveyed to *James Baker* in fee; *James*, by a separate indenture, executed at the same time, agreed that if *Lawrence* paid £30 half-yearly during his life, and if the heirs of *Lawrence* after his death pay unto *James Baker*, his heirs, executors, administrators, or assigns, within six months after the death of *Lawrence*, the full sum of £500, with the interest due since the payment of the last £15, then the conveyance to be void. *Lawrence* died, and the Plaintiff's wife is daughter and heir. *James Baker* died in 1659, and by his death the forfeited premises descended to *John Baker*, an infant, his son and heir, who was Defendant. by Sir *John King*, his guardian, together with his mother *Sarah*, the administratrix of *James*, since married to *Nichols*.

The Plaintiff's suit was to have the redemption: the Defendants, by answer.

submitted to a redemption, and the administratrix confessed that *James* left assets to pay his debts, besides the £500 and interest; and the question before the *Master of the Rolls* was, whether the heir or administratrix should have this money? Wherein because the precedents were various, and this was like to be a leading case for the future, the *Master of the Rolls* would deliver no opinion, but left the cause to be set down before me to receive my determination upon it.

[629] I decreed the money to the administratrix for these reasons :

First, where the condition of the fee-simple mortgage mentions neither heirs nor executors, there the money ought to be paid to the executors; for so is *Littleton's* text (sect. 339), and *Goodal's* case (5 Co. 95); and the reason is, because the money came first out of the personal estate, and so naturally returns thither again.

Secondly, when both are mentioned, but disjunctively, there if the mortgagee pay the money precisely at the day, he may elect to pay it to the heir or executor as he pleases.

Thirdly, where the precise day is past, and the mortgage forfeited, there all election is gone in law; for in law there is no redemption.

Fourthly, though equity do still give the mortgagee a power of redemption, yet equity will not revive the power of election which was once gone, because of the inconvenience; for if it should be revived to the mortgagor, he would delay payment as he pleased, and at last force a composition, and pay the money into the hand which would use him best; and if the Court should exercise that power, and take upon them to elect to whom they would give the money, it might be too arbitrary.

Fifthly, there ought so to be some certain rule; and the best rule is to come as near the rule and reason of the common law as may be: now the law always gives the money to the executor or administrator if no person [630] be named; and when the election to pay either heir or executor is forfeited, it is all one in law as if neither heir nor executor had been named.

Sixthly, to inquire whether the executor or administrator have assets or not assets, is not the measure of justice in this case; it is a proper inquiry when the Court will exercise an arbitrary disposition of the money, but otherwise it is not reasonable to hinder the mortgage money from returning to the personal estate, whence it came, only because the executor is thought to have enough already; for in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money; wherefore when this security descends to the heir of the mortgagee, charged with an equity of redemption, as soon as the mortgagor pays the money, the land belongs to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executor or administrator.

Seventhly, although when the mortgagor covenants with the mortgagee, the case of the mortgagee's executors and administrators be so much the stronger for that personal covenant, yet without such a covenant the case is strong enough; and if the right of the money should depend upon these or the like circumstances, it might prove *casus pro amico*, which were not convenient.

Eighthly, it is not inconvenient nor absurd, that the heir who loses the land should also lose the money which comes in lieu of the land; for, as hath been said, the land is no more in equity but a security; and upon this ground it is that in *London*, mortgages in fee simple are always reckoned as part of the personal estate, and divided, according to custom.

[631] Then I proceeded to consider the precedents. The first was 16th June 11 Car. 1, *Saint John v. Wareham* (cited 1 Ca. in Cha. 88. 2 Freem. 126). The defendants, for £3000 conveyed the lands to Sir *Richard Grobham* and his heirs; Sir *Richard* made a lease to *Wareham*, rendering to him and his heirs £230 *per annum*, and this lease was for seven years, with a *nomine pœnæ* distress and clause of re-entry, and a proviso, that if *Wareham* and his heirs should within seven years be desirous to repurchase, and signify the same to Sir *Richard Grobham*, his heirs and assigns, and pay them £3000, then he and they to assure to *Wareham*. Lord *Coventry*, *Richardson* Chief Justice, and *Crook*, decreed the money to the heir of Sir *Richard G.*, and not to the plaintiff, *Saint John*, who was his executor, and justly; for this was not the case of a mortgage, but of an absolute purchase; for the proviso could not turn it to a mortgage, but was a mere collateral agreement, for which there was no remedy in equity after the seven years. And so it was ruled in this court, 16 Car. 2, *Cage v.*

*Sir Ralph Bovy*; and again, *T. 24 Car. 2*, in *Isaac Cottington v. Lord Cornbury*, where the covenant was to reconvey, upon the repayment of the purchase-money within seven years. But if the purchase-money had not been near the value of the land, that and such like circumstances might have made it a mortgage.

The next precedent was 27th October 12 *Car. 2*, *Tilly v. Egerton* (1 *Rep. in Cha.* 96; 3 *Rep. in Cha.* 35; 2 *Freem.* 125) where the Plaintiff, having purchased from the mortgagor in fee his equity, and agreed with the mortgagee to pay £6 per annum for ten years, upon a suit for this redemption after the death of the mortgagee, was decreed to pay the money to that heir of the mortgagee and not to his administrator, because no [632] want of assets was proved, though alleged. This precedent, though made by the Earl of *Clarendon*, with advice of *Bridgman*, Chief Justice, I could not approve, and well remember the bar was unsatisfied when the decree was made; for the original proviso mentioning neither heirs nor executors, if the money had been paid at the day, and the mortgagee had been then dead, the heir could not have had the money; then for equity, to give the heir that money after forfeiture, which he could not have had before forfeiture, was somewhat strange and arbitrary; especially when the mortgagee himself had agreed to take a certain sum, which should be ten years in paying, and so turned it to a chattel in equity.

The third precedent was 17th July 13 *Car. 2*, between *Martin and Hall*, executors of *Andrews*, plaintiffs, and *Gobe and Bridget* his wife, daughter and heir of *Andrews*, defendants. The Earl of *Carlisle* mortgaged the manor of *D.* to *Andrews*, in fee, for £1000, payable to him and his executors, and covenants to pay the money, and in default of payment to make further assurance to *Andrews* and his heirs, and gives bond to perform covenants; the mortgage is forfeited; then *Andrews* makes his will, gives his only daughter and heir but £20, his wife his household stuff, his executors the residue of all his personal estate, and dies; the heir to whom the forfeited mortgage descends, exhibits a bill against the Earl of *Carlisle*, to redeem or be foreclosed, and obtains such a decree; the executors, who were no parties to this suit, exhibit a new bill against the Earl of *Carlisle* and the heir, to have this money, as being due to them by the very original defeasance of the mortgage, and secured by the covenants and bonds, which belong to them to put in suit; but this last bill was dismissed; and the first decree, which gave the money to the heir or the land unredeemable, well approved by [633] *Clarendon*, C., and the *Master of the Rolls*. They went upon these grounds; the executors wanted no assets; the heir had no other provision, but was disinherited; the gift of the personal estate would not carry a fee simple mortgage to executors. This precedent I could not approve, though I were of counsel with the heir in obtaining the decree and dismissal; for the decree was obtained by the precedent of *Tilly's* case, and when there was no executor to contest it. The dismissal of the executors was obtained because the Court was already engaged in a former decree, but the reasons of it are not very strong; for assets or not assets is not the measure of justice to executors, but a pretence for favour to the heir, who either ought to have the money, though there be no assets, or not to have it, though there be assets; disherison of the heir an argument of compassion, not of right; and the gift of the personal estate by the will cannot make the case of the executors the worse, whose title was good without that bequest; for a stronger case for executors can never happen, the defeasance of the mortgage, the covenant, and the bonds, all speaking for the executors.

The fourth precedent was 21st October 20 *Car. 2*, between the Lord *Gorges* and *Sir Robert Dillington* (1 *Rep. in Cha.* 147). *Sir William Lisle* mortgaged in fee to *Sir Robert*, proviso to be void on payment of the principal and interest to *Sir Robert*, his executors and administrators, and covenants to pay the money accordingly. *Sir Robert* dies before the principal is due; but after forfeiture for non-payment of interest, leaving *Sir Robert*, the defendant, his son and heir. Decreed by Lord *Bridgman*, *Custos*, that the Plaintiff, as administrator should have the money, and the defendant the heir should convey [634] the security to the administrator; and this was right and just. But after, viz. 6th March 23 *Car. 2*, in another case, which makes the fifth and last precedent, between ———, Lord *Bridgman*, *Custos*, declared, that in regard there was no defect of assets, no covenant to repay, as personal security, and the re-conveyance must be by the heir, the money ought to be paid to the heir, unless the constant course of the Court had been to the contrary. So that his Lord-

ship adhered to his first opinion, as an assistant in *Tilly's* case ; but by this time began to doubt the course of the Court. Now this last reason, that the re-conveyance must be by the heir, doth not, *ergo*, conclude he must have the money ; for he joins in a conveyance where the land is appointed to be sold by executors, yet hath none of the money ; and when the mortgagor hath once paid the money according to the purport of the defeasance, the estate in law becomes a trust for him, which the heir of the mortgagee is bound to exercise.—Lord Nottingham's MSS.

STOKES v. VERRIER. 31st October, 27 Car. 2, 1677.

A rent-charge of £20 granted in consideration of £240, redeemable on repayment of the consideration to the grantee's heirs, within a year after notice of the death of his wife, ceases on repayment of the sum stipulated to his executors, the conveyance being considered as a security for money.

This point was moved upon exceptions : 7 Jac. *John Verrier*, father of the defendant, did, for the consideration of £240, grant a rent-charge of £20 *per annum* to *Nethersole* and his wife, and the heirs of *Nethersole* ; proviso, that if the grantor or his heirs do, [635] within one year after the death of *Nethersole's* wife, upon notice thereof given by the grantee or his heirs, pay unto the said *Nethersole* or his heirs the sum of £240, then the rent shall cease ; the wife dies, and the money is paid to the executors ; the question is, whether the rent do cease or no ? which depends upon this, whether the rent were a purchase, or only a security for money ; for if it were in the nature of a mortgage, then the rent ceases, because the mortgage-money ought to be paid to the executors, though the inheritance mortgaged descend to the heirs. It was said, that this could not be looked on as a security for money ; 1. because it was most plainly a provision for a jointure for *Nethersole's* wife ; and it would be a strange kind of security for money which must stay for payment till after the death of the jointress, who might live fifty or sixty years ; 2. because this kind of security would depend wholly on the pleasure of the grantee, whether it should ever be redeemed or no ; for he may refuse to give notice of the death of the jointress within the year. But I held it to be clearly a security for money, and in the nature of a mortgage ; for 1. though £20 *per annum* be not the true interest of £240, as money then went, at £10 *per cent.*, yet it is between 8 & 9 *per cent.*, and exceeds all the rates of purchases ; so that a man may well desire a proviso to call back such an estate again, though he suffer it to lie out for a jointure ; but if the rent had exceeded the annual rate of £10 *per cent.*, then to construe it a security were to make it an usurious contract, which were a hard case, but still the same. 2. No mortgage can be redeemable on one side only ; but however it be penned the law will still imply a liberty to the other side to foreclose that redemption, and this the grantee might do in this case by bill in this Court ; and by like reason the grantor may redeem, though after the [636] year, and though no notice be given of the jointress's death, according to the judgment in *Danby v. Rod* (*Rep. temp. Finch*, 226).—Lord Nottingham's MSS.

TABOR v. TABOR. 22d November, 31 Car. 2, 1679.

Money due on a mortgage in fee, paid to the heir of the mortgagee, was recovered from him by the executor.

The Defendant was the grandson and heir of *Edmond Tabor* ; the Plaintiffs were the three younger sons of *Edmond*, and uncles to the Defendant, and they were also executors of their mother, and administrators *de bonis Edmondi non administratis* per the mother, administratrix of *Edmond*. The case was this : *Edmond Tabor*, in the year 1650, lent a sum of money to one *Ayloff*, who for security thereof made a mortgage in fee simple to *Edmond*, but the possession remained with the mortgagor ; and about eleven years since, *Ayloff*, the mortgagor, exhibited a bill against the Defendant as grandchild and heir of *Edmond*, to have a redemption, but did not make an executor or administrator of *Edmond* party. The decree passed, and the money was paid to the Defendant, the heir, and the land reconveyed ; and now the scope of this bill was, to make the grandchild and heir of

*Edmond* pay back the mortgage money to the Plaintiffs, who were the administrators *de donis non*, upon the reason, and according to the resolutions of *Thornborough v. Baker* (3 Swans. 628); and the Plaintiffs thought their case much stronger than that case, because [637] here *Edmond*, the mortgagee in fee simple, did not die seised in possession; and because *Edmond*, by his will, left two other mortgages in fee simple to his heir, *ergo*, he did not conceive the third would go to him.

I said, I was still of the same opinion, that the money due upon a forfeited mortgage in fee simple ought to be paid to the executor of the mortgagee; as was held in *Thornborough v. Baker*, *Stokes v. Verrier* (3 Swans. 634), and *Ballard v. Ballard*; for by the judgment of the common law, if a feoffment in mortgage be made upon condition to pay money generally, without saying to whom, the common law gives it to the executors; or if it be to pay money to the mortgagee, his heirs, or executors, if the mortgagee die before the day, the mortgagor at the day has election to pay either to heir or executor, as *Littleton* says (*Note*: The proposition cited occurs not in the text of *Littleton*, but in *Coke's* commentary. *Co. Lit.* 210 a); but after the day, when the mortgage is forfeited, there is an end of all by the common law, and no room left for any farther election. Now, though by the law of Chancery, an equity of redemption does still subsist after forfeiture, the question is, in what manner it shall subsist, and upon what terms? And, first, it were most unreasonable for the Chancellor to give the mortgagor an election to pay the heir or executor; for though there be no great inconvenience in such an election at the common law, seeing it is to be executed and determined at a precise and certain day, yet it were intolerable to allow the mortgagor such an election in equity, where there is no certain time of redemption fixed, but the mortgagor may bring his bill to redeem when he pleases, and in the mean time may agree to play the money into the hands of the heir or executor, [638] according as he can best make his bargain with them; and it were yet worse to leave such a power of election in the Court itself; for that were to make every redemption of a mortgage *casus pro amico*, and is too great a latitude to trust a Chancellor with. Since, *ergo*, some certain rule is necessary, what better rule can be given than to come as near the rule and reason of the common law as is possible; and that is always to give the money to the executor, where it is left to construction to whom it should be given. But, because this has been long a controverted point, and was never fully settled till my time, as appears by *Thornborough* and *Baker's* case, and the precedents then cited, *ergo*, it is not fit to look too far backwards, or to give occasion for multiplying suits; for God forbid men should search the register's files to find out how many decrees have been made for payment of mortgage money to the heir, and then stir up the executors or administrators to sue the heir for it again; nevertheless, I had so much respect to the length of time, as to excuse the heir from paying any interest or costs."—Lord Nottingham's MSS.

Sir FRANCIS HOLLES v. Sir ROBERT CARR. 10th February, 28 Car. 2, 1676.

[See *Young v. Smith*, 1865, L. R. 1 Eq. 183; *Buckland v. Buckland*, [1900] 2 Ch. 540.]

*Rep. temp. Finch*, 261; 2 *Mod.* 86; 2 *Freem.* 3.—Specific performance decreed against an heir in tail in possession, of an agreement, during the life of the tenant for life to levy a fine.

The Defendant prayed a commission to examine witnesses to prove the contents of some deeds, which his mother, the Lady Carr, a few days before her death, had partly burned, and partly cut, defaced, and embezzled, without which he should not be able to [639] make his defence. This I was ready to grant; but the Plaintiff, rather than put off his hearing, did consent that those witnesses should be examined *viva voce* at the hearing, and that for the preservation of their testimony for the future, a schedule of interrogatories should be exhibited into the office, and there the witnesses be examined again: and upon this rule, by consent, the cause came now to hearing.

The bill demanded £6000 portion due to the Plaintiff in right of his first wife, who was the daughter of old Sir Robert Carr and his Lady, and the sister of the now

Defendant. That demand is founded] upon articles bearing date 22d August 1661, between the Lord *Holles* and Sir *Francis* his son on the one part, and old Sir *Robert Carr* and Dame *Mary* his wife, and the Defendant by the name of *Robert Carr*, Esq., on the other part; these articles recited a marriage intended between Sir *Francis* and Mrs. *Letitia Carr*, and the Lord *Holles* and Sir *Francis* covenant to settle a jointure within six months; and old Sir *Robert Carr* and his Lady, and the Defendant, covenant to pay the portion within eighteen months; and then the articles recite further, that whereas a fine is intended to be levied by the *Carrs*, the use thereof is declared to be for securing the portion of £6000. These articles were sealed by the Lady *Carr*, without her husband, who was looked on as *non compos*; and upon her sealing only the marriage proceeded; and after the marriage, the Defendant coming from *Cambridge* to town, was also persuaded to seal, but hath endeavoured to prove that the inducement for his sealing was a promise from Sir *Francis Holles* to settle an additional jointure, which was never done, or which is worse, was preconveyed before it was done, as the Defendant alleged; and to show that the additional jointure was the consideration of Sir *Robert Carr's* sealing the ar-[640]-ticles, a bond was produced bearing date the same day Sir *Robert Carr* sealed the articles; and after all this, in the year 1664, a private act of parliament passed for the settling of the estate of Sir *Robert Carr* the elder, by which act an estate for 500 years is vested in Sir *Richard Temple* and others, in trust for raising the portion of £6000, and the articles are again enacted to be performed by the Lord *Holles* in all points, which the Court of Chancery shall not dispense with; but in the same act there is a saving of all rights other than the rights of those who claim by some conveyance made since the year 1639, or under some conveyance made before the year 1639, with power of revocation, and revoked; which latter exception out of the saving was of no use but only to make good all revocations when the circumstances of the power were not pursued.

Not long after the passing of this act, the Lady *Letitia Holles* died, leaving only one daughter, *Denzella Holles*, since dead without issue; and in the year 1667, old Sir *Robert Carr* died; and then this suit was commenced; against which, Sir *Robert* that now is, endeavoured to defend himself, by insisting upon a settlement made by his father before the year 1639, with power of revocation, and never revoked, by which settlement old Sir *Robert Carr* was tenant in tail remainder to *Rochester Carr* in fee; this estate descends to the Defendant as issue in tail, and is a right not barred by the act; but expressly within the saving; this settlement, though defaced, was, together with some other deeds, proved by Mr. Justice *Ellis* *visa voce* at the hearing, out of an abstract which he took in *January* 1668, and the manner of it was this: upon the 1st of *December* 1636, a lease for sixty years was made by old Sir *Robert Carr* unto *Berisford Dalyson*, and *Goodwyn*, of all his lands in *Lincolnshire* in trust to secure his [641] wife's jointure, his own legacies, and his daughters' portions, if two, £2500 a-piece; there was in it a power of revocation, and a further clause, that when his issue male came to be twenty-one, the trust should determine; and upon the 2d and 3d of *December* 1636, a settlement was made by way of lease and release, to the use of the Defendant's father in tail, remainder to *Rochester Carr* in fee; but in this settlement some parcels of land were omitted, which by the act of parliament are vested in Sir *Richard Temple*, &c., for 500 years, namely, *Monk Thorp*, or *Monk's Warmouth*, and *Steeple Hill*; so that those parcels cannot pretend an exemption by the saving, because they are not comprised in any settlement; and the Defendant did further offer, that while the main jointure was delayed to be settled, the £6000 had been raised, and by direction of Mr. *Cook*, a trustee for Sir *Francis Holles*, was left in the hands of Mr. *Cox*, where it miscarried; and this they would have to be a payment in equity. Also the Defendant read some proof of unkindness in Sir *Francis Holles* to his former wife; which was improper, and not pertinent to this case.

And the case being thus opened in the presence of Mr. Justice *Wyld*, and Mr. Justice *Wyndham*, whom I called to my assistance,

Mr. *Attorney* said for the Defendant; first, no portion was due in equity from Sir *Robert Carr*, who sealed only in contemplation of the additional jointure, which was never made, and which Sir *Francis Holles* had disabled himself to make; secondly, if it were ever due, it is paid; for payment to *Cook* and *Fleetwood*, who were trustees to receive this money, had been good payment, but payment to *Cox* by their

direction is payment to themselves ; and some monies have been paid to the Lady *Holles* to supply her in her extreme necessity ; [642] thirdly, if all due and unpaid, yet there is no remedy here ; against the person, clearly none, nor yet against the estate by way of execution of a trust : for, first, the lease for sixty years is out of the case, for the trust of that is determined, and now it attends the inheritance ; and as to the inheritance, whereof the settlement is preserved by the saving, the Plaintiff hath no better case than this ; the issue in tail in the life of the father joins with his mother, a feme covert, in articles ; this could not bind the estate in the land, for the son had then no estate in it, and equity respects the commencement, at which time there was no real lien.

Mr. *Keck* added, that if Sir *Robert Carr* had been sued in the life of his father, he could not have been compelled to join in any assurance to the trustees, because it would have been vain for the Court to decree an act which would be illusory, and might have been defeated again ; and cited *Allen v. Wentworth* ; and showed further that the Defendant ought to be looked on as a surety, for the marriage proceeded without his sealing, as not then thought necessary, and he was drawn in afterwards ; and he observed the hardness of the case, for the £6000 and interest swell now to £10,000, and though £2000 have been paid, that will only be accounted interest ; and it ought not to be objected to the Defendant, that he paid some part of the money upon these articles ; for all those payments were in his father's name, and by his order, and not one penny paid since his father's death in 1667.

Serjt. *Maynard*, Sir *J. Churchill*, and Sir *J. King*, for the Plaintiff, said, there is a debt of £6000, as appears by the articles, and the act of parliament which confirms the articles, and is an evidence of the continuing agreement. The bill justly seeks to enforce the exe[643]-cution ; for my Lady *Carr* acted as a feme sole, managed all, and upon the confidence of her and her sons joining the marriage was had ; and though the settlement be admitted, and within the saving (for it is vain to object here to the saving, because that is at law), yet if an issue in tail will seal articles declaring that a fine is intended to be levied to secure the portion, if the land come afterward to him by descent as heir in tail, he ought to make it good ; for if tenant in tail upon a marriage agreement make a defective surrender of a copyhold or other assurance, the heir, though no party, shall be obliged to make it good ; *a fortiori*, where he is party to the articles : and they denied *Cook* and *Fleetwood's* directions to pay the money to *Cox*, or that he had any power to give such directions ; and though Sir *Robert Carr* could not have been decreed to join in the fine, yet his person might have been decreed to pay the money, and the land would have been bound by that decree when it came to him.

Justice *Wyld* said, that as these articles are penned, which declare an intent that a fine shall be levied to secure the portion, no action of covenant lies for not levying the fine ; I said I doubted that, because it amounted to an agreement under hand and seal that a fine shall be levied, and upon every agreement under seal a covenant lies.

And I put the case, that Sir *F. Holles* had sued in his wife's lifetime, could he have had a decree without settling the additional jointure ? The counsel for him said No, and the Court took time to advise.

*Note* :—These things are clear, and without dispute. 1. There is £6000 principal money due by the articles ; 2. it remains still due, for the money deposited in *Cox's* [644] hands cannot be taken for payment, for neither are such directions sufficiently proved, nor any sufficient authority to give such directions ; 3. there is a remedy at law against the person upon those articles by debt or covenant, but no suit lies here for a sum of money certain and due by specialty ; 4. there is a remedy at law against some of the lands, viz. *Monks Thorp* and *Steeple Hill* ; for these lands not being comprised in the settlements which have been proved, can have no benefit of the saving in the act, and by consequence are vested in the trustees for 500 years ; 5. there is a remedy in equity against these lands ; for the trustees ought to be decreed to execute their trust, and to enter upon these lands, and by sale or otherwise raise what they can towards the portion, and for so much the bill without question is just, and must be retained, and the Defendant himself may be decreed to join in the sale of those lands for 500 years ; 6. the main point is, what may be done in Chancery against the other lands which descend to the Defendant as issue in tail, by a right of settlement which is saved by the act, and by consequence were never vested in the trustees for 500 years ? Wherein it will be fit, in the first place, to put that out



of the case which serves only to make a show, and ought not to sway the question. First, then, it is not now material to inquire upon what inducements the Defendant came to seal the articles, for having sealed them, he must perform them, let the inducements be what they will ; besides, it is plain the Defendant relied upon his bond for the performance of those inducements, and so both sides trusted to their reciprocal remedies ; secondly, it is as little to the purpose to debate what kind of decree the Court ought to have made if this bill had been exhibited in the life of the Lady *Holles*, before any additional jointure settled, or in the life of old Sir *Robert Carr*, the tenant in tail ; for we ought to consider the case as [645] it is at present, when there is no cause for any additional jointure, and when the estate tail is actually descended from him, who was no party to the articles, to him that sealed them ; for if the plaintiff have timed his case well by not exhibiting his bill sooner, he ought not to fare the worse for having followed good advice.

To come, *ergo*, to the main question, whether lands which descend upon the issue in tail shall be made liable in equity to the performance of those articles which the issue sealed in the life of his father,

First, I observe, there is no necessity at all of this suit in equity, for the Plaintiff hath a clear remedy at law by action of covenant to enforce the Defendant to levy a fine of those lands of which, when levied, the articles have declared the use to be for securing the portion ; for to an action of covenant the word covenant is not necessary, but a perfect agreement under hand and seal, which is here ; for the articles are entitled Articles of Agreement, and that word agreement goes quite through, and governs that very clause which says a fine is intended to be levied to secure the portion, and turns that into an agreement for which an action lies.

Secondly, yet there is no impropriety, and there may be great convenience, in commencing such a suit in equity, not only in respect of the difficulties which arise at law upon doing the first act, and tendering of the charges, but in respect of the precedents of the Court ; for this Court hath often decreed fines to be levied according to agreement, when the lands are to be specifically enjoyed, as here they ought to be, till the portion levied or paid ; and it is not fit to turn the Plaintiff to a personal remedy, which may fail by death and want of [646] assets, when the Court may decree a fine to be levied, which is a real remedy.

Thirdly, but then the doubt is, whether the Plaintiff have any such prayer in his bill, which seeks only to enforce the trustees to execute their trust, or to compel the Defendant to pay the money ; for the general prayer of relief perhaps will not serve.

Fourthly, if the Court go about to affect the lands entailed merely by the articles, then they put themselves upon these considerations : 1. How far the son had been bound if the father alone had sealed and died, and the issue had come in *per formam doni* ; 2. How far the issue in tail, in the life of his father, can bind the land wherein he had nothing, or charge or incumber it with any equity merely by sealing of articles, and by conveyance make articles stronger than a fine levied by the issue, which though it may bar the entail so as to let in his father's incumbrances, yet he himself can neither alien nor charge the entail by such a fine ; points not necessary, and very difficult to be resolved ; whereas to decree the issue to levy a fine according to his agreement, is attended with no difficulty at all. *Sed de his amplius deliberandum.*

22d April, 28 Car. 2, 1676. In the case of Sir *Francis Holles* and Sir *Robert Carr* the Court this day delivered their opinion.

Justice *Wyndham* thought the Court not bound to do any more than to decree the trustees to execute their trust as far as the act warrants it. Justice *Wylde* agreed so far, and observed the right of the Plaintiff was not remediless, for he might have debt or covenant for the [647] money, and he had no real remedy against the land by the articles ; because nothing in the articles amounted to a covenant to levy a fine, but only declared an intention to levy a fine, and then this Court never decrees an execution *in specie* where there is no covenant to sue at law.

I was of opinion, as before, 1. that the duty was clear ; 2. that it remained unsatisfied ; 3. that for a sum certain due by specialty the remedy is at law, and it cannot be decreed here, if that demand stand alone ; 4. that the trustees may be decreed to transfer the estate for 500 years vested by the act in Sir *Richard Temple*, &c. ; and this, as to *Monk Thorp* and *Steeple Hill*, will pass the legal estate, because these parcels are not in the Defendant's settlement, and by consequence are out of

the saving ; and, as to the rest, will convey to the Plaintiff all their equity ; 5. but the articles themselves cannot directly and immediately affect the entailed lands, which the Defendant claims by settlement, and the saving in the act, because the Defendant's father, who was tenant in tail, never sealed, and the son, who sealed in the father's life, had not the estate tail in him to encumber with an equity, and if he could so encumber it during his own life, yet it may be doubted whether the issue of the son would be bound by it ; 6. but the articles may affect the land by consequence, if they oblige the person to levy a fine of these lands unto such uses as may secure the portion ; and if this be so, then all other points are unnecessary, and out of the case.

Now herein I confess I differ from the Judges ; for I cannot but think these articles do amount to a covenant to levy a fine, for neither the word covenant nor the word agreement is necessary to an action of covenant, [648] but a deed under hand and seal, testifying an agreement (*Holman v. Wood, Rolls, Trin. 1825*) ; *ergo*, if rent be reserved to a stranger, covenant lies ; nay, covenant lies upon a bond. Here it is stronger ; for the title is, Articles of Agreement, which word agreement goes quite through ; and the first articles covenant to pay the money and to secure it in manner following ; now there is no other manner following, but that of levying a fine, *ergo*, that is covenanted for ; and when both parties recite, whereas it is intended a fine shall be levied, this declares an agreement to levy, and accordingly the use is declared to be for the securing the portion, which couples it to the manner following in the first article. Wherefore I said, the cause hitherto was only ripe for this kind of decree : 1, that Sir *Richard Temple, &c.*, should transfer their estate to the plaintiff, *vaile que vaile pourra* ; 2, that the Plaintiff, notwithstanding that, be still at liberty to pursue his remedy against the person by action ; but before the remedy could be carried further against the rest of the lands in equity these points were to be spoken to : 1, whether these articles in the frame and purport of them do give an action of covenant for levying a fine ; 2, if they do, whether this Court be bound in justice to decree a specific performance, or may leave the Plaintiff to his action ; of which the consequence may be, that the Plaintiff shall have no better remedy to enforce a fine than he hath for payment of his portion, *viz. damages* ; and if the Defendant dies, assets may fail ; whereas a decree to levy a fine according to the covenant, if it be obeyed, affects the land in law ; if it be disobeyed, affects it in equity, and saves a great many formalities in law, precedent to the action of covenant ; 3, whether the bill, which prays relief generally, do sufficiently warrant such [649] a decree by a special remedy ? which it seems to do ; because it discloses the whole nature of the case, and mentions that once a caption of a fine was prepared ; 4, supposing a fine levied, whether it can enure to the use of *Cox* and *Fleetwood* for 500 years, to secure the portion, a new term of 500 years being given by the act to Sir *Richard Temple, &c.*, of the same lands ? But that will not be material ; because if it do not, however, the old entail is barred, and the new lease good. But above all points, I recommended it to Mr. Attorney and Sir *John Churchill* to mediate an agreement.

5th June, 28 Car. 2, 1676. *Sir Francis Holles v. Sir Robert Carr*. It was now urged for the Plaintiff, by Serjt. *Maynard*, that the articles, being taken all together, did amount to a covenant to levy a fine ; and he cited *H. 13 Car. 1. Mannors v. Norwood* ; the Defendant agreed to pay £500, and the true intent of the parties is, that he shall give bond for it ; adjudged a covenant. So a termor for ninety-nine years, &c., if three *vies* live, recites his interest, and that one life is in being, and assigns his term ; adjudged a covenant that the life continued.—*P. 11 Car. 1, 221. Best v. Brett, and 1 Roll. Abr. 518, 519.*

Mr. Attorney for the Defendant confessed, that where a writing under hand and seal testifies an agreement or undertaking, it amounts to a covenant ; as in an apprentice's indenture, matrimony shall not contract, shall not embezzle, &c., are all covenants ; here it amounts only to a declaration of uses, if a fine be levied, not to a covenant to levy a fine ; for such a covenant were useless as a personal security, because a covenant to pay the money is as good.

[650] I said the point in law was not necessary to be precisely debated ; for though I was of opinion it amounted in law to a covenant to levy a fine, yet if it were but an agreement in equity to levy a fine, it ought equally (if not more) to be decreed, the rather because the late act doth expressly enact the articles to be performed. Where-

fore I recommended it to the Plaintiff to accept security for the principal at 4 *per cent.*; and if the Defendant would not consent to give it, left the Plaintiff to draw up his decree according to this and the former debates.—Lord *Nottingham's MSS.*

A bill was afterwards filed against the persons to whom Sir *Robert Carr* had devised his estates in trust to pay his debts, reciting a decree made on the hearing of the original cause: "That if Sir *Robert Carr* should fail to pay to the Plaintiff, at a day therein expressed, what a Master of the Court should certify to be due, then he should levy a fine of the said manors and lands, and the Plaintiff should have, hold, and enjoy the same, during the residue of the said term of 500 years"; and stating that the Master certified due to the Plaintiff, on the 1st of *March* 1678, £10,360, 9s., and that before payment, fine levied, or possession delivered, Sir *Robert Carr* died; by whose affected delay in the suit the original debt exceeded the value of the lands, the subject of the decree in the first suit: the bill prayed that the devisees might pay the £10,360, 9s. with interest and costs, or raise, out of the remaining estates of Sir *Robert Carr*, what was due to the Plaintiff, beyond what the said lands would raise. The bill was dismissed 3d *February* 1685. Reg. Lib. A. 1685. It seems that on a rehearing relief was decreed. 1 *Vern.* 431; 1 *Eq. Ca. Ab.* 139.

[651] Serjeant MAYNARD v. OSWALD MOSELEY. 3d *May*, 28 *Car.* 2, 1676.

2 *Freem.* 1; *Rep. temp. Finch*, 288.—When eviction entitles a purchaser to relief.

The Plaintiff exhibited his bill to be repaid £600 upon this case. Sir *Edward Moseley* devised the *Leicestershire* lands unto his wife, the now Lady *North*, for life; remainder to the 1st, 2d, 3d, 4th, 5th, and 10th son of his sister *Maynard* (wife of *Joseph Maynard* the Serjeant's eldest son) in tail; remainder to *Nicholas Moseley*, the father of *Oswald*, for life; remainder to *Oswald Moseley* in tail; with other remainders over; and died in *October* 1665. The Serjeant goes down into *Lancashire*, peruses all the writings (makes agreements with Mr. *Edward Moseley* on behalf of his son not to contest the will, and to discharge a lease for eleven years, and thereupon hath £10,000 debt secured by judgment, all which agreements his son flies off from, and tries the will, &c.), and perceiving that if the will stood (as he believed it would do, having examined all the witnesses upon the place), then it would be in the power of my Lady *North*, by joining with *Nicholas* and *Oswald*, to bar all the contingent remainders to his daughter's children, who at that time had none, and so the *Leicestershire* lands, worth £600 *per annum*, would be lost; in *December* 1665 comes to an agreement with *Nicholas* and *Oswald* to buy their remainder or possibility in the *Leicestershire* lands for £600, and pays it down; and the manner of the further assurance was to be thus: *Nicholas* and *Oswald* were to procure the Lady *North* (without whom it could not be done) to join with them in a common recovery before the end of three [652] years; and to secure this, *Nicholas* and *Oswald* gave a bond of £1200 to the Serjeant, conditioned, that if no recovery be suffered within three years, whereby the estates of *Nicholas* and *Oswald* may be sufficiently barred, then upon the reconveyance of the premises, to repay £600. After this Mrs. *Ann Moseley* sets up a title to the *Leicestershire* lands by virtue of a will of Sir *Edward Moseley's* father, found in loose sheets among the evidences, and supposed to be suppressed by the son; upon which title she exhibited a bill in this Court, and obtained a decree for the *Leicestershire* estate; notwithstanding which eviction, the recovery was suffered within the three years by the Lady *North*, and *Nicholas* and *Oswald Moseley*, in due form; and now the Serjeant demanded the £600 in equity, because no reconveyance of the premises could be made within three years, in regard the title was evicted, and the recovery did him no good.

But I dismissed the bill; for I saw no reason, as this case was, to amend the Plaintiff's security in equity, or to give him a better remedy for his money in Chancery, than he had provided for himself by the condition of the bond which he took; 1st, for there was no fraud in the defendants at the time of the sale, but the nature of their title was better known to the Plaintiff than to themselves, for the Plaintiff had perused and studied all the evidences of the family; 2dly, their estate was very valuable at the time of the sale, and might have been sold for more to another, and had it not been for this eviction, the Plaintiff had now gained £600 *per annum* for

£600 ; 3dly, the condition of the bond is literally performed, if not, got to law ; if so, why should the Defendants, who have performed the condition of their bond, forfeit their bond in equity ? 4thly, the Plaintiff was not disabled to sue at law, because he could not [653] reconvey the premises for want of a title, for the word reconvey implies no more than convey back what was conveyed before, be the title what it will ; 5thly, but that which disables him to sue at law, doth also disable him in equity, and that is, that in truth no reconveyance ought to be made, but in default of recovery within three years, which hath been had, and then no money being to be repaid but upon a reconveyance, what ground hath the Plaintiff for this demand ? 6thly, to offer now to reconvey is nothing, for the Defendant is not bound to take it in equity, if he be not bound in law ; nor was he bound to take it though it had been offered within the three years, if a sufficient recovery were suffered before ; 7thly, if the Defendant had not sold his interest, then the loss of this eviction must have fallen upon the Defendant ; shall the loss fall upon the Defendant, too, when he hath sold it without any covenants or warranties, and without any other conditions than what are performed ? *Caveat emptor* is a very needless advice, if the Chancery can establish another rule intsead of it, by declaring that equity must suffer no man to have an ill bargain ; 8thly, if the Defendant had been Plaintiff to recover £600, he had no equity to recover it after eviction, nor hath the Plaintiff equity to be repaid contrary to the terms of his own agreement.

Serjeant MAYNARD v. OSWALD MOSELEY. 27th June, 28 Car. 2, 1676.

The cause, which was heard before, and dismissed, came now to be reheard at the Plaintiff's importunity, who pressed earnestly for a decree ; but I continued of the same opinion in substance, and caused the reasons of that opinion to be specially entered by the registrar in manner following.

[654] His Lordship declared, that as this Court suffers no man to overreach another, so it helps no man who hath overreached himself without any practice or contrivance of his adversary ; that it was most plain in this case there was no fraud nor concealment in the Defendants at the time of the sale of their remainders, but all things were more open and better known to the Plaintiff than they were to the Defendants ; for the Plaintiff had been upon the place, and perused the evidences of the family, and the Defendants did not solicit the Plaintiff to buy, but the Plaintiff importuned the Defendants to sell their remainders, and had reason so to do, for otherwise, as things then appeared on all hands, the Defendants, with the concurrence of the Lady North, might have disinherited the issue male to be begotten on Mrs. Maynard of all the *Leicestershire* estate, worth £600 *per annum*. Accordingly the Plaintiff covenants with the Defendants for their title for £600, which was much short of what it was then worth in all appearance ; and the Plaintiff draws his own assurance, and pens the defeasance of that bond upon which he now sues in equity to have back the £600 and interest ; by which very bill the Plaintiff admits that the Defendants can no way be charged with the bond at law. It remains, *ergo*, to be considered, what grounds there are to charge them in equity ; for the Defendants, who made no corrupt or fraudulent agreement at first, insist upon it that they have literally performed that agreement which they made, and for which they took their money ; *ergo*, that the Defendants should now be forced in equity to pay back their money and interest, and be put into the same plight in effect as they would have been if they had broken their agreement, seems hard.

And the more, because all the reasons which are used to enforce such a decree do arise either from the eviction [655] by Mrs. Ann Moseley, or from the supposed defective and illusory performance of the agreement by the Defendants, or from some other circumstance in the case, which hath disabled the Plaintiff to sue his bond at law ; and yet no arguments are drawn from any of these heads strong enough to support this bill.

For, first, as to the eviction ; although after the bond and the agreement the lands were evicted by Mrs. Ann Moseley, so that the Defendants may now seem to retain the £600 for nothing, yet he that purchases lands without any covenants or warranties against prior titles, as here, where the Defendants sold only their own title, if the land be afterwards evicted by an eigne title, can never exhibit a

bill in equity to have his purchase-money again upon that account ; possibly there may be equity to stop the payment of such purchase-money as is behind, but never to recover what is paid ; for the Chancery mends no man's bargain, though it sometimes mends his assurance ; and it cannot be truly said that the Defendants keep the money for nothing, since they have done all which was agreed to be done for it ; but if the Plaintiff had bought that which falls out to be worth nothing, he can complain of none but himself.

Then as to the manner of the Defendants' performance of their agreement, the objections are four : 1st, They delay performance as long as was possible ; for *November 1668* was the last term within the three years wherein any recovery could be had ; but still they do perform in time ; and since the Plaintiff might at any time after the three years have enforced the Defendants to suffer a recovery, but the Defendants could not after that time have forced the Plaintiff to accept of a recovery, it is enough for them they performed so soon.

[656] Secondly, they suffered the recovery the same term, and some days after the decree passed by which the title was denied ; but His Lordship held this to be no great fault ; for since the Defendants were like to lose the land by a title which they never covenanted against, they had reason to do what they could to secure the money they had sold it for ; and the rather, because though the Defendants were in a great mistake when they supposed that suit to be stirred up and encouraged by the Plaintiff in hopes that his grandchild or grandchildren by Mrs. *Maynard*, who are inheritable to Mrs. *Ann Moseley*, might one day succeed to the *Leicestershire* estate upon cheaper terms, there being no proof in the cause which looks that way ; yet even a mistake, while it continues so, works as strongly as a just belief, and then it is not to be wondered at if the Defendants made haste to secure themselves.

Thirdly, they gave no notice at all to the Plaintiff of their proceedings, that he might see all fairly done. This His Lordship said looked like an unkindness, but was no injustice ; for the Defendants were not obliged in strictness to give notice, since it is at their own peril if the proceedings be not in exact and legal form ; and perhaps the shortness of time discouraged them from acquainting the Plaintiff, whose interest it was to seek delays.

Fourthly, there is no recovery at all to bar the remainders ; for that the bargain and sale to make a tenant to the præcipe was not acknowledged to be enrolled until the 25th of *November*, which was long after the recovery passed ; but then either this is made good in law by relation, or else the agreement remains unperformed, and the Plaintiff may sue his bond at law.

[657] For whereas the Plaintiff supposes himself disabled to go to law in regard the Defendants are not obliged to repay without a reconveyance, which cannot now be made in regard of *Ann Moseley's* eviction, his Lordship conceived this to be only a pretence ; for whether the title be good or bad, the Plaintiff may still proceed to reconvey what was preconveyed, and then assign the breach in not suffering a recovery if he think good.

And the Plaintiff might as reasonably have prayed a decree heretofore that the Defendants might not perform their agreement, as pray a decree now that they may be never the better for it if they have performed it.

Wherefore, upon the whole matter, though if the Defendants had been Plaintiffs for the money, his Lordship would hardly have decreed for them, as they are Defendants and in possession of money upon an agreement executed, his Lordship saw no cause to decree against them.

But yet I did not absolutely dismiss, but decreed, 1. if Plaintiff go to law, Defendants to admit a reconveyance, and not to take advantage of eviction here ; 2. if Plaintiff release, Defendants to make further assurance.—Lord *Nottingham's* MSS.

[658] WEBB v. WEBB. 3d July, 28 Car. 2, 1676.

Bill of review of a decree by consent, dismissed.

The case was between father and son ; the son had formerly exhibited a bill against his father, to have an account of a personal estate, and also of the prebend of *North Grantham*, where his father was a trustee for him. At the hearing the

son proved his case. The *Master of the Rolls*, who heard it, mediated an agreement ; which produced a consent that the father should convey to the son, and the son should pay the father £50 *per annum*, and release to his father all accounts of the arrears and of the personal estate. Both subscribed their consent to the minutes ; and thereupon a reconciliation was made, and blessing asked and given in open Court. And after[all this, the father brought a bill of review to reverse this decree ; but I immediately dismissed the bill, and would hear no more of it : for there can be no error in a decree by consent, *consensus tollit errorem* ; there can be no injustice in a decree by consent, *volenti non fit injuria*.(1)

*Note* : This case had for a long time stood referred to the Lord Chief Justice *Hale*, who had married his daughter to the son ; but he could never bring the father to reason.—Lord *Nottingham's MSS.*

(1) *Downing v. Cage*, 1 *Eq. Ab.* 165. *Toder v. Sansam*, 1 *Bro. P. C.* ed. Toml. 468. *Harrison v. Rumsey*, 2 *Ves. Sen.* 488. *Bradish v. Gee*, *Amb.* 229. *Wood v. Griffith*, 1 *Mer.* 35.

[659] JEWON and his WIFE v. GRANT. 26th October, 29 Car 2, 1677.

Legatee when liable to refund.

The Plaintiff's wife was formerly the second wife of the Defendant's father, by whom she had several children ; but the Defendant was a son by the first venter. The Plaintiff's wife, upon her first marriage with the Defendant's father, caused him to enter into a bond of £1000 to secure a provision for the children she should have by him. The Defendant's father by his will gave the Defendant a legacy of £600, and made his wife, the Plaintiff's wife, executrix ; she comes to an agreement with the Defendant to pay him his legacy, so as he would release his right to the real estate, and give bond of £4000 not to disturb ; he does so, and executes the release by fine ; then she gives him a bond of £600 for payment of his legacy ; and afterward, in satisfaction of that bond, grants him a rent-charge of £80 *per annum* during his life. This continued to be paid for seventeen or eighteen years together : but now of late the bond of £1000 is put in suit against her for the benefit of those children she had by *Grant* ; and the bill doth suggest that this bond will swallow up all the assets which *Grant* left, and that if it had been known at the time of the payment of this legacy, nothing ought to have been paid ; and *ergo* prays that the payment of the £80 *per annum*, which came in lieu of the legacy, may at least cease for the future, the Plaintiff being content not to demand repayment of what is past.

I said this bill did rightly presuppose a rule of equity, that whensoever a legacy is paid by an executor, and afterward an unknown bond appears when the assets are gone, the executor hath equity in this case against the legatee to make him refund, though he have no equity [660] at all against the creditor. And this is the reason why this Court, when it decrees a legacy to the plaintiff, never requires security from the legatee to refund if debts appear, for the law of this Court is security enough ; and otherwise few legacies could ever be paid ; for if men must find security against all dormant debts or contingent covenants before they receive their legacies, this security must lie out for ever, and very few will be able to find such security. It is true the Spiritual Court requires security before they give sentence for a legacy, and cannot be prohibited if they do so ; but this Court never does it but in very extraordinary circumstances.(1)

As right as this rule is which the bill does presuppose, yet it is very wrongfully applied to this case ; for here is no bond started up whereof there could be any ignorance in the executrix, it being made upon her marriage, and for the benefit of her children ; nay, it is not without some reasonable suspicion that she is privy and consenting to have that bond sued against her, thereby (like a true stepmother) to load the Defendant with it if she can ; here is no grant of a rent-charge, &c., in satisfaction of a legacy only, but also for a release of a right by fine and a bond of £4000 ; wherefore after an agreement for a legacy, among other things, executed for eighteen years together, to put the Defendant now to prove assets over and above

the bond, or else to lose the rest of his satisfaction, is unconscionable and absurd. So I dismissed the bill.—Lord Nottingham's MSS.

(1) *Nelthrop v. Hill*, 1 *Ca. in Cha.* 135. *Grove v. Banson*, 1 *Ca. in Cha.* 148. *Noel v. Robinson*, 2 *Vent.* 358; 1 *Vern.* 90; *Anon.* 1 *Vern.* 162. *Hodges v. Waddington*, 2 *Vent.* 360; 2 *Ca. in Cha.* 9. *Newman v. Barton*, 2 *Vern.* 205. *Anon.* 1 *P. W.* 495. *Anon.* 1 *Atk.* 491. *Edwards v. Freeman*, 2 *P. W.* 447. *Orr v. Kaimes*, 2 *Ves. Sen.* 194. *Moore v. Moore*, 2 *Ves. Sen.* 596. *Hawkins v. Day*, *Ambl.* 160; 3 *Mer.* 555. *Walcott v. Hall*, 1 *P. W.* 495, n.; 2 *Bro. C. C.* 305. *Malin v. Hooper*, cit. 2 *Bro. C. C.* ed. *Belt*, 305, n. *Simmons v. Bolland*, 3 *Mer.* 547. *Antrobus v. Davidson*, 3 *Mer.* 569.

[661] GORING v. GORING. 17th December, 28 Car. 2, 1676.

An injunction to restrain a lessee from ploughing pasture lands, which had remained unploughed during the continuance of the lease for thirty years, but were ploughed within six years prior to its commencement, refused.

Lessee for years, determinable on lives, during the last aged life begins to plough, and an injunction was prayed.

1. Before the statute of *Gloucester* if lessee for years, whose estate was created by act of the party, had ploughed up meadows and pastures, no account of waste lay, not so much because it was doubted whether it was waste, as because it was the folly of the party that he did not provide for his own security by covenant; for otherwise it was of estates created by act of law, as tenant in dower and tenant by the courtesy, &c. 2. In those days we meet with no injunctions granted in equity to amend the common law. 3. But now, in imitation of the law, it hath obtained that if a jointress go about to deface a seat, or if lessee for years would make any considerable destruction, this Court usually grants an injunction, and stays the ploughing of meadows or of ancient pastures. 4. Here the pastures had been ploughed within six years before the lease began, and *ergo*, though the lease have continued thirty years, during all which time the pastures have been unploughed, yet that will not make them ancient pastures within the rule of this Court; for as to the lessee himself who took these pastures subject to the liberty of ploughing, they remain still so, notwithstanding this forbearance; otherwise if they had been so long out of lease: besides, it was said that the pastures being grown lean, and running to fern and moss, the ploughing would be an improvement. Wherefore I granted an injunction only as to the meadows, but not as to the pasture.—Lord Nottingham's MSS.

[662] DENEW v. STOCK. 9th November, 29 Car. 2, 1677.

*Rep. temp. Finch*, 437.—No relief in equity against a security given for performing the sentence of a court of admiralty, although reversed on appeal, the court to which appeal had been made not having jurisdiction.

The ship *Diana*, which was the Defendant *Stock's* ship, was taken at sea, in the time of our wars with *Holland*, and carried into *Villa Franca*, and there condemned as prize, and sold to *Coleman*; afterward the ship coming through our channel was, by distress of weather, driven into the port at *Dover*, where *Stock*, the Defendant, seized her as his own. *Denew*, the Plaintiff, to rescue this ship from seizure, gave bond to the value of the ship to abide the final sentence of the admiralty at *Dover*; they adjudge the ship to *Stock*; *Denew* prays a commission of review; upon which divers witnesses were examined, and the sentence in *Dover* reversed; but all this set aside again upon pretence of informality, because the commission of review was not in the name of the Lord Warden of the Cinque Ports, but granted as of course by the judges of the admiralty at *Dover*. Then *Stock* gets the bond out of the court below, and sues it at law; and to be relieved against that suit was the scope of the bill.

I sent this case first to law, to see whether, as the condition of this bond was penned, there were any forfeiture at law; and after judgment there, to resort back

to this court for equity. At law it was resolved upon argument, 1. that no sentence in the admiralty of *Dover* could be reviewed by the judges there, or by the Lord Warden himself; for the Lord Warden cannot have a greater power to review his own sentence than the [663] Admiral of *England* hath; but all sentences in the High Court of Admiralty are reformed by appeal to the King in Chancery, and a commission under his Great Seal delegating some persons to review; and so it ought to have been here, for there is no doubt but the king's commission will go to the Cinque Ports, though his ordinary writs do not; and this way of review is evident to be a part of the common law, by the statute of 25 H. 8, touching appeals in ecclesiastical proceedings, which says, as hath been used in cases of the admiralty. 2. The consequence of this is, that the commission of review, and all proceedings thereupon, and the reversal of the first sentence, are not only informal, but utterly null and void. 3. The consequence of that consequence is, that now the first sentence at *Dover* is become the final sentence, for non-performance whereof the bond is forfeited. So judgment was given for *Stock* at law.

And now, for equity, it was urged, that *Denew* was in effect but bail for *Coleman*; that his title was grounded on a sentence at *Villa Franca*, which is presumed to be just, for the contrary sentence at *Dover* was manifestly erroneous, though a right way were not taken to reverse it; and the very possession of a prize for twenty-four hours alters the property, without a sentence. So that if an *Englishman* retake that prize, he may retain it against the first *English* proprietor, as our law books say. The defendant said the justice of the cause was not examinable here; if it were, it would manifestly appear that the capture was a downright piracy, without any pretence of a *Dutch* commission, except one dated the 24th *March*, which plainly was sent for after the fact done; for this could never warrant a capture in *Italy* upon the 1st *April*. And it is a strange kind of equity to say the sentence was unjust when a man hath bound himself to perform it; for by this the justice of all inferior courts [664] shall be examinable here, if security have been given to abide the order of the courts; and to debate the merits were to turn the Chancery to an Admiralty.

I said (as before in *Peter Blad's* case, the *Dane* (3 *Swans*. 603, 604)), that the Chancery had undoubtedly an Admiralty jurisdiction, but there was no use of it here, for the examination of the fact can now be carried no further; *ergo*, the law being against the plaintiff, equity is so too, and the bill must be dismissed.

ASH v. ABDY. 13 *June*, 30 *Car.* 2, 1678.

A demurrer to a bill exhibited subsequently to the statute of frauds, for the performance of a parol agreement prior, overruled, the statute not being retrospective. Statutes restrictive of the common law receive a restrictive construction. The statute of frauds originated with Lord *Nottingham*.

The bill was to execute a parol agreement before the late act for prevention of frauds and perjuries (29 *Car.* 2, c. 3), but the bill itself was exhibited since the act; for which cause the Defendant demurred, supposing the new act had barred this suit; but I overruled the demurrer; for the act was not to be construed with a retrospection and to bar agreements precedent, but did only look forward and provide for the future (4 *H.* 7, 10, pl. 6; 10 *H.* 7, 22; *Jenk.* 233, pl. 6. *Jaques v. Withy*, 1 *H. Bl.* 65); the rather because all acts which restrain the common law ought themselves to be restrained by exposition. And I said that I had some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received [665] some additions and improvements from the Judges and the civilians. (1) And the counsellors at the bar cited another case in the King's Bench this very term, where the same point being specially found, was so likewise adjudged upon argument; which I was glad to hear of; but said, if they had adjudged it otherwise, I should not have altered my opinion.

(1) No one of the popular conjectures concerning the history of this celebrated statute refers its origin to Lord *Nottingham*. That fact seems placed beyond doubt by the account in the text; and there may have been some foundation for the



tradition, that Sir *Matthew Hale* and Sir *Leoline Jenkins* assisted in its preparation. See *Gilb. Rep. in Eq.* 171 ; 1 *North, Life of Guilford*, 209 ; 1 *Burr.* 418 ; 5 *East*, 17.

LORD HOLLES v. HUTCHINSON. 24th May, 31 Car. 2, 1679.

[See *Fraser v. Mason*, 1883, 11 Q. B. D. 580.]

Copyhold fines were ascertained at two years' value, and a commission was issued to ascertain the value of the tenements issued under a decree by consent, the principle of which was disapproved.

On rehearing, it appeared, that there had been two decrees in the case ; one in the time of the Lord *Bacon*, when the fines were ascertained at two years' value, upon an alienation, and a year and a half's value upon a descent or alienation to wife or children ; another in the time of the Lord Chancellor *Bromley*, which was to explain the former decree, upon a complaint that the lord took upon himself to judge the values, whereupon the Chancellor issued out a commission to survey the value of every tenement ; and upon the return of that commission a decree was drawn up, by consent, to make this survey the binding and perpetual measure as to the values.

The Plaintiff urged, that the second decree could not be binding for ever ; for, 1, the survey to which [666] the decree refers, is not extant upon record ; so there is no way either for lord or tenant to prosecute contempts upon this decree. 2. If it could be so, yet the decree is now become impracticable, for the survey sets various and uncertain values upon meadow ; and who can now tell, in divided tenements, which is the best and which is the worst sort of meadow, *et sic de cæteris*.

The Defendant said this decree, by consent, had been found very practicable for fourscore years together, and the survey had been the rule all this while ; for though it be not enrolled with the decree, as the latter and better practice is, yet an ancient survey is still extant, and was found amongst the writings of Sir *Erasmus Harly*, who mortgaged to the Plaintiff, and is since foreclosed, and could not be made to serve this turn ; and offered to try at law that this was the true survey, by which it appears, that of ninety-five tenements contained in it, sixty still remain as they were at first, so no ground to change the decree as to them ; and of those tenements which are altered, the nature and quality doth appear by the copies ; and the Defendant offered to mend the decree so far, that where there is any variance from the survey, the Plaintiff shall be answered according to the highest value of meadow, arable, or pasture ; and hoped, that after so great improvements, all should not be let loose again ; the rather because, if the lord and tenants had agreed by deed under hand and seal to settle the fines in this manner, it would have bound a purchaser with notice ; *a fortiori*, of a decree by consent.

I said the first decree was adversary, and when it reduced uncertain fines to two years or a year and half's value, it said no more than the law would have said ; for fines uncertain are not arbitrary and unlimited, but ought to be reasonable ; and here the fines were still left [667] uncertain as to the quantity, though not as to the measure ; 2. but then the second decree, which came into this case by way of explanation, was altogether improper and unnecessary ; for by pretending to ascertain the values of every tenement it changed the whole nature of the case, and would make fines in themselves uncertain, to be fines certain for ever ; and this was attended with manifest inconvenience : for the values of land being subject to a perpetual variation, it was absurd to settle them at a perpetual certainty ; and it might be as reasonable to settle a perpetual value of tithes, which ought to rise and fall with the land itself ; and if there had been no such explanatory decree, the law would still have kept these uncertain fines, within the certainty of a reasonable measure ; yet it cannot be denied that this decree was by consent ; 3, there are many precedents in this Court whereby fines uncertain have been reduced to a reasonable estimate or value, but this second decree is the first precedent whereby uncertain values were made certain and perpetual by a survey ; 4, it is manifest that the execution of this survey is become in part very difficult, insomuch that the Defendants themselves do offer some amendment of the decree in these particulars ; so that there is an evident necessity of some kind of variation ; 5, the

main end of the decree is peace, and if that cannot be attained by it, some other course must be thought of ; but here can be no avoiding of suits while this decree stands, that is plain : for the lord hath no remedy for any fine ; for if he demand it according to the survey, the lord cannot prosecute the tenants upon the decree, for want of a copy of the survey which the tenants now show, but the lord hath it not, and *ergo*, must be forced to exhibit a bill to discover the survey ; and if the lord would enter for a forfeiture for non-payment of the fine, he cannot do that because the duty is uncertain ; or if he could, a suit in [668] equity by the tenants, grounded upon this decree, would follow : since, *ergo*, suits are unavoidable during this decree, it were better to leave the lord and tenants to the common rules of law in such case, than to entangle and perplex both sides by such a decree ; 6, for the survey produced is manifestly defective in regard it doth not appear it was ever subscribed by *Malin*, as the decree required, so that the decree of itself neither helps nor hurts without the aid of this Court ; and if the tenants were Plaintiffs, they ought to pray this Court to supply the defect of this decree, but being Defendants, how can they hinder the reformation of it ? 7, and especially since it is become in a great measure impracticable ; as for example, it appears by the survey that *William Morgan's* tenement is subdivided in such manner, that several copyholders inhabit the same messuage ; and if one die, what fine shall be taken to conclude the rest, unless it be such a fine as shall be ascertained upon trial at law ? So likewise when lands are subdivided, or the kind and nature of the lands altered ; 8, for it is no answer to say that the memory of the ancient nature of the lands, together with the abutments and boundaries of it, is preserved in the recitals of the copies ; for the survey and decree ought to be complete in themselves, and not to depend upon the diligence of the steward to amend their imperfections, because if the decree be not perfect throughout, the sooner it is set aside the better, for time, which hath already made great alterations in part, will still make more and more ; 9, nor is it greatly material to say this decree hath been found practicable, and submitted to for eighty years last past ; since, for more than forty of those years, the manor hath been in the hands of successive mortgagees who were lords *pro tempore*, and they being accountable for no more than what they received, were not concerned to dispute ; 10, the only difficulty which re-[669]-mains with me is, that the bill doth not pray to vacate the decree, or to set it aside, but only to amend the defects of the survey, and that a new commission may be awarded to that purpose ; that to open a new survey, the true state and value of all the tenements may be known : now, though this kind of remedy will be necessary to be renewed every thirty or forty years, yet since no decree can go beyond the prayer of the bill, I awarded such a commission, and will consider of the further settlement at the return of that commission.—Lord *Nottingham's* MSS.

REX v. CAREW. 12th October, 34 Car. 2, 1682.

1 Vern. 54.—Letters of marque vacated.

Memorandum, that in *Easter* term last, though hitherto not reported, there was a *scire facias* brought against *Carew*, to repeal certain letters of marque and reprisal, which he had obtained *anno* 1665 against the *Dutch flagrante bello*, and still insisted upon, notwithstanding the treaty at *Breda*, whereby all pretences of this kind were amortized, and notwithstanding several orders of the council board to forbid all proceedings upon those letters, and a proclamation under the great seal to recall them : his pretences were, 1, that letters of marque are the subject's remedy against foreign injuries ; and when they are once granted, the king cannot determine that remedy in prejudice of the subject till satisfaction be obtained. 2. The rather, because there was an express clause inserted in those letters, that no future peace should derogate from them : and [670] his counsel, after a week's time given them to argue these points, prayed longer time, that they might study this case a little better, as the novelty of it deserved.

I said this case was of great concernment to the kingdom, and that peace or war with *Holland* did depend upon the resolution of it, and made it necessary to be speedily determined ; wherefore I would not grant them any further day, for I had thoroughly considered the case. And first I observed, that this cause was

properly in Chancery upon many accounts, not only as it was a *scire facias* to repeal letters patent, but as it was a cause of state ; and likewise as it was a marine cause, and did concern depredations on the sea, in which cases the Chancery as well as the Admiralty hath a clear jurisdiction, and this appears by what was said in *Peter Blad's* case (3 Swans. 603, 604), and by many records and precedents cited in my Parliament MSS., tit. *Admiralty*, and tit. *Chancery* ; and is most expressly so settled and enacted in a statute not printed ; viz. 31 H. 6, Rot. Pl. No. 68. (5 Rot. Parl. 268.)

Secondly, it is a considerable question whether these letters of marque were ever good, because they were granted *flagrante bello*, at which time the previous conditions, of letters of request, &c., could not be observed.

Thirdly, if they were never so well granted at first, yet they are now very clearly determined. Wherein, first, it is to be considered, that all letters of marque and reprisal are in their own nature determinable at the pleasure of the prince or state which granted them, and that, without any wrong or injustice at all to the person to whom they are granted ; for they are and must always be subject to that supreme law of *salus populi* ; and if [671] it were otherwise, it would be quite out of the power of any government to preserve their subjects in peace, but all treaties of accommodation must be forborne until he who had letters of marque would consent, which were most absurd ; and *ergo*, the clause in these letters that no future peace should derogate from them, as it is new and of a strange nature, so it is utterly void in itself ; for the king's prerogative in matters of peace and war is absolute and unlimited, nor can the king put it out of his power to make a peace, or enable any subject to dispute his sovereignty in this point.

Secondly, this point is most clear by the constant practice of all ages and all nations. And, first, it is plain that a truce, which is less than a peace, doth supersede all letters of marque for that time. This appears by 10 H. 6, Rot. Pl. No. 34 (4 Rot. Parl. 402), where the Commons, in their petition for reprisals against *Denmark*, say there was a statute made in 4 H. 6, that if the subject be spoiled contrary to the tenor of any truce, for want of mentioning therein that letters of marque should cease, the persons grieved should have reprisals. In the next place a safe conduct, which is less than a truce, doth likewise supersede all letters of marque ; and so it was ruled in the parliament of *Paris* against the merchants of *Montpellier*, who would have executed their letters of marque against the subjects of *Genoa*, upon such as came thither by safe conduct, as appears, *Papon's arrears*, 284 ; and the like appears by the judgment of the parliament 2 H. 5, pl. 1, Rot. Par. No. 34 (4 Rot. Parl. 50), where some citizens of *London* who had letters of marque against the *Genoese*, petitioned the king, that he would be graciously pleased hereafter to grant them no safe conduct in prejudice of those letters of marque. And be-[672]-fore that, viz. 11 H. 4, Rot. Pl. No. 66 (3 Rot. Parl. 643), *John Kedwelly de Bridgewater* complained in parliament of divers injuries done him by the *French*, and prayed letters of marque and reprisal, as well by sea as by land, against all those who have no safe conduct ; the answer was, that letters of request ought first to precede ; but admitted on all hands that a safe conduct would prevail.

Wherefore upon the whole matter, I gave judgment, that the letters patent of marque and reprisal should be vacated and cancelled.—Lord *Nottingham's* MSS.

TONSON v. WALKER.(1) 25th April 1752.

Injunction till hearing [to restrain the publication of *Milton's* poems with Dr. *Newton's* notes, notwithstanding a small addition of original commentary.

The Solicitor-General moved for an injunction to stay the Defendant's printing an edition of *Milton*, with Dr. *Newton's* notes, and made three points.

1. That at the common law, authors have a right to their productions, exclusive and independent of the statute 8 Anne, c. 19, upon principles of property, upon the constant opinion of all men. In 1662, statute 13 & 14 Car. 2, c. 33, s. 3, gives power to the Universities to licence books, except such as belong to particular persons, and those not without their consent, supposing there were such books. Another clause prohibits sell-[673]-ing books without the consent of the proprietor ; not giving any right, but supposing that it already existed. That law expired in

1692; it dropped in respect of the licensing clauses, and not from the acknowledgment of property in authors. In this time several bye-laws were made by the Stationers' Company, and confirmed by the Chancellor, settling penalties on those violating the right of the owners. In 1694 bye-laws were made to remedy what was lost by the expiration of the act, but they were ineffectual. The principle of ownership is received as a ground of property, 18 *Car.* 2. The Stationers against the patentees, about the printing of *Roll's Abridgment* (*Carter*, 89), 29 *Car.* 2 *The Company of Stationers v. Seymour* (1 *Mod.* 256). There *Pemberton* argued from the principle of property in the author, and it was admitted on the other side; and the Court said that almanacks might belong to the crown, because there was no particular author. The world has entertained the same notion; they buy and sell, settle, pay debts, and make provisions. The Defendants admit it, and, therefore, cannot contradict the right of authors antecedent to the statute of *Anne*. If any other proof were wanted, the preamble to that statute supplies it.

2. Whether the act has accumulated remedies to secure a prior right violated or to take it away? The act took its rise from a private petition of booksellers, asserting, as a thing uncontroverted, that they had the right in the copies, and prayed a confiscation of what had been printed, the provision by action on the case not being effectual. The preamble is to encourage authors; taking away copyright would not do it; it is not done; but they give, during a certain time, pe-[674]-nalties of confiscation, and other penalties and privileges; and these to begin from the entry in the Stationers' Hall. The Universities have a right to particular books; *Oxford*, in 1703, to Lord *Clarendon's History*: the act neither benefits nor prejudices any right under letters patent.

3. Subsequent determinations and exposition show that it has been so understood. The act does not meddle with law books, because it did not mean to take away the right of the crown or patentee; that was not a mischief to be remedied: yet in cases of law books, the Court has interposed on the original right.

1. *Webb v. Rose*, *Easter term* 1729. Decree, 1732 (cit. 4 *Burr.* 2330; 2 *Bro. P. C. ed. Toml.* 138). The bill was by *Webb's* executors, to prevent the Defendant printing his Precedent's of Conveyancing, and decreed; not from the force of the statute of *Anne*; 1, the work was not within it; 2, it was not then printed, and the act extends only to books after publication, and no action would lie, because they were not entered. It turned, therefore, on the original right.

2. *Forester v. Walker*, 13th *June* 1742 (cit. 4 *Burr.* 2331; 2 *Bro. P. C. ed. Toml.* 138). A bill was brought by the author of *Notes of Cases*, in Lord *Talbot's* time, to enjoin the printing; this being a law report, was not within the act, and could not be published without the licence of the patentee, yet an injunction was granted and acquiesced under.

3. *Pope v. Curl*, 5th *June* 1741 (2 *Atk.* 342). Bill to prevent the publication of his letters with *Dr. Swift*; upon [675] argument, the injunction was granted and acquiesced under.

4. *Austin v. Cay*, 17th *May* 1739. A demurrer, because the discovery would expose the party to penalties, was over-ruled, the remedy in equity being upon the original right; beside, there is no proceeding for the penalties until entry in the books of the Company; but the want of entry is no impediment here, the Court proceeding on the property; and the objection has been repeatedly over-ruled. If the term is expired, the Court does not refuse to interpose. Sir *Joseph Jekyl*, who sat in parliament when the act passed, made a precedent, 9th *June* 1735.

5. *Anon.* (probably *Eyre v. Walker*, 9th *June* 1735, cit. 4 *Burr.* 2325; 2 *Bro. P. C. ed. Toml.* 138). A bill for an injunction against the Defendant, for printing the *Whole Duty of Man*, upon an assignment of property by the author of it; the work having been printed in 1657, was not within the statute of *Anne*; an injunction was granted and acquiesced under. The author was only guessed at, but it was presumed that the person who first brought it to the press, had the property of it assigned to him.

6. ——— *v. Falkner*, 28th *November* 1735 (*Motte v. Falkner*, cit. 4 *Burr.* 2325; 2 *Bro. P. C. ed. Toml.* 138), by Lord *Talbot*. The bill was filed by the assignee of *Pope's Letters* for an injunction, and to restrain their being printed in *Ireland*. Several of the pieces were printed in 1701 and 1702, and 1708, so that the term

of twenty-eight years was expired. Lord *Talbot* granted an injunction to restrain the printing of the whole ; and that was acquiesced under.

[676] 7. *Walker v. Walker*, 27th June 1736 (*Walthoe v. Walker*, cit. 4 Burr. 2325 ; 2 Bro. P. C. ed. Toml. 138). The bill was to restrain the printing of *Nelson's Festivals*, a book first printed in 1703. Sir *Joseph Jekyl* granted the injunction, which could not have been unless the property had continuance beyond the term limited by the act, and it was acquiesced under.

8. *Tonson v. Walker*, 5th May 1739 (cit. 4 Burr. 2325). The bill claimed property in *Milton's Poems*, and the notes of the commentators ; on certificate of bill, and reading affidavit and assignment, an injunction was granted *ex parte*, and acquiesced under.

No one application was refused. This is, at least, sufficient for granting an injunction till hearing ; especially where the Defendant has acquiesced in former instances, and has added what he has clearly no right to, as *Newton's* notes. Public utility makes one wish the law could be thus ; and that consideration weighs in cases doubtful.

The objections are not true in fact, or grounded on narrow principles. That it will make books dearer ; manifestly it will not. The public is interested to have good editions, and cheap. If the property is not secured, there can be no fine editions of new books, while they may be printed worse, on a worse paper ; if they have property it may be done, because they may wait for time to supply the charge by a number. As to cheap editions, less than 500 copies will not reimburse them ; it is their interest then to make such an edition as will be sold universally. This is a scandalous edition ; the [677] paper and the printing bad. The principle is narrow ; books are the production and property of man's ingenuity ; the property in them, is the only encouragement of letters.

The *Lord Chancellor*. If this case comes to be heard, I shall be inclined to send a case to the judges, that the point of law may be finally settled, for I do not know that it has been judicially determined ; but Dr. *Newton's* notes come within the statute of *Anne* ; and this edition mixing his notes with the rest, cannot go on unless they can answer that. I should therefore be glad to hear the Defendant's counsel on that point.

Mr. *Clark* for the Defendant. There are two questions : 1, the nature of the work, and the ingredients of it ; 2, the Plaintiff's right to the ingredients, and whether what the Defendants have done is an infringement of his right ?

The ingredients are said to be the text, and the notes of various editions by *Fenton*, *Bentley*, and *Newton* ; there are other ingredients to which the Plaintiff has no right, from the comment of *Hume*, *Addison*, *Pearse*, *Richardson*, *Warburton*, *Benson*, *Upton*, and the essay on *Milton's* Imitation. The Defendant, *Merchant*, is a man of learning, and an admirer of *Milton*. Dissatisfied with the text and notes, he planned a new edition from various sources.

The *Lord Chancellor*. I shall not determine the general question, either at law or on the effect of the statute ; but I desire to know [678] how you show that Dr. *Newton's* notes are not within the statute.

Mr. *Clark*. There are several works not within the statute ; as a dictionary, like *Stephens's Thesaurus*. If another writer were to compile another dictionary, and take considerable portions of the former, if not done evasively, there would be no violation of the act. No more is a fair abridgement. As in *Gyles v. Davis*, 1741, the bill was filed to restrain the publication of an abridgment of *Hale's Pleas of the Crown*. (*Eyles v. Wilcox*, 2 Atk. 241 ; 3 Atk. 269 ; *Barnard*. 386, cit. 2 Bro. P. C. ed. Toml. 138.) The objection was the sameness of the work, and a reference was directed on that point ; but your Lordship declared that a fair abridgment is not within the act. In *Cogan v. Cave*, 26th July 1743, the bill prayed an injunction to stay the editor of a magazine publishing the parts of the Unfortunate Young Nobleman ; the injunction was dissolved on the merits.

The *Lord Chancellor*. Before I give an opinion, I will have ascertained the number of the original notes of *Merchant*. If a critic publishes an edition *cum notis variorum*, I think that a republication is within the act. It is a work of which the property is in the author, and protected by the act. So is a dictionary. That brings it to the question, whether the alterations make it a new work, or are intended evasively to colour a new edition. In the case about *Partridge's Almanack*

(10 *Mod.* 105 ; 4 *Burr.* 2402), originally before Lord *Cowper*, a case was directed for the Court of King's Bench, and I believe it was never determined.

[679] The *Attorney-General* cited *Read v. Hodges*, 19th May 1740 (cit. 2 *Bro. P. C.* ed. *Toml.* 137 ; 2 *Atk.* 142), to stay the republication of a history of the Czar of *Muscovy*.

The *Lord Chancellor*. I thought it an evasive abridgment, and therefore allowed the injunction. In *Gyles v. Wilcox*, the abridgment contained 35 sheets, the original 275 ; it was referred to award, and held a fair abridgment, and not within the statute.

30th April 1752. It appeared that there were 28 notes by *Merchant*, and that the rest were 1500.

The *Lord Chancellor* [Hardwicke]. I entertained no doubt from the first whether I should grant an injunction, but how far, and to what extent ; 1. In regard to this book, whether the property was sufficient to maintain it ? 2. To what extent it should go, as to vinding this edition ?

It is not necessary or proper to determine the first question ; but if the case is doubtful, that may be a ground to grant an injunction until the matter can be considered at the hearing ; thus in waste, not a clear right, but probability of right, may be, and is, a ground for an injunction. (*Note* : Of the cases on this point, some, at the first view, appear inconsistent with the doctrine of the text.) In *Partridge's* case, Lord *Cowper* and Lord *Harcourt* both thought the right doubtful ; but the first granted an injunction till the hearing ; the latter [680] directed a case, not saying that the injunction should be continued ; but I take it that is done of course ; because making a case is a kind of continuation of the hearing, by taking in the assistance of the court of law.

It is immaterial whether the question arises on letters patent or general property : both are to convey a right or claim. I will only say that there is no determination of the general point. Cases of pirating copies from unpublished books do not come up to the present case ; they were never made *publici juris*, but are as much the author's as any thing else in his closet. Such are the cases of Mr. *Webb*, Mr. *Forester*, and Dr. *Burnett's* treatise *de Statu mortuorum* in Lord *Macclesfield's* time. (*Burnett v. Chetwood*, 2 *Mer.* 441, 442. n.) The strongest thing is, what is said by the judges in *Seymour's* case (1 *Mod.* 256), arguing on the general right.

■ In cases on grants by the Crown of exclusive publication of particular books, as Bibles, Prayer-books, acts of parliament, and year-books, the general argument in favour of the patentee has been, that the books were made at the expense of the Crown, and, therefore, the property is in the Crown. And these cases are used as tending to prove a general right in the author.

Arguments from public utility may be urged on both sides ; but if this were more doubtful, still it is clear that the injunction ought to be granted, because the notes are colourably abridged or taken from *Newton*, and only twenty-eight added by Mr. *Merchant*. What right could he give to *Walker* to print Dr. *Newton's* notes ? To say that he had the same right to publish *Newton's* notes, as *Newton* had to publish those of others, is not defence, but recrimination.

[681] A fair abridgment would be entitled to protection ; but this is a mere evasion.

Therefore let an injunction be issued till the hearing, and let the Plaintiff speed his cause.

" His Lordship doth order that an injunction be awarded to restrain the Defendants, their servants, agents, and workmen, from printing, reprinting, publishing, or exposing to sale any copy or edition of a certain book or poem, entitled *Paradise Lost*, composed by *John Milton*, or of the life of the said *John Milton*, or of the notes of various authors upon the said poem, compiled by Dr. *Thomas Newton*, until the hearing of this cause ; and it is further ordered, that the Plaintiffs do speed their cause." Reg. Lib. B. 1751, fol. 322.

(1) 4 *Burr.* 2325, 2327, 2379, 2380 ; 1 *Black.* 345 ; 2 *Eden* 328 ; 1 *Cox*, 285. The present report confirms Lord *Mansfield's* representation of this case in the passage first cited.

WRIGHT v. FEARRIS. *In Chancery.* 15th March 1791.

*Goldsmid v. Goldsmid*, 1 Swans. 211.—A bond for marriage portion to secure a life interest to the wife, is not satisfied by a distributive share of the husband's estate to a larger amount.

*Thomas Wright*, previous to his marriage with *Mary Wright*, entered into and executed a bond or obligation in writing, dated the 8th May 1767, to *John Parker* and *Thomas Matton*, in the penal sum of £2000, for securing the sum of £1000, being the marriage portion of the said *Mary Wright*, the interest of which was to be paid to her for her life, in case she survived him, and after her death the principal to be divided among the children of the marriage, in equal shares and [682] proportions. *Thomas Wright* died intestate, and left more than the amount of the bond, as the distributive share of the wife.

The *Master of the Rolls*. It is not a condition that he would leave to her at his death. In this case he has not satisfied the debt.—Lord *Colchester's MSS.*

WILMOT v. LENNARD. *In the Exchequer.* 1st March 1792.

*Field v. Beaumont*, 1 Swans. 209.—Where a Plaintiff at law is nonsuited for want of evidence withheld by the Defendant, he shall be relieved in equity, and the Defendant shall pay the costs of *nonsuit*.

Demurrer to a bill, which stated that the Defendant had come upon premises belonging to the Plaintiff, under the pretence of an execution, and spoiled fruit trees, &c.; and afterwards an action being brought by the Plaintiff, she was nonsuited for want of being able to identify the goods on account of the death of her father in the mean time; and that the Defendant, who had been applied to for the purpose, refused to produce the inventory.

*Johnson* for the demurrer objected, that there was no ground for any relief in this case.

*Hollist, contra.*

*Eyre*, Chief Baron, said. The only doubt which is raised in my mind is upon the circumstances attending this nonsuit. But I take it to be clear that if a party [683] is nonsuited at law for want of evidence which the Defendant has in his power, and withholds from him, that he may come to a court of equity, and he shall have not only discovery but relief, and the Defendant shall be made to pay the costs of the nonsuit. If it is not true that you refused to let him have the inventory, you may answer to that part, and demur to the rest. And certainly the demurrer is informal (as Mr. *Hollist* has observed) in stating that the Plaintiff is not entitled to either discovery or relief. It should have said, that forasmuch as Plaintiff is not entitled to the discovery and relief in the bill prayed. Demurrer over-ruled.—Lord *Colchester's MSS.*

COSSERAT v. TOLLETT. *In the Exchequer.* Mich. 13 G. 2.

*Curzon v. De la Zouch*, 1 Swans. 185.—After the time for answering is expired, a Defendant cannot file a general demurrer.

The bill in this case was filed in *Trinity* term last, and on the 13th of August the Defendant tendered a general demurrer to the whole bill, which was refused to be received by the Plaintiff's clerk in Court, insisting that as the Defendant was in contempt by not answering in time, according to the rule of the Court, which is eight days, he had lost the privilege of demurring to the bill; and this term the Plaintiff sued out an attachment against the Defendant for want of an answer: and it was now moved to discharge this attachment for irregularity, urging that the Defendant was at liberty to demur alone, till he was in actual contempt by an at-[684]tachment being sued out against him, for that he is not properly in contempt till he is

put into contempt by the Plaintiff in suing out an attachment ; that in this case the Defendant had never prayed time to answer, or any commission to take his answer, and, therefore, though after a prayer of time to answer, or a commission to take his answer, the Defendant is not entitled to demur alone, yet here not having prayed either, he ought to have that liberty ; and to show that he is not to be deprived of this benefit till after an attachment, or till time or a commission prayed, it was said to be the practice in the office as soon as the eight days are expired (which is the time allowed to every Defendant to make what defence he can), to seal an attachment to prevent a demurrer.

But *per Curiam*. No Defendant who is in contempt, shall be permitted to put in a demurrer ; and every Defendant is in contempt, who does not put in his answer within the eight days ; and *per*—

*Carter*, Baron. The attachment is not that which makes the contempt ; the contempt is precedent, and that follows it as a punishment for the contempt. No order made.

*Mich.* 13 G. 2. Afterwards in this case the Defendant demurred to part of the bill, and answered as to the residue ; and this answer and demurrer was refused in the office to be received and filed, insisting, that by the former order it appeared that no Defendant in contempt could demur ; whereupon it was moved, that the Defendant might file his answer and demurrer upon clearing his contempt, which was allowed by the Court, and so ordered.—From Mr. Coze's MSS.

[685] MEDWIN v. SANDHAM. *In the Exchequer.* 2d March 1789.

1 T. R. 715 ; 1 Swans. p. 353.—A court of equity will not, against the reversioner, reform a lease executed under a power where it contains covenants not warranted.

Judgment. The Lord Chief Baron. This is a bill to reform a lease, and bring it within the power, the lessor being no longer alive, nor any person capable of exercising this power ; and the relief is asked against the reversioner.

The power is to lease for not more than twenty-one years, inserting usual covenants ; the lease made is with a covenant, " that, in case of fire, the lessor shall rebuild, or the lessee may quit."

The question is, whether this is a usual and reasonable covenant ? An ejectment has been brought, and the lessee is evicted, on the ground that this is a covenant not usual and reasonable. (1 T. R. 705.)

Were the question open, it might be said, that if reasonable, though not usual, yet equity will support such a covenant ; but we have no such jurisdiction, the question being precluded by the judgment at law ; and there is no equity to interpose against the reversioner.

One case has been decided, viz. *Campbell v. Leach* (Ambl. 740), where the term was mistaken, and made longer than the power. I submit to the authority, but I cannot ex-[686]-tend the principle of the case, not agreeing to it or understanding it : though if the principle was clear, the consequences should certainly be pursued ; and I understand the propriety of equitable relief in case of wives, children, and creditors, in many instances.

But this is not such a case ; this is the case of a purchaser, with notice of the power under which the lease was granted, against another purchaser, viz. the reversioner : this is not like a case of forfeiture.

If we are to interpose to expunge the objectionable covenant (being in truth a part of the very contract originally made), there is no instance to be put in which we ought not to reform the wrong execution of a power.

Perhaps there may be a right to compel a grantor to amend his own act, but not to prevent a reversioner from taking advantage of his legal title.

Bill dismissed with costs.

*Perryn*, B., said *Campbell v. Leach* was to relieve lessees who had laid out great sums on the demised mines ; and the Court there proceeded on prior authorities.—Lord Colchester's MSS.



[687] NICOL v. STOCKDALE and OTHERS. *In Chancery*. 15th January 1785.

A voyage of discovery having been executed, and a narrative of it prepared under the orders of the crown, the narrative is the property of the crown ; but on a bill by a publisher, authorised by the secretary to the board of admiralty to publish such a narrative, the profits remaining at their disposition, an injunction restraining publication by a stranger was dissolved.

The bill stated, that the Plaintiff, by virtue of a paper set out in the bill, and signed by Mr. *Stephens*, secretary to the Board of Admiralty, was possessed of the whole interest in a work intituled "A Voyage to the *Pacific Ocean*, undertaken by command of His Majesty, and performed under the Directions of Captains *Cooke*, *Clerke*, and *Gore*"; the Lords of the Admiralty, who, as the bill stated, were the sole proprietors of this work, appointing and authorising the Plaintiff to print and publish it. The bill then stated, that the Defendants had published another edition of the same work, and prayed that they might be restrained by injunction from selling it. The Lords of the Admiralty and the Attorney-General, on the part of the Crown, were made Defendants, as claiming some interest in the work.

An injunction was issued upon the filing of the bill before the Defendant's appearance.

*Scott* now moved that the injunction might be dissolved, upon three grounds ; 1, that the Plaintiff had not in the work any interest which could entitle him to such an injunction, he having no interest which is described in the statute of Queen *Anne*. He does not pretend to be the author, nor is he the assignee of the author or proprietor. The Lords of the Admiralty appointed him to print it, but for aught appears, and as it is most natural to suppose, the Lords of the Admiralty meant to make a present of the work to the public, [688] through the Plaintiff ; 2, that the injunction issued irregularly, being before appearance of the Defendant, and no precedent can be found of such an injunction being granted before the Defendant had appeared ; 3, that the work printed by the Defendant was not the same with that printed by the Plaintiff, but an abridgment of that, and an entire new work ; that it was unnecessary to say any thing about the prints published in the work, because they are not mentioned in the bill, and the injunction does not extend to them ; nor indeed could it, because, by the statute 8 *G.* 2, c. 13, the exclusive right is given to none but the original designer, and not to any proprietor who becomes such by purchase.

The *Lord Chancellor* [Thurlow]. When the first bill in this cause was filed it was in the name of the Attorney-General, and the interest in the work was stated to be in the Crown. Upon that occasion I thought that it did not appear that the Crown meant to make any profit by the work, or that it was printed with any other view than that of giving it to the public completely ; but it was afterwards said, that the work was published by the direction of the Crown, for the benefit of the widows of the officers and men who had perished in the expedition. It then appeared clear to me, that when the Crown directs a voyage of discovery to be made, and afterwards directs a narrative of the voyage to be drawn up, and gives all the benefit of that work to any individual, that person is entitled to every benefit which can be derived under the statute of Queen *Anne* ; but that for that purpose it must be clearly vested by the Crown in some person, either for his own benefit, or in trust for others. In the present bill, the Plaintiff states that he is employed by the Board of Admiralty, under the di-[689]rection of the King, to make this publication, and the profits arising from the publication are to be at the disposition of the Lords of the Admiralty. So that so far from establishing any right to this monopoly in himself, he states the use of it to be in the Defendants, the Lords of the Admiralty. By the affidavit, indeed, on which the injunction was granted, the charitable purpose for which the publication was made appears ; but as it does not appear in the bill, and as the injunction ought to be warranted by what appears in the bill, and not in the affidavit, I think the injunction was improperly granted, and that it must be dissolved.

It is not true, as has been urged, that the Court must determine upon the answer of the Defendant. I might refer it to the Master to see whether the work complained of is an original work or not ; so that if the injunction could have been

maintained at all, the answer would not have been a ground for dissolving it ; but as the matter stands the injunction must be dissolved. From Mr. *Romilly's* Notes.—Lord *Colchester's* MSS.

NEWMAN v. BATESON. *In Chancery. July 13th, 1786.*

[See *In re Richards*, 1869, L. R. 8 Eq. 119.]

1 *Swans.* 553.—On legacies to a natural child of the testator, with directions to apply a competent part of the interest for maintenance, interest is payable from the testator's death.

A sum of £20,000 was given by the testator *Newman* to his natural daughter, with directions that so much of the interest should be applied in her maintenance, as his executors should think proper.

[690] The *Master of the Rolls* [Sir Lloyd Kenyon] for the *Lord Chancellor*, said, that although the daughter was a natural child, yet the testator having given maintenance expressly to her, it came within the common rule of a legacy given to a child, and directed interest from the time of the testator's death. From Mr. *Cox's* notes.—Lord *Colchester's* MSS.

BRUMMELL v. CLAVERING. *Mich. 1722.*

3 *Swans.* 99.—Persons in possession under an agreement for a lease of part of an estate in strict settlement by the tenant for life, were relieved in equity after his death, during the minority of his son, the tenant in tail, the guardianship of whom he had devised to his mother, a control over the minor's estate being incident to the power of appointing a testamentary guardian ; and inquiries were directed for modifying the agreement to the advantage of the minor.

Sir *John Clavering* being tenant for life, with remainder to his son, the Defendant *James*, now Sir *James Clavering*, who was then an infant of about two years old, of certain lands contiguous to the river *Darwent*, and very necessary for the landing of coal from several pits thereabout to the river, in order to be shipped for *London* and other places, entered into articles with the Plaintiffs for granting to them a lease of a waggon way over the said lands for nineteen years, by which time, as he seems to have computed, his son, the Defendant, would be of full age ; and this lease was to be at a very considerable reserved rent, and the Plaintiffs, who by the articles were to be at the charges, had laid out several thousand pounds in making waggon ways, staiths, and other things necessary in such cases, and had for several years paid the rent without any lease made to them ; and some years since Sir *John* died, and the Defendant, Sir *James*, his son, was now about fourteen years of age.

[691] Sir *John* by his will had devised the guardianship of his son till he should come to the age of twenty-one years to the Defendant, the Lady *Clavering*, his mother, and wife of Sir *John*. It was admitted by the Defendants *Brummell* and others in the cross cause, who were Plaintiffs in the original cause, that they had notice that Sir *John* was but tenant for life of these lands, but that in respect of the necessity they were under of having a waggon way over the said lands, and of the great advantage it was to the estate of Sir *John* and his son, by reason of the rent and other great profits out of the coal, they were determined to run the hazard of Sir *John's* life for their term, but now Sir *John* being dead, the Defendant and his mother had pulled down great part of the way, sunk pits in it, and threatened not only to make it entirely useless to the Plaintiffs, but also to bring their ejectment and turn the Plaintiffs out of possession. It did not appear in the cause that any lease was made to the Plaintiffs, but they held under the articles, and had not only paid the reserved rent, and been at such charges as aforesaid in the lifetime of Sir *John*, but had also, for some time after his death, paid the said rent to the Lady *Clavering* ; but being in a manner defeated of the way, and threatened with ejectment, they brought this bill to be quieted in the enjoyment thereof from the nature and necessity of their case, and the great benefit arising thereby to the estate of the Lady *Clavering* and her son.

In answer to which, all that seemed to be insisted on by the Defendants was, that they could have a much greater rent for the lands to be used as a waggon way, and that other landowners thereabout made much more of their estates when leased for such purposes, and that Sir *John* being only tenant for life, if he had actually made a lease, it would have determined by his death, [692] and no acceptance of the rent after could have set it up again ; and that if the Defendants had the law on their side, a court of equity ought not to interpose to take it from them.

But the *Lord Chancellor* [Macclesfield] said, though he could not decree the lease to be good, which was determined by the death of the tenant for life, nor decree the Defendants to make a new lease, yet he was of opinion, that as the father had power by the statute to devise the guardianship of his son till he was twenty-one years, and he had in this case devised the guardianship to his mother till that age, this by consequence gave him some power over his son's estate till that age, since otherwise the guardianship would in effect be frustrated and defeated, and the power of devising it given to him by the statute be in some sort eluded. Therefore, he said, though he could not establish the lease or articles, yet he would, and did accordingly order, that if the Defendants brought an ejectment, they should not be at liberty to give the settlement in evidence during the minority of Sir *James*, whereby the estate was settled on his father for life, with remainder to his son in tail.

At the hearing the following decree was made, 7th November 1722 : " Whereupon, &c., and whereas upon arguing the plea " (of the settlement under which he claimed) " put in by the Defendant Sir *James Clavering* to the said original bill, upon the 3d of August 1720, and the Plaintiffs then consenting to pay, if this Court should think fit, such advanced rent for the benefit of the Defendant Sir *James Clavering* for the waggon way in, on, and over his ground for leading coal, for such time past as well as to come as the Court at this hearing should direct, and to let the Defendant Sir *James Clavering* make use of the way for leading coal without [693] paying any rent, paying a proportion of the repairs of the way ; it was ordered that the said plea should stand for an answer, and that the benefit thereof should be saved to Sir *James* at the hearing, as by the said order now likewise read appears ; and the Plaintiff *Cotesworth* now present in court, consenting that if the old way-lease may be ratified, he will quit the 6s. 8d. per ton by the proposal agreed to be to him paid by Sir *James Clavering*, and will quit the restraint on Sir *James Clavering* from leading more than the quantity of 800 tons, so as the like restriction may likewise be taken from him the said *Cotesworth* ; and also offering, if the present term in the Plaintiffs' said way-lease shall be enlarged for a reasonable time after the Defendant Sir *James Clavering* shall come of age, if Sir *James* shall, within six months after he comes of age, require the same, and agree to enlarge his term for the same time, His Lordship doth thereupon think fit and so order and decree, that it be referred to Mr. *Holford*, one, &c., to look into the new agreement mentioned in the said Sir *James Clavering's* bill to have been made in writing, by some of his friends on his behalf, with the said A. H. and B., and see whether the same can be made effectual or not ; and if he shall find it can so be, then to see what advantages will accrue to Sir *James Clavering* thereby, and also what disadvantages he may be liable to by reason thereof, and what expense it has been or will be to him, in making and finishing the said new way, and staiths, and other appurtenances belonging thereto ; and the said Master is also to see whether the said old way be or can be made effectual or not ; and if the old lease should be ratified and confirmed consistently with what is now consented to and offered by Mr. *Cotesworth*, what advantage and what disadvantage it will be to Sir *James Clavering* ; and to state which of the said two ways is most to his advantage, [694] and the particulars wherein ; and if any difficulty shall arise before the said Master, he is to state the same specially for the farther direction of the Court ; and the said Master is also to consider what advanced rent, if any, is reasonable to be paid by the plaintiffs in the original cause to Sir *James Clavering*, in respect of the said old ways lying over so much of Sir *James Clavering's* lands, more than any of theirs, or in respect of the situation of the said lands respectively ; but his Lordship doth reserve the consideration, whether any and what allowance shall be made in respect thereof ; and likewise reserves all farther directions, &c., with liberty to apply, &c.; but in the meantime the said Sir *James Clavering* is to be at liberty to make use of the said new ways to bring what coal he pleases from his

collieries within his own grounds, Mr. *Cotesworth* now consenting thereto; and if in the meantime any dispute shall arise, or obstruction be made in the use or enjoyment of either of the said ways, either party is to be at liberty to resort to the Court touching the same."—Reg. Lib. A. 1722, fol. 333–336.

PAGET v. GEE.(1) *Lincoln's Inn Hall.* 4th December 1753.

Rent paid to the remainder-man by lessees of a tenant in tail, after his death, apportioned.

A tenant in tail made leases of the lands, reserving rent half-yearly, and died seven days before the day on which half a year's rent became due. [695] Upon his death without issue the person in remainder entered upon the lands, and the tenants paid the whole half-year's rent to him, amounting to about £150, and now the bill is by the executors of the tenant in tail against the remainder-man to be paid a proportion of the rent, viz. all except for the seven days.

For the Plaintiff it was insisted that this was a case within the statute, 11 G. c. 19, s. 15. It was admitted on all sides that, if this is not a case within the statute, there was no remedy against the tenants, except by the remainder-man, for the last seven days; and that though actions at law for the use and occupation of land have of late been encouraged, yet such actions cannot be maintained where there is a lease or special contract; and it was admitted, that there was no case at law, before the statute or since, where a tenant for life died, and the under tenant held by no lease or particular contract, that the executor of the tenant for life was allowed to bring an action against the under-tenant upon the permission of the testator to hold the lands.

For the Defendant it was insisted that this was not a case within the statute, for that the statute was for tenants for life only, and this was the case of a tenant in tail. But in answer to this it was said that the under-tenants having paid their rents, the question arose, on their having declined to take the advantage they might have done, whether the Defendant should not account, he being plainly no way entitled but for the rent of the seven days; and that the statute being for the benefit of the subject, the Court should be industrious to enlarge the remedy. The lease of a tenant in tail under the statute of *Hen.* 8, is good only against the issue in tail, and was never attempted to be supported against a remainder-man.

[696] Lord *Hardwicke*, Chancellor. I do not find that there is any precedent to go by in the present case; but the Plaintiff's equity is to me so strong that I shall not at all scruple to make a precedent. There are two grounds on which the Plaintiff founds his equity; first, the act of parliament, and, second, the tenants having submitted, and having actually paid the rents.

The inconvenience before the statute was, that if a lessee died a day or two before the half-year or quarter-day on which the rent was payable, there could be no recovery against the tenant; which was a great injustice that the statute designed to remedy. The objection upon the statute is, that the preamble of the clause mentions tenants for life only; but the enacting part is at large, which is more proper to be followed, and especially to obtain justice upon it; and though it is objected that a tenant in tail is more than a tenant for life, yet courts of law have often considered a tenant in tail to many purposes but as a tenant for life; and I know no better rule of equity than to follow the law; and I cannot in the present case but consider the tenant in tail as tenant for life, for the present purpose of relieving the Plaintiff. And even in this Court, a tenant in tail is considered the tenant for life only to some purposes; as in the cases where injunctions have been allowed against destructive waste and the cutting down ornamental trees; and I should have no doubt that a tenant for ninety-nine years, determinable on lives, would be a tenant for lives within the statute; so a tenant in tail after possibility of issue extinct; so of an estate tail in a woman *ex provisione viri*; and there are cases wherein this Court follows the law by analogy, and even goes further. On the statute of forcible entries the courts at law proceed in a summary way to remove [697] the force *brevi manu*, and the party may come here for a decree to quiet his possession.

Upon the whole, if there was nothing more in this case than the statute, I should

incline to relieve the Plaintiff upon it ; but what I shall ground my decree on is, that the tenants have submitted, and held themselves bound by equity and conscience to pay their rents ; and there are many cases where a sum of money has been paid as a debt due in conscience for which no remedy could be had either at law or in equity, where this Court has, after such payment, interposed, and decreed the same to be accounted for and distributed according to equity. I consider the payment of these rents, therefore, as a payment of what in conscience ought to have been paid, and therefore ought now to be apportioned according to equity.

Decree for the Defendant to pay the apportionment to the Plaintiff, but no costs on either side.—Mr. Coxe's MSS.

"His Lordship doth order and decree that the Defendant do pay unto the Plaintiff such proportion of the rent of the premises in question which has been received by him from the tenants of the said premises, for the half-year ending at *Lady-day* 1746, as was equal to such part of that half-year during which the said *Samuel Gee* was living, both sides having all just allowances ; and it is hereby referred to Mr. *Bennett*, one, &c., to settle such proportion if the parties differ about the same ; and no costs are to be paid on either side to this time ; but His Lordship doth reserve the consideration of subsequent costs," &c.—Reg. Lib. B. 1753, fol. 68, 69.

(1) The following note of Lord *Hardwicke's* judgment, found among Mr. *Coxe's* MSS., corrects the printed report in the point on which the editor had ventured to question its accuracy. 1 *Swans*. 341.

[698] BULLOCK v. BULLOCK. *Lincoln's Inn Hall. May 6th, 1791.*

An injunction to restrain a suit in the Exchequer for the same matter was refused, but granted to prevent the parties from disposing of the fund until the rights in Chancery were determined.

There was a settlement on marriage, limiting the interest to the father for life, remainder to the children ; on failure of issue, part of the premises absolutely to the father. The mother being dead, the father filed a bill in the Exchequer, suggesting a failure of issue, and praying that the fund might be transferred to him. In the mean time a bill was filed in this Court by one claiming to be issue of the marriage.

*Scott*, Solicitor-General, now moved to restrain the Defendant here from proceeding in his suit in the Exchequer.

*Richards contra.*

The Lord Chancellor [Thurlow] refused to stay the suit, but made an order to restrain the trustees from transferring the fund.

*N.B.* The bill here was more large, as applying to the whole fund ; that in the Exchequer, only to the portion limited eventually to the father ; on that account the Chancellor recommended the latter to be dismissed, and the parties to go on here.—Lord *Colchester's* MSS.

[699] DORAN et UX v. WILTSHIRE and OTHERS. *In Chancery. May 14th, 1792.*

[See *In re Llewellyn*, 1887, 37 Ch.D. 325.]

2 *Swans*. 149.—A tenant for life without impeachment for waste, with power to sell, if he sells, is not entitled to the produce of the timber on the estate. Where the purchase-money is to be laid out again by the trustees generally, the purchaser need not look to the application. Trustees, whose consent was required to the exercise of a power of sale by tenants for life, submitting to act under the direction of the Court, on a bill for specific performance of a contract to sell, an inquiry into the propriety of the contract was ordered.

The bill was filed against the Defendant *Wiltshire* for specific performance of an agreement for sale of a real estate. The other Defendants were the trustees under the marriage settlement of the Plaintiff, and their infant son. The premises were settled in the usual way on the Plaintiff *Doran* for life, without impeachment of

waste, then on the other Plaintiff his wife for her jointure, and so on the issue, with power for the Plaintiffs in their lifetime to sell the premises with the consent and approbation of the trustees, signified under their hands and seals; the trustees to receive the purchase money, and to lay it out again in lands to the uses of the settlement, and till that was done, to invest it in government funds, &c. The bill then stated the agreement for the sale, which included the timber on the estate, the produce of which the Plaintiff *Doran* claimed to appropriate to his own use.

The Defendants, the trustees, said they were willing to execute the trusts, &c., but did not say that they had signified their consent in writing under their hands and seals.

The Defendant, the infant, submitted to the Court that the money produced by the sale of the timber ought to be paid to the trustees, and to be laid out by [700] them in the same manner as the rest of the purchase-money.

*Scott*, Solicitor-General, for the Defendant *Wiltshire*, resisted the bill on several grounds.

1st. He urged that no good title could be made to the Defendant, because there was no clause in the settlement which said that the receipt of the trustees should be a good discharge to the purchaser.

But as to this he seemed to urge it, not so much on principle as on the prevailing opinion and practice among conveyancers, who uniformly held such a clause to be necessary.

2dly. It appeared that there was a subsisting mortgage on the estate for £1000, which the Plaintiff *Doran* had covenanted to discharge with his own monies; but had not so done, and in fact appeared not to have the money.

3dly. There was this doubt respecting the timber, which made it unsafe for the purchaser to go on, and which would make it necessary to go before the Master, if the infant was entitled to have the produce laid out. Then there was a difference as to the mode of valuing the timber. The advertisement was, that timber and timber trees were to be taken at a fair valuation, down to 1s. per stick inclusive. This *Christie* (the auctioneer) explained afterwards to be 1s. per stick "to fall," which is always valued at less than if valued "to grow"; if to grow, it is reckoned at four times the value. Then they have not delivered possession at the time which they stipulated.

[701] The *Lord Chancellor*. That can only operate as a waiver; if you can make it to be that, it may be material, but it can go no further.

*Scott*. It will become material as to the costs; for the fact is, that the Plaintiff having insisted on more money for the timber than he was entitled to, and the Defendant refusing to come into it, the Plaintiff upon that sowed the ground with black oats, and otherwise injured the estate. If the refusal to deliver possession is wilful and malicious, it will be a reason why the Plaintiff should pay the costs of the suit. At any rate the Defendant ought not to pay them. No title can be made out without paying off the mortgage. And there was such doubt on the other points that they could not execute the contract without a suit in this Court: they have acted unfairly. If they could not, the Defendant ought not to be subject to the expense of it.

The *Lord Chancellor* [Thurlow] said, he thought, as to the produce of the timber trees, the Plaintiff *Doran* could not be entitled to it. There is a great difference between a tenant for life cutting down timber for which he is not impeachable while he actually occupies the land; and his executing a power to sell. In the latter case he is not to have the value for himself. As to the power which the trustees have of giving a discharge, it is true, that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or any reasoning in any case which goes the length of saying that a purchaser is so bound; and, therefore, he conceived that the receipt of the trustees would be a good discharge in this case. Then he [702] should refer it to the Master, to inquire whether it was a proper purchase, and to report upon the value and other particulars.

*Mansfield* for the Plaintiff said, it was not usual to make a reference to the Master as to the propriety of a purchase, where the parties had a power to sell given to them by the marriage settlement.

The *Lord Chancellor*. True, but it cannot hurt ; and the trustees have submitted to act under the direction of the Court, in which case I take it to be a matter of course to make such a reference.

Ordered accordingly.

From Mr. *Le Mesurier's* Notes.—Lord *Colchester's* MSS.

" His Lordship doth order and decree, that it be referred to Mr. *Holford*, one, &c., to inquire and state to the Court, whether the contract, bearing date the 18th day of *February* 1790, is proper to be carried into execution by the defendants, *P.* and *S.*, the trustees ; and that he do also state to the Court what was the condition of the estate at the time of the contract, and what is the condition of it at this time ; and it is ordered, that the said Master be at liberty to state to the Court any other matter he thinks material ; and for the better discovery, &c." Reg. Lib. A. 1791, fol. 620–622.

[703] NATHANIEL BAYLEY, *Appellant* ; BRYAN EDWARDS, *Respondent*. *Privy Council*. 14th March 1792.

[See *Mutrie v. Binney*, 1887, 35 Ch. D. 619.]

1. A suit pending in *England* is not a good plea in bar to a subsequent suit in the plantations for the same matter.
2. A Defendant after a decree to account, though called an actor in the suit, yet is not prevented becoming Plaintiff in another suit for the same matter.

In 1776 *Nathaniel Bayley* filed a bill in the Court of Chancery in *England* against *Bryan Edwards*, and several other persons, for an account from *Bryan Edwards* of the personal estate of the testator, *Zachary Bayley*, and of the produce of *Zachary Bayley's* real estates during his possession for five years under the testator's will ; subsequent to which term of five years, *Nathaniel Bayley* and *Bryan Edwards* were entitled in moieties to estates of inheritance in this property.

In 1777 and 1782 a reference took place as to some branches of the account, and an award was made upon inspection and investigation of papers and accounts in *Jamaica*.

In 1784 a decree to account was made in *England*, but not prosecuted.

In 1787 *Bryan Edwards* and *Nathaniel Bayley*, being both in *Jamaica*, *Bryan Edwards* filed a bill in the Court of Chancery there, touching the same property, praying *inter alia* to have the account adjusted on the footing of the balance awarded, and for an injunction to restrain *Nathaniel Bayley*, who had bought in some outstanding debts of the testator, from suing *Bryan Edwards* pending the suit in *Jamaica*.

[704] To this bill *Nathaniel Bayley* pleaded the decree in *England*, and averred that it was pending, and for the same matters. The plea was overruled by the Chancellor of *Jamaica*, and the Defendant appealed.

This case stood over several times, Lord *Camden* conceiving the question to be of great importance to the jurisdiction of the mother country and colonies.

For the Appellant, *Hardinge* and *Sewell* cited *Cann v. Cann* (1 P. W. 723), *Johnson v. Northey* (2 Vern. 407 ; *Prec. in Cha.* 134), *Levington v. Woton* (1 Rep. in Cha. 28), and *Roberts v. Hartley* (1 Bro. C. C. 56).

They insisted, 1, that setting down the plea to be argued admitted the two suits to be for the same purpose, or else it should have been replied to and referred to the Master ; *Umlin v. Hudson* (1 Vern. 332). And 2, that the *English* suit was pleadable in bar of the *Jamaica* suit, upon the authority of *Wells v. Lord Antrim*, cited in *Foster v. Vassal* (3 Atk. 588), which in the register's book stands thus :

*Wells et Uz. v. Earl of Antrim*, 16th December 1717. The matter upon the plea put in by the defendant to the plaintiff's bill coming this present day to be argued before the Right Honourable and Lord High Chancellor, &c., in the presence of counsel learned on both sides, and the defendant's plea being, that the plaintiffs, in *January* 1714, did exhibit their bill in the Court of Exchequer in *Ireland* against him and *Dennis Dalley*, and *Thomas Windham*, for a discovery and relief, touching the same matters for which the plaintiff hath brought [705] his bill in this court, and that the defendant, the Earl of *Antrim*, hath put in his answer to the said bill exhibited in the Court of Exchequer in *Ireland*, and the cause is now depending in

the said court, and undetermined ; on which the defendant insists in bar to the discovery and relief sought by the bill exhibited by the plaintiff in this court ; upon debate of the matter, and hearing what was alleged on either side, his Lordship held the said plea to be good and sufficient, and doth order that the same do stand and be allowed ; but his Lordship nevertheless reserved a power to give directions for the plaintiff to proceed in this court, in case the Lord Antrim, or any other of the defendants to the bill brought in the Court of Exchequer in *Ireland*, shall make it impracticable for the plaintiff to proceed in the said suit ; and it appearing that *James Blake*, Esq., *James M'Donnel*, and *Peter Cottingham*, Gent., had, pursuant to an order of the 26th of *August* last, entered into a recognizance to his Honor the Master of the Rolls, and Sir *Thomas Gory*, Knight, one, &c., in the penalty of £6000, conditioned that the defendant, the Earl of *Antrim*, should, on or before, the 23d of *October* then next and now last past, return by commission, and put in his plea or answer to the plaintiff's bill ; it is thereupon further ordered, that the Master who allowed the said security, do see whether the condition of the said recognizance hath been performed or not ; and if it shall appear that the condition of the said recognizance hath been performed, then the said recognizance is to be vacated. (*Reg. Lib. B. 1717, fol. 44.*)

*Mitford* and *Abbot* for the Respondent. The plea of the former suit and decree in *England*, is bad as a plea to the whole of the subsequent bill in *Jamaica*. If the [706] suits are for the same purposes, yet in point of jurisdiction the one suit is not pleadable in bar of the other ; and this is in substance a direct plea to the jurisdiction of the islands. And in either view, the Court itself was competent to decide the question upon argument, and without referring it to the Master, for the question of identity is apparent on the plea itself, which states the former suit ; and on the equity side of the *Exchequer* in *England*, the Court pronounces without the intervention of the Master ; and though the course of the Court of Chancery is to refer it ; yet that is not for want of competency, but for ease only. The other question of jurisdiction is a pure question of law, and will be conceded to be such as the Court alone should decide upon.

Upon the first head. The matters are not the same, because the second suit seeks relief upon the foot of the balance awarded after the filing of the first bill, a matter not then in issue. And also it seeks an injunction upon the *quia timet*, to prevent the Plaintiff lying in gaol during the whole account, which might otherwise happen, though the ultimate decree were in his favour ; this also could not possibly be had in the former suit. The parties and their situations are different and independent of the collateral parties, of whom there are twelve in one suit, not included in the other ; and the principal parties are in different capacities, the Plaintiff in the first, is Defendant in the second suit. But the precedents of such a plea are all where both suits are brought by the same plaintiffs. As at law *Sparry's* case (5 Co. 61), and in equity *Crofts v. Wortley* (1 Ca. in Cha. 241), *Bell v. Read* (3 Atk. 590), *Foster v. Vassal* (3 Atk. 587), *Umlin v. Hudson* (1 Vern. 332).

[707] And though it is said that, after the decree to account in the first suit, all parties are equally actors, yet it is not within the principle of a double vexation. The difference is, that a defendant who never has proceeded under such a decree, cannot be said to have sued there, merely because he might have sued. The former decree never was prosecuted by any party, how then can Mr. *Edwards*, the Defendant there, be said to have been a Plaintiff in it, either nominally or substantially ?

Therefore the two suits are not *ad idem*.

Upon the second head. If the suits are substantially the same, yet the first is not pleadable in bar of the second, in point of jurisdiction.

1. The form of the plea is itself bad, being a mixture of a plea of a former suit pending, and of a former decree made, and, therefore, improper. A decree to be pleadable in bar, must be final, *Senhouse v. Earl* (2 Ves. Sen. 450), *Child v. Gibson* (2 Atk. 603) ; and if it be not signed and inrolled, it can only be insisted upon by way of answer, *Kinsey v. Kinsey* (2 Ves. Sen. 577).

2. A suit in *England* pending, cannot be pleaded in bar of a suit in *Jamaica*. Upon the authorities. No direct authority is to be found for the plea, and there are authorities by analogy against it. For the plea is cited, *Wells v. Lord Antrim*, before Lord *Cowper*, 6th *December* 1717, which was the plea of a bill pending in *Ireland* ; but Lord *Hardwicke* disapproved it (3 Atk. 589), and it was not allowed



to bar, but only to suspend the second suit ; and Lord *Cowper's* own proviso applies [708] here, viz. that the second suit was to proceed whenever the first became impracticable, which is the very case here, from the situation of the parties and property.

Also by the register's book, it appears 6th August 1717, that the same Plaintiff here as in *Ireland* prayed a *ne exeat regno* against Lord *Antrim*, who happened to be over here ; the writ was awarded, and the security was given accordingly, by which it appears that Lord *Cowper's* order was merely to relieve Lord *Antrim*, who had been caught in a recognizance.

Against the plea the authorities stand thus : judgments here and in the courts of *Jamaica* are as foreign judgments to each other, *Walker v. Witter* (*Dougl.* 1), *Messin v. Lord Massareene* (4 *T. R.* 493).

Then this *English* decree, as a foreign judgment in *Jamaica*, can carry no conclusive title, nor conclusive bar to any party. *Otway v. Ramsay* (2 *Str.* 1090 ; 14 *Vin.* 569, pl. 5) at law shews, that a judgment in *England* is not a conclusive ground of action in *Ireland*. Lord *Hardwicke* says (3 *Atk.* 589) that a judgment in a foreign country will not make a conclusive title or bar to a party suing here, it not being obligatory, but matter of evidence examinable here. So *Dupleix v. De Roven* (2 *Vern.* 540) in equity, *Gage v. Bulkley* (3 *Atk.* 215 ; *Ridgeway*, 263).

But also here, even between courts themselves concurrent, nothing short of a final decree bars, *Lord Newburgh v. Wren* (1 *Vern.* 220), *Coysgarne v. Jones* (*Amb.* 613), *Batten v. Batten* 1771, *Bullock v. Bullock*, 1791. (3 *Swans.* 698.)

[709] Upon the justice of the case. To hold up the *English* decree in bar of the *Jamaica* suit is to defeat justice by setting up an ineffectual against an effectual suit ; and if the suit is impracticable, it comes even within *Wells v. Lord Antrim*. It is ineffectual, because the parties are not amenable here upon interrogatories, and because the property is not within reach of *English* process.

No ejectment lies in *England* for land in the plantations, *Dict. in Crispe v. The Mayor, &c., of Berwick* (*Vent.* 59), because the king has no sheriffs there to execute the judgment at law. And though it was formerly said, that equitable process would go to *Ireland* or the plantations, viz. in *Sir John Fryer v. Bernard* (2 *P. W.* 261. See the report of this case, 9 *Mod.* 124, *Sel. Ca. in Cha.* 5), yet that was a single case, and only a dictum, and not a judicial act. And, contra, no commission for partition lies to *Ireland*, *Cartwright v. Pettus* (2 *Ca. in Cha.* 214. Vide 2 *Swans.* 323, n.), *Lord Arglasse v. Muschamp* (1 *Vern.* 135), sequestration was refused. So in *Fryer v. Vernon* (*Sel. Ca. in Cha.* 5), said to be impossible, and the case of *Richardson v. Hamilton*, *Reg. Book*, 8th June 1732, was denied as not warranting a sequestration out of the realm.

And the plantations are not under the jurisdiction of Chancery ; *St. Christopher, Robardeau v. Rous* (1 *Atk.* 544), *Maryland, Penn v. Lord Baltimore* (1 *Ves. Sen.* 444 ; *Ridgew.* 332), *Isle of Sark, Toller v. Carteret* (2 *Vern.* 494), *Isle of Man, E. Derby v. D. of Athol* (1 *Ves.* 202), the *English* Chancery acting only upon the person, which being absent, its decrees are ineffectual.

The consequence in general is, that after any suit here, the Plaintiff in the island should file a supple[710]-mental bill to enforce the execution of the first decree, according to the case from *Wales, Morgan v. Halford* (1 *Atk.* 408 ; *Dougl.* 6).

Or if the Plaintiff omits this, the true course is, for the Defendant to insist on the prior decree by answer, not to the whole of the subsequent suit, but only so as to have the effect of the first decree allowed *pro quanto* it may extend. (See *King v. Brownlow*, 1 *Ca. in Cha.* 233.)

Lord *Camden, C.* It is impossible to maintain this plea.

I. It is a plea to the jurisdiction, and the nature of it is so treated in *Sparry's* case (5 *Co.* 61). The Plaintiffs in *England* attempt to set up the suit here in bar of the jurisdiction of *Jamaica*, but the causes for allowing the plea of double suits are all where the suits are in courts here ; while this is of a second suit in a court, which is a foreign court ; inasmuch as this country has no process to enforce its decree in the islands.

In *Gage v. Bulkely*, Lord *Hardwicke's* reasons go a great way to shew the true effect of foreign sentences in this country. And all the cases shew that foreign sentences are not conclusive bars here, but only evidence of the demand.

In the colonial court the question is not, whether those courts had original

jurisdiction, for they had clearly, because the property itself lay there ; but here the court, on a principle of personal compulsion, drew to itself a jurisdiction, as in the case of *Penn v. Lord Baltimore*, proceeding only in personam.

[711] If the first suit had been instituted in *Jamaica*, would the Court of Chancery here have allowed such a plea ? Certainly not : *a fortiori*, the Court in *Jamaica*, which is the more apt jurisdiction, could not be expected to allow it.

As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdictions ; I think the parties ought to be amenable to every court possible, where they are travelling from country to country, and we must then endeavour to correct the mischief of these double suits as much as we can, by allowing in each country the benefit of all the other proceedings in the other part of the king's dominions ; and this should be introduced by supplemental bill, or insisted upon by answer, according as the occasion may require.

As to authority, there is no case in support of this plea but Lord *Antrim's*, and that is no authority at all, not even to shew that the instituting of the first suit in one country should be pleadable in bar to a second ; on the contrary, the plea is not really allowed, and Lord *Cowper* keeps the second suit before him, that the parties may proceed upon the same bill, if the former suit became impracticable.

II. As to the form of the plea.

1. The Plaintiff in a suit here being Defendant there, cannot, as I think, plead it, because there is not the same plaintiff in both causes. And although, after a decree of account the Defendant becomes an actor, it does not therefore follow that he is a Plaintiff, because he might become a Plaintiff.

[712] The *Master of the Rolls*. 1. A Defendant after a decree to account is only an actor, *qua tenus* the account, but not entitled as an original Plaintiff to other relief ; and, therefore, not within the case of pleading double suits.

2. A foreign sentence, though not strictly pleadable, yet has been lately held by Lord *Kenyon* to be conclusive evidence, and only to be falsified by shewing error apparent.—Lord *Colchester's MSS.*

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